

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 151 of 2005

SAMUEL MUHOA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

SAMUEL MUHOA MWANGI, the Appellant, was charged with the offence of riding on a dangerous position contrary to Section 61(2) of the Traffic Act Cap 403 of the Laws of Kenya. The particulars of the offence are that on 5th January 2003 at about 5.00 p.m. within Kanyariri Trading Centre in Nyandarua District of Central Province he was found riding on a dangerous position to wit on top of a trailer which was hauled by a tractor registration number KAA 266K, Trailer ZB 2361 which was loaded with firewood he fell down and suffered a fractured right leg. He pleaded not guilty to the charge but upon trial before the Senior Resident Magistrate at Nyahururu he was convicted and discharged under Section 35(1) of the Penal Code to be of good conduct for a period of 12 months. He has appealed to this court against that conviction.

Section 61(2) of the Traffic Act states:-

“No person shall ride or be carried on any load upon a vehicle if such a proceeding is unsafe by reason of the insufficiency of space available for such person to stand or sit, or by reason of the position in which he is carried or the height or arrangement of the load.”

I agree with both Mr. Mugambi, the learned state counsel, who rightly conceded this appeal and Mr. Wahome for the Appellant that the evidence adduced in the lower court was not only at variance with the particulars of the charge but also did not prove it. While the particulars of the charge stated that the accident occurred on the 5th January 2003, PW1 and PW4 said it occurred on 31st December 2002 while PW3 said it was on 5th December 2002.

All the prosecution witnesses said that they did not see the Appellant board the tractor. They said that it was after it had swerved and spilled the firewood it was carrying on the trailer when they saw the Appellant lying down with a broken leg. There was therefore no evidence at all that the Appellant was riding at a dangerous position on the trailer. Nobody saw where on the trailer the Appellant was before the accident. That is why I agree with both counsel that the charge was not proved.

Moreover PW2 also conceded under cross examination that he was the one who was driving the tractor when it was involved in the accident and that he did not have a driving license. He was therefore unqualified to drive. An unqualified person cannot be said to have been driving with due care and attention. The Appellant's complaint that this charge which was preferred after one year and after he had filed a civil suit against the owner of the tractor to shift blame to him is therefore not without foundation.

For these reasons I allow this appeal, quash the conviction and set aside the conditional discharge.

DATED and DELIVERED at Nakuru this 3rd day of October, 2008.

D. K. MARAGA

JUDGE