REPUBLIC OF KENYA

IN THE HIGHC OURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.26 OF 2020

REPUBLIC.....APPELLANT

VERSUS

BOGERE ABUBAKAR.....RESPONDENT

J U D G M E N T

[1] The Respondent, **BOGERE ABUBAKALI** appeared before the Senior Principal Magistrate at Busia charged with permitting a motor vehicle on a road with a load greater than the load specified, contrary to **S.56 (1)** as read with **S.58** of the **TRAFFIC ACT**, in that, on the 25th September 2019 at 1219 hours at Mayoni Virtual Weighbridge Station along Mayoni – Bungoma road within Kakamega County, being the owner of motor vehicle Reg. **No.UAZ 709V** make Scania Class 34 permitted the use of the vehicle on a road with a load greater than the load specified by carrying 47,392 kgs instead of 26,000 kgs, an overload of 21,392 kgs per the Kenya National Highway Authority ticket No.TAG 44887235.

[2] After entering a plea of not guilty, the respondent was tried with the prosecution calling a total of three (3) witnesses before closing its case. Thereafter, the respondent made submissions of no case to answer contending that the prosecution had failed to establish a "*prima facie*" case.

In its ruling made on the 3rd September 2020, the trial court found that the prosecution had failed to establish a "*prima facie*" case such that the respondent had no case to answer. Accordingly, the respondent was acquitted under **S.210** of the **CRIMINAL PROCEDURE CODE**.

[3] Being aggrieved by the ruling, the prosecution through the office of the Director of Public Prosecution, preferred the present appeal on the basis of the grounds set out in the petition of appeal dated 16th September 2020, in which the appellant complaints that the respondent was acquitted against the weight of the evidence which was overwhelming and sufficient in establishing a "*prima facie*" case to warrant that the respondent be placed on his defence.

[4] At the hearing of the appeal by way of written submissions, the learned prosecution counsel **MR. MAYABA** represented the appellant and filed his submission on the 8th April 2021.

The respondent was represented by the learned counsel **MR. ASHIOYA**, who filed his submissions in opposition to the appeal on the 29th April 2021.

[5] The duty of this court as the first Appellate Court was to revisit the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witness (see **OKENO VS REP [1972] E.A** 32). In regard, the evidence availed to the trial court by the prosecution through **SETH ONGOYA (PW1) P.C WALTER OMENDA (PW 2)** and **ERICK MWONGERA (PW3)** was given due consideration by this court in the light of the respondent's submissions of no case to answer. It is the opinion of this court that at that juncture the issue that fell for determination by the trial court was whether the evidence adduced at the close of the prosecution case was sufficient and credible enough to establish a "*prima facie*" case against the respondent and have him placed on his defence.

[6] The same issue also arises in this appeal and having considered the grounds of the appeal and those in opposition thereto in the light of the rival submissions, it is this court's opinion that an accused person can only be placed on his defence if the prosecution evidence against him is sufficient and credible enough to establish the necessary ingredients of a charge, hence a "*prima facie*" case. Such a case is one in which a reasonable case properly directing its mind to the Law and evidence before it would convict if no explanation is offered by the defence (see **R.T. BHATT VS REP [1957] E.A 352).**

[7] In this case, the prosecution through prosecution witnesess No.1 and No.2 led cogent evidence which clearly suggested that the respondent's material motor vehicle was virtually captured and detected to have been carrying a load in excess of the prescribed load in that, instead of carrying the permitted load of 26,000 kgs, it carried a load of 47,392 kgs. This translated to an overload of about 21,392 kg, in contravention of the provisions of the Traffic Act.

[8] At the close of the prosecution case, the respondent's submissions were not based on the sufficiency and credibility of the prosecution evidence in establishing the material ingredients of the charge but rather, on the failure by the prosecution to avail in court the necessary gazette notice respecting the Mayoni Virtual Weighbridge Station. This was a matter of technicality or form rather than substance and ought not to have been given undue regard as was done herein by the respondent. Similarly, the non-arrest of the driver of the vehicle and the production of the vehicle and original documents as exhibits were more technical than substantial factors in establishing the material ingredients of the charge. In any event, such favours ought to have been addressed in the final submissions if the respondent had been placed on his defence and given his evidence.

[9] It is notable that the trial court based its impugned ruling largely on the issue of ownership of the material motor vehicle and its non-production in court as an exhibit, yet there was no substantial dispute that the respondent was the apparent owner of the vehicle which was at the time impounded and parked at the Busia Weighbridge holding yard within the jurisdiction of the court from where it was to be released to the respondent pursuant to the order of the trial court made after the delivery of the impugned ruling. Clearly, the vehicle would not have been released to the respondent if it did not belong to him or was non-existent as it was not produced in court.

[10] It is quite intriguing how such a "monster" of a vehicle could be produced in court as an exhibit. A mere photographic image of the vehicle would have sufficed and served as adequate evidence of its existence as the ill-fated vehicle.

It is clear for all the foregoing reasons that the prosecution evidence was credible and sufficient enough in not only establishing the material ingredients of the charge but also a "*prima facie*" case warranting that the respondent (accused) be placed on his defence. He surety had a case to answer.

[11] In sum, this appeal is merited and it hereby allowed to the extent that the impugned ruling made by the trial court on the 3 rd September 2020, be and is hereby quashed and set aside together with all consequential orders including the acquittal of the respondent under S.210 of the **CRIMINAL PROCEDURE CODE**. Further, there be a re-trial of the case before a different magistrate of competent jurisdiction.

Ordered accordingly.

J.R KARANJAH

J U D G E

[DELIVERED, DATED THIS 4TH DAY OF MAY, 2021].

In the presence of Mr. Mayaba for Prosecution and Mr. Ashioya for respondent.