REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

CRIMINAL APPEAL NO.1 OF 2018

GEORGE WAMBUGU THUMBI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the conviction and sentence by Hon.W.Kagendo,

CM on 2nd January 2018 in Nyeri Traffic Case No.4 of 2018)

JUDGMENT

The appellant was charged with the offence of driving under the influence of a drink c/s 44(1) as read with s. 45(1) of the Traffic Act Cap 403 Laws of Kenya. The particulars of the charge were:

> *On the 1st day of January 2018 at about 1330 Hours at King'ong'o along Nyeri Nyahururu Road within Nyeri County of the Republic of Kenya, being the driver of PSV motor vehicle registration no. KBV 990K make Mazda Bongo Matatu did drive the same while under the influence of alcohol and when his breath was tested his blood alcohol concentration was found to be 0.29mg/l beyond the prescribed limit of 00.00mg/l for PSV drivers.*

He appeared before the Chief Magistrate on the 2nd January 2018. The record reads;

> *`The Substance of the charge(s) and every element thereof has been stated by the court to the accused person, in a language he /she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies; TRUE*

The facts were read to the appellant to the effect that

> *'the motor vehicle was stopped because it appeared to be haphazardly driven. When checked he was found smelling alcohol(sic). A test was conducted. The level was 0.29mg/l. that is past the permitted scale. He was arrested and taken to Kiganjo Police station.'*

Before he could plead the plea court sought to know whether he had passengers in the motor vehicle.

> *Court: Did he have any passengers?*
>
> *State Counsel: I am not certain.*

The prosecutor was tasked to ascertain that fact. The matter was later mentioned and the prosecutor told the court:

> *I have confirmed that he had three passengers*
>
> *COURT: Are the facts as read out true?*
>
> *ACCUSED: Yes*
>
> *Court: Why did you drive the vehicle under the influence of alcohol?*

Accused: I drank the night before

COURT: Plea of guilty entered

STATE COUNSEL: No previous records. He may be treated as a first offender

COURT NOTES: Accused is a PSV driver. He had passengers. I note the increase in accidents.

SENTENCE: Accused fined Ksh 100,000 in default one year in prison

In addition, the court will suspend his PSV license for a period of 6 months.

The appellant filed his petition of appeal on the 11th of January 2018 seeking that the conviction be quashed, the sentence be set aside; on the grounds that his plea was unequivocal, the conviction was based on inadmissible, insufficient and inconclusive facts, and that the sentence was harsh and excessive.

The appellant was represented by Mr. CM King'ori and the State by Mr. Magoma

Mr. King'ori filed written submissions n 29th October 2018 t which Mr. Magoma made oral response.

44. Driving under influence of drink

(1) Any person who, when driving or attempting to drive, or when in charge of

a motor vehicle on a road or other public place, is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

45. Prohibition of drinking when driving or in charge of public service vehicle

*(1) Any person who**, when driving** or **in charge of**, or **during any period of duty in connexion with the driving of**, a **public service vehicle**, **drinks any intoxicating liquor** shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.*

The appellant argued that though he pleaded guilty to the charge the plea was unequivocal because each ingredient of the charge were not explained to him on order for him to plead to the same. He relied on **Mose v R (2002 1 EA ,163**, where it the Court of Appeal Chunga CJ Lakha and Okubasu JJA held;

'The procedure for calling upon an accused to plead required that the accused admit to all the ingredients of the offence charged before a plea of guilt could be entered against him. The words "it is true" standing on their own did not constitute an unequivocal plea of guilt. It was desirable that every constituent ingredient of the charge be explained to the accused so that he should be required to admit or deny every constituent'

and **Adan v R (1973) EA 445** where the Court of Appeal set out the procedure for taking plea. This included that

'the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands, the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.'

To this the state responded that the record was clear. The appellant was given the opportunity to dispute the facts. That he had drunk the night before, that he had three passengers in the m/v and in any event under section 348 of the CPC he could not challenge his conviction. Section 348 states:

348. No appeal on plea of guilty, nor in petty cases

No appeal shall be allowed in the case of an accused person who has pleaded

guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

It was also argued that as was held in **Yusuf v R (1971) EA 49,** intoxicating per se did not found an offence under s. 44 (1) of the Traffic Act. Kneller J stated that

'the appellant did not in his reply admit more than that he was under the influence of drink when he drove that vehicle there that evening. He did not say he was under the influence to such extent that he was incapable of having proper control of the vehicle which was an essential element of the offence. It is not an offence to drive a vehicle under the influence of drink'.

The appellant argued that no medical report was produced and relied on **Bukenya v Uganda (1967) EA 341.** that the failure to do so was fatal to the case for the state as without that evidence that charges could not be said to have been proved. In **Yusuf v R**. there was a medical report on the accused person. The judge observed that:

> *'The medical report on the appellant as summarized by the prosecutor did not allege he was incapable of having proper control of the vehicle when he drove it because he was under the influence of drink to that extent.*

The state argued that the appellant pleaded guilty to the charges and the facts established the offence. The appeal was opposed.

The appellant also argued that the sentence was unlawful and/ or excessive as there was no evidence that he was incapable of having proper control of the motor vehicle. And also that s. 45(1) did not include a provision for disqualifying the accused from driving.

I have carefully considered the rival submissions.

Can the appellant challenge his conviction having pleaded guilty to the charge?

