



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 85 OF 2017

MUSSA KUNNO ABALUKU.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTION

AS HEARD TOGETHER WITH

HCCRA NO. 86 OF 2017

WAWERU MUNGAI.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTION

JUDGMENT

1. The matters for hearing are HCRA Appeals No. 85 and 86 of 2017 arising from Traffic cases No. 109 and 110 of 2017 Kilungu Law Courts arising from the charges of dangerous loading with conditions on the road Contrary to section 56(2) and 57(1) as read with Section 58(1) of the Traffic Act Chapter 403 Laws of Kenya.
2. In the appeal no 85 of 017 the particulars were that for Mussa Kunno Abaluku on 27/02/2017 at about 07.35 Hours along Mombasa-Nairobi road in Mukaa Sub-County being driver of motor vehicle KBJ 465A/2B 8277 Make Renault Semi-Trailer used the wide load vehicle without owner's escort as required by the conditions on exemption permit and loaded in such manner as to make it a danger to the persons using the road or to persons travelling on the vehicle.
3. For Appellant Waweru Mungai in HCRA 110/2017, the particulars were that on the same date and place, he drove motor vehicle KBJ 463A/ZF 4436 same make used same without onwer's escort as was required by the conditions on the permit and loaded in such a manner as to make it danger to the other person using the road or persons travelling on the vehicle.
4. The Appellants separately pleaded guilty and the prosecution in lieu of setting out the facts stated that **“as they appear in the charge.”**
5. The Appellants seem to have answered that **“facts are correct.”** This was the same day of the arrest on 27/02/2017.
6. The court proceeded to sentence the Appellant each being awarded a fine of Kshs. 150,000/= and in default 1 year imprisonment.
7. They paid but however appealed on what they now say is equivocal appeal. The Appellants set out the grounds of appeal which are just a replication of one another.
8. The only ground argued was that the plea was equivocal and did not follow the parameters set by the authority of **Adan –vs- Republic.**
9. In the case of **ADAN VS. REPUBLIC 1973 EA LR 445, KARIUKI VS. REPUBLIC 1954 KLR 809**, the court held that:- **“the manner in which the pleas of guilty be recorded is:**

The trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;

He should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;

The prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan vs. Republic [1973]EA 445.”

10. The prosecution conceded appeal but sought retrial. They agree that the procedure for the plea taking was defective and thus appeals have merit.

11. On issue of retrial the Appellant argues that the exhibits may not be available.

12. The prosecution argues that the matter is of recent past and the witness and exhibits will be available.

13. The principles upon which a Court can order a retrial were set out in the case of Ahmed Ali Dharmasi Sumar –vs- Republic 1964 E.A 481 and restated in **Fatehali Manji –vs- The Republic 1966 E.A. 343** as follows:

“In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

14. The court finds that this is a fit case for retrial thus makes the following orders.

1. The appeal is allowed, conviction quashed and sentence set aside.

2. The matter will be retried afresh in Kilungu Law Courts in Traffic Case No. 109/2017 and 110/2017 by any of the Magistrates in the station.

SIGNED, DATED AND DELIVERED THIS 10TH DAY OF JULY 2018, IN OPEN TRIAL COURT.

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C KARIUKI

JUDGE