



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 43 OF 2016**

*(An Appeal arising out of the conviction and sentence of Hon. B.M. Nzakyo (MR.) – SRM delivered on 19<sup>th</sup> February 2016 in Nairobi CM.C. TR. Case No.29212 of 2014)*

**EDWARD WAYNE ORAMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Edward Wayne Orambo was charged with three (3) counts under the **Traffic Act** but was convicted of two (2) of the counts. This was after the Appellant had pleaded not guilty to the charges and the case had gone to full trial. He was convicted of the offence of **dangerous overtaking/overlapping** contrary to **Rule 73(4)** of the **Traffic Rules**. The particulars of the offence were that on 11<sup>th</sup> November 2014 at 5.30 p.m. along Parklands Road in Nairobi, the Appellant, being a driver of motor vehicle Registration No. KYV 136 Toyota Starlet, dangerously overtook a flow of motor vehicles. He was further charged with failing to obey verbal direction given by a police officer in uniform in execution of his duty contrary to **Section 52(1)(a)** of the **Traffic Act**. The particulars of the offence were that on the same day and in the same place while driving the same motor vehicle, the Appellant failed to obey the direction given by a police officer in uniform in execution of his duties. The Appellant was sentenced to pay a fine of Kshs.20,000/- or in default four months imprisonment in respect of the 1<sup>st</sup> Count and Kshs.10,000/- or in default two months imprisonment in respect of the 2<sup>nd</sup> Count. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence that did not establish his guilt to the required standard of proof. He took issue with the fact that the trial court failed to consider the fact that he had been taken to court and charged with the offences fourteen (14) days after the time in which he was supposed to have been charged had elapsed. He was aggrieved that his defence was not considered by the trial court before arriving at the decision to convict him. In essence, the Appellant contends that there was no basis upon which the trial magistrate could have convicted him. He took issue with the fact that the trial court failed to consider that his rights upon arrest were infringed by police officers before he was arraigned in court. In the premises therefore, he urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral rival submission made on behalf of the Appellant and on behalf of the State. Mr. Omuganda for the Appellant submitted that the Appellant was taken to court after the expiry of fourteen days from the time the offence was allegedly committed contrary to **Section 50** of the **Traffic Act**. He explained that the summons requiring the Appellant to attend court was issued on 28<sup>th</sup> November 2014 more than fourteen days from the time the incident is alleged to have taken place i.e. 11<sup>th</sup> November 2014. He urged that the prosecution had failed to give reason why the police failed to prosecute the Appellant within fourteen days of the alleged incident. He submitted that the Appellant's cash bail of Kshs.30,000/- was unfairly forfeited when he allegedly failed to attend court. The Appellant disputes that he failed to attend court when he was required to do so. The Appellant explained that there was inconsistency between the evidence of PW1 and PW2 which rendered their evidence to

lack credibility. Learned counsel submitted that it was wrong for the trial magistrate to rely on such incredible and uncorroborated evidence to convict the Appellant. He asserted that the Appellant was a victim of police abuse. He urged the court not to rubber stamp the injustice that was occasioned to the Appellant. He stated that the Appeal should be allowed, the conviction quashed and any sums paid by the Appellant be refunded to him.

Ms. Nyauncho for the State opposed the appeal. She denied the allegations made by the Appellant to the effect that summons were issued to him after the expiry of fourteen days. She explained that the Appellant was required to attend court on 28<sup>th</sup> November 2014 but failed to do so. The date in which the Appellant was required to attend court was deferred to a future date when plea was taken. As regard the issue of forfeiture of cash bail, Ms. Nyauncho observed that the trial court was entitled to forfeit the cash bail because of the Appellant's failure to attend court on several occasion. In respect of the substance of the appeal, learned state counsel submitted that the evidence adduced by the two prosecution witnesses was consistent and corroborated each other in all material respect in regard to all the material aspects of the charges. She urged the court to disallow the appeal.

