

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 138 OF 1995

JOSEPH WAWERU RITHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Appealing against both conviction and sentence, the appellant who is charged with failing to report an accident contrary to section 73 of the traffic act cap 403 Laws of Kenya was duly fined Kshs 1,000/- in default 3 months imprisonment.

This counsel raised three major issues that this court would consider. The first being that the charge sheet ought to have complied with section 134(a)(ii) of the Civil Procedure Code. Namely that the statement of offence should have contained – where the offence charged was by enactment so created contain “a reference to the section of the enactment creating the offence. In this particular instance the offence that read contrary to section 73 of the traffic act ought to be read with section 75 of the act – which section outlines the penalty the accused will be charged with. The case of U v Kenneri Opidi 1965 EA 614, refers.

Where the respondent had been charged under the traffic act for a non existent sub section of the traffic ordinance and as such not available. With it was unclear as to whether the charge laid was under the traffic ordinance or the traffic regulations. Following the above finding counsel for the appellant argued that as the penalty section of the offence was not stated the charge against the appellant was not available. The said charge cannot thus stand.

I must distinguish the above case and the present one before court. The appellant in this case was charged with an existing offence namely section 73 of the traffic act of failing to report an accident. The prosecution omitted to add the section 75 presiding the penalty to comply with section 137(a)(ii) of the criminal proceeding code. The above case law dealt with the non-existent section. This point though was brought up after the close of the prosecution case. The prosecution should have brought this attention to the court before he closed his case in order for the trial magistrate to comply with section 214 of the charge to include section 75 of the traffic act but didn't.

As to the injuries sustained by the complainant, that this he refused to be proved but no medical report was deduced, the prosecution ought not only to have brought a medical expert to give a report on the injuries but should have charged the appellant with the offence of reckless driving contrary to section 47(1) or careless driving contrary to section 49(1) of the Traffic Act. If this was done then further proof to show that careless would have been refused. The appellant afforded the police no opportunity to inspect the vehicle by simply not reporting the accident as to the burden of proof – it is the appellant who raised an alibi namely that the vehicle on the 1.10.93 was in the garage the whole day till the following day of the 2.10.93 under section 111(1) of the Evidence Act cap 80 reads:

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception of exemption from or qualification to the operation of the law creating the offence with which he is charged and the burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances of facts exist: ...

I find that the appellant raised an alibi. It is up to him to prove that alibi by bringing a witness from the garage who attended to the vehicle the whole day.

Alternative if it is in the prosecutions power, the prosecution would bring in a rebuttal evidence to prove his was not so – unfortunately the appellant who raised this issue did not give details of such garage to allow for rebuttal evidence to be called.

As a whole I would agree that the prosecution ought not to have omitted section 75 from the charge but I see that there was no miscarriage of justice.

An accident occurred. The complainant fell out of a vehicle driven by the appellant – he should have reported it to the police but failed to do so.

This court would uphold the conviction and sentence and dismiss this appeal.

Dated and delivered at Nyeri this 15th day of November, 1995

M.A. ANG'AWA

JUDGE