



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 12 OF 2015

PATRICK JUMBA MUHADIA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable B. KIPTOO in Kapsabet Criminal Case No. 118 of 2014, dated 24th January, 2014)

JUDGMENT

1. The appellant was charged in two counts with two traffic offences. In Count 1, he was charged with the offence of driving a defective motor vehicle on a public road Contrary to **Section 55 (1)** as read with **Section 58 (1)** of the **Traffic Act**.
2. The particulars thereof alleged that on the 24th day of January 2014 along Uganda road in Eldoret West, Uasin Gishu County, being the driver of motor vehicle Registration No. KBK 706D make Scania Bus, he drove the said vehicle while it was defective in that its rear reflector was faded.
3. In count 2, he was charged with the offence of operating a long distance public service vehicle at night without a valid licence Contrary to **Rule 10** as read with **Rule 15** of **Legal Notice No. 219 of 2013** enacted under The National Transport and Safety Authority Act. It was alleged that on 23rd January, 2014 along Eldoret- Nakuru Road at Tarakwa in Eldoret South district within Uasin Gishu County he drove motor vehicle Registration No. KBK 706 D at night without a valid licence from the National Transport and Safety Authority.
4. When the appellant was arraigned before the lower court in Kapsabet criminal case No. 118 of 2014 he was convicted on his own plea of guilty in each of the two counts.

In count 1, he was sentenced to pay a fine of Kshs.1,000 in default to serve three months imprisonment.

In count 2, he was fined Kshs.100,000 in default to serve 6 months imprisonment. The sentences were ordered to run concurrently.

5. The appellant was aggrieved by his conviction and sentence. He proffered an appeal to the High Court. In his petition of appeal filed on 8th February 2015, the appellant limited his appeal to the conviction and sentence in count two as no challenge was apparently made on the conviction and sentence in count one. The crux of the appellant's appeal is that he was convicted for a non-existent offence as the regulations under which he was charged had not been tabled in parliament by the minister concerned within the stipulated time; that the learned trial magistrate failed to

consider his plea in mitigation with the result that she imposed a very harsh sentence which had an adverse effect on his health and the well-being of his children. He urged the court to quash the conviction and to set aside the sentence.

6. The appeal is not opposed by the state. Learned prosecuting counsel *Miss Mokuu* when conceding to the appeal submitted that legal Notice No. 219 of 2013 under which the appellant was charged and convicted was subsequently declared null and void in April 2014 by Odunga J in ***Paul G. Muthumbi & others V Cabinet Secretary for Transport and Infrastructure and others JR No. 2 of 2014***; that the cabinet Secretary for transport and infrastructure later issued another Legal Notice No. 23 of 2014 quashing Legal Notice No. 219 of 2013; that for this reason, Legal Notice No. 219 of 2013 is no longer in existence and the appeal ought to be allowed.
7. I have read the Ruling of Odunga J in the JR. No. 12 of 2014. I note that in that ruling, the Hon. Judge confirmed that Legal Notice No. 219 of 2013 under which the Regulations used to charge the appellant were promulgated had been revoked by Legal Notice No. 23 of 2014 which was issued on 8th March, 2014.

It is for this reason that on 14th April, 2014 the Hon. Judge formally declared that the Regulations under Legal Notice No. 219 of 2013 were null and void. It is however important to note that the appellant was convicted of the offences in the two counts on 24th January, 2014 when the said Regulations were still in force.

8. That said, I have noted that in count 2, the appellant was charged with the offence of operating a long distance public service vehicle at night without a valid licence contrary to **Rule 10** as read with **Rule 15** of Legal Notice No. 219 of 2013 of the National Transport and Safety Authority Act. I have read the ***National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations of 2013***. Rule 10 of the said Regulations sought to regulate the operation of commuter service vehicles with respect to the salaries, hours of work of the drivers, conductors and other staff employed in public service vehicles and the manner in which marketing for passengers as well as their picking and dropping would be done. The Rule did not prohibit the operation of public service vehicles at night without a licence from the National Transport Authority. Regulation 11(1) is the Rule that prohibited the driving of long distance public service vehicles at night without a valid licence issued by the Authority. It is the Rule which should have been invoked to charge the appellant.
9. In view of the foregoing, it is evident that the appellant was charged and convicted in count 2 under a provision of the Regulations which did not create the offence charged. The charge was therefore defective and a conviction flowing from it cannot stand.
10. Before concluding this judgment, I wish to observe that the trial court's order directing that the sentence in default of payment of fine imposed in both counts should run concurrently was illegal as under **Section 37** of the ***Penal Code***, such terms should run consecutively.
11. I have also noted from the court record that there was a grave error made by the trial court's registry personnel when preparing the warrant which committed the appellant to prison to serve the term of imprisonment imposed in default of payment of fine.

The warrant indicated that in count 2, the appellant had been sentenced to pay a fine of Kshs. 100,000 in default to serve 24 months imprisonment. This means that the appellant was made to serve an extra period of five months in addition to the term that had been imposed by the trial court. The appellant has now finished serving that sentence. The aforesaid inadvertent error is highly regretted and this court unreservedly apologizes to the appellant on behalf of the trial court for the injustice the mistake must have caused him.

12. In view of the foregoing, I find that this appeal is merited and it is accordingly allowed. The conviction in count 2 is quashed and the sentence set

aside.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 9th day of March 2016

In the presence of:

The appellant

Ms Mokuu for the State

Ms Naomi Chonde Court Clerk.