This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial court and reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must always bear in mind that it did not see nor hear the witnesses as they testified and is required to give due allowance in that regard. (See **Okeno –vs- Republic [1972] E.A. 32**). In the present appeal, the issue for determination by this court is whether the prosecution established the two charges that the Appellant was convicted of to the required standard of proof beyond any reasonable doubt.

The Appellant complained that he was summoned to attend court after fourteen days had expired from the time he was alleged to have committed the traffic offences. In that regard, the Appellant cited **Section 50(b)** of the **Traffic Act** that requires that:

***“within fourteen days of the commission of the offence a summons for the offence was served on him.”***

From the proceedings, it is not clear when the Appellant was issued with summons to attend court. However, it is evident that when the charges were lodged in court on 28<sup>th</sup> November 2014, the Appellant had not been notified that he was supposed to attend court. Plea was deferred to 5<sup>th</sup> December 2014 when the Appellant attended court. He pleaded not guilty to the charges and was released on cash bail of Kshs.30,000/-. He paid the cash bail. The Appellant was required to attend court on 15<sup>th</sup> December 2014 for the mention of his case. He failed to attend court. The cash bail was forfeited. A warrant for his arrest was issued. He failed to attend court on the date when the case was fixed for hearing. However, he appeared later before court. He was released on a personal board of Kshs.20,000/-. The Appellant again failed to attend court. A warrant of arrest was again issued. He later attended court and the warrant of arrest was lifted. The hearing then proceeded to its conclusion.

The Appellant's claim that he was not issued with summons to attend court within fourteen days was disputed by the prosecution. The prosecution claimed that it had indeed issued summons for the Appellant to attend court within fourteen days but the Appellant had failed to attend court within fourteen days hence the deferral of the date the plea was supposed to be taken. This court's evaluation of the rival and contrasting facts placed before the court leads this court to the determination that it cannot reach a finding one way or the other whether the Appellant was issued with summons to attend court within fourteen days of the date of alleged commission of the offence. This court was not helped by the fact that the Appellant did not raise this issue before the trial court. As an appellate court, this court relies on the record of the trial court. If that issue was not raised before the trial court, this court will be hampered to that extent in its decision making because there will be no record to support the contention by the Appellant that he was not served with summons within fourteen days of the alleged commission of the offence. This court therefore finds that the Appellant failed to establish to the required standard of proof that he was not served with summons within the statutory period. As regard the forfeiture of the cash bail, this court is of the view that the trial court was justified in forfeiting the said sum to the State because of the Appellant's

persistent failure to attend court. He cannot complain at this stage of proceedings that the order of forfeiture was made without reasonable cause.

As regard the substance of the appeal, it was not disputed that the Appellant was driving the suit motor vehicle along Parklands Road on the material day of 11<sup>th</sup> November 2014. He was seen by PW1 Corporal Abel Mwandegwa and PC John Mulundi recklessly overtaking several vehicles. He was stopped and instructed by the two police officers to drive the motor vehicle to Parklands Police Station. The Appellant disobeyed this order and instead proceeded to Visa Oshwal Primary School to pick his daughter. She testified as DW2. The two police officers pursued the Appellant and found his motor vehicle parked outside Visa Oshwal Primary School. The motor vehicle was immobilized before a motor vehicle was called to the scene to tow away the motor vehicle to Parklands Police Station. The Appellant disputes the version of events as explained by the two officers. He however concedes that he was stopped by the police and instructed to drive the motor vehicle to Parklands Police Station. The Appellant stated that he did not commit the offence of recklessly overtaking other motor vehicles. He also did not fail to obey the instruction of the police officers to drive the motor vehicle to Parklands Police Station. This court's re-evaluation of the evidence adduced by the two police officers, in light of the evidence adduced by the Appellant in his defence, leads it to the inexorable conclusion that the two police officers were telling the truth. Their evidence was cogent, consistent and corroborated each other in all material respects. There was no reason why the two police officers singled out the Appellant from all the motorists who were on the road on that day for special attention if indeed the Appellant had not committed the offences in question.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF MARCH 2017**

**L. KIMARU**

**JUDGE**