In **Davies Maina v R NYERI HCCR APPEAL NO. 49 OF 2017** I said the following:

Although the provisions of section 348 of the CPC appear to framed in mandatory terms the Court of Appeal has variously held otherwise. This is in recognition of the fact that our criminal justice system is open to abuse by those who wield power despite the rights guaranteed for an accused person. Secondly, it is not a friendly system, has not yet to be fully demystified, and attain the requisite levels of professionalism. Persons of all walks of life are intimidated by it. Some end up pleading guilty out of fear and confusion, and even ignorance of processes.

In Wandete David Munyoki v Republic [2015] eKLR the Court of Appeal (Makhandia, Ouko & M'inoti, JJ. A). stated

*It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in **Ndede v R [1991] KLR 567**, this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there has been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed. (emphasis added)*

Hence, in my view fortified by the Court of Appeal's determination above, yes, the appellant can challenge his conviction against a plea of guilt.

The powers of the High Court in an appeal are found in section *354 of the CPC and include;*

> *(3) The court may then, if it considers that there is no sufficient ground for*
>
> *interfering, dismiss the appeal or may—*
>
> *(a) in an appeal from a conviction—*
>
> *(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or*
>
> *(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or*
>
> *(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;*
>
> *(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.*

In this case I start with the charge sheet.

Though this was not raised by either side, a glance at section 44(1) and section 45(1) of the Traffic Act will demonstrate that each section provides a substantive offence by itself. Each of them is self-contained and does not need the support of 'as read with' from the other.

Section 44(1) gives the ingredients of the offence and the penalty. It leaves no room to be read with any other provision of the law.

The prosecution must establish that the accused person

> **1. is under the influence of drink or a drug while**
>
> > **i. is driving or**

ii. attempting to drive, or

iii. is in charge of a motor vehicle on a road or other public place,

2. to such an extent as to be incapable of having proper control of the vehicle,

The penalty is provided at one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both. In addition, the court is to disqualify the offender '*for a period of twelve months from the date of conviction, for holding or obtaining a licence.'*

Section 45(1) is very specific. It addresses the person who is driving or is in charge of a public service vehicle. The prosecution must establish that the accused person

1. drunk intoxicating liquor when

i. driving a PSV or

ii. in charge of a PSV or

iii. was on duty in connexion with the driving of a PSV

The penalty is set out at a *fine not exceeding one hundred*

thousand shillings or to imprisonment for a term not exceeding two years or to both. Subsection 2 provides the offence and penalty for the person who gives or sells alcohol the accused.

Unlike s. 44, s. 45 has no provision for disqualification of the accused person.

Clearly the appellant was prejudiced by the double charge which the prosecution set out placing two offences with different ingredients in the same charge sheet.

On that alone it cannot be said that the plea was unequivocal.

Even where an accused person pleads guilty the prosecution is expected to provide the sufficient facts to disclose the offence and establish each ingredient to enable the accused person answer to the same. Assuming that this is the charge the appellant was answering to, were all the ingredients explained to the appellant. Did he respond to each one of them?

It is time that when an accused person responds 'it is true' to a charge read to him or her, to be asked what exactly he is saying is true to. In this case it was clear that the appellant was saying it was true he had taken alcohol but the previous night. Hence, it was still in his system at the time he was arrested. It is noteworthy that the previous night was the last day of 2018. The appellant fell short of confessing to partying that night yet he still had to report on duty the following day. That came out clearly from his mitigation. Under s. 44(1) the prosecution was required to show that the appellant was so drunk that he could not exercise proper control of the said motor vehicle. Where was that evidence? The prosecution only produced the Alco blow count. The law that states that for PSV drivers the prescribed limit for alcohol is 0.00mg was not cited either. It is not provided for under either s. 44 or 45 a cited in the charge sheet. So it is not clear where that 'ingredient' of the offence was picked from. Neither was any evidence produced to show that the appellant was incapable of controlling the said motor vehicle. The state counsel told the court that the vehicle appeared to be driven' haphazardly'- what does that even mean in reference to driving? Was it driven or it appeared to be driven? The facts as delivered were also vague.

Merely having alcohol in your system is not an offence. The offence crystallizes when you cannot control the vehicle you are driving. Those are the words of s. 44(1). And that was the holding by this court in **Yusuf v R** as long ago as 1970.

Under s. 45 the prosecution was to show that the appellant took the alcohol while he was on duty. Drinking while on duty is completely prohibited. If the appellant was to respond to this charge, the ingredients would be different. They would have included specifics of where and when he drunk the intoxicating liquor.

The appellant's counsel correctly submitted that under s. 45 there is no provision for disqualification, it only comes under s. 44. Having been charged under both provisions of the law it is apparent why the appellant was prejudiced. One provides only for a fine, the other provides for a fine and disqualification.

From the record it is clear that the appellant's plea was that yes had taken alcohol the previous night hence smell in his breath and the alcoblow reading.

From the foregoing I am persuaded that the plea was unequivocal.

The appeal succeeds.

The plea of guilt is set aside. The conviction is quashed and the sentence is set aside.

Dated, delivered and signed at Nyeri this 4th day of March 2019.

Mumbua T.Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Appellant-present

Ms.Nyakio holding brief for Mr.King'ori for accused.

Magoma for state

Mumbua T.Matheka

Judge

4/3/19