



REPUBLIC OF KENYA

HIGH COURT AT MOMBASA

CRIMINAL APPEAL NO 113 OF 1988

AHMED AIDARUS ALWI APPELLANT

VERSUS

REPUBLIC.....ESPONDENT

(From original conviction and sentence of the Resident Magistrate's Court at Kilifi, PM Ndungu, Esq,
RM in Criminal Case No 197 of 1988)

JUDGMENT

The appellant was charged with the offence of failing to obey ferry rules contrary to Rule 6(4) (f) Cap 410 Laws of Kenya.

He pleaded guilty to the charge and was fined shs 800/- or 2 months' imprisonment.

He appeals against conviction and sentence.

The charge sheet reads as follows:-

Charge:- Failing to obey ferry rules contrary to Rule 6(4) (f) Cap 410 Laws of Kenya.

Particulars:-

On 21st day of January, 1988 at 9.30 am at Kilifi Ferry in Kilifi District of the Coast Province, being driver of m/v reg. No KWY 410 Nissan Kombi *matatu* drove the said vehicle on to ferry without first causing every passenger on board the motor vehicle other than a disabled person to vacate the said m/v."

The court record shows that the appellant was taken to court on the same day the offence was committed. The charge was read and every element explained and the appellant pleaded:-

"It is true".

The facts were stated to him "as per charge sheet" after which the appellant is recorded to have said:-

"I agree".

The appellant was then convicted. In his mitigation, the appellant told the court:-

"I ask for forgiveness as I did not know".

Mr Suchak for the appellant was in the course of hearing of the appeal allowed to argue an additional ground of appeal that the charge as laid does not disclose an offence. Mr Suchak in support of that ground argues that the Ferries Rules mentioned in the charge-sheet do not contain Rule 6(4)(f). Mr Metho for the State conceded but submitted that the offence in the particulars of the charge is created by Rule 4(f) of the same Ferries Rules and that the error in stating the sub-rule is curable.

The rules for framing charges are set out in section 137 of Criminal Procedure Code. Section 137(a)(ii) provides among other things that

“If the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence”. However, S 382 of the Criminal Procedure Code prohibits reversal or alteration of finding, sentence or order of a competent court by appellate court on account of error or omission in the charge unless the error, omission or irregularity has occasioned a failure of justice.

The Ferries Rules under which the appellant was charged are made under S 6 of Ferries Act and the Rule 4(f) of the Ferries Rules create the offence which is stated in the particulars of the charge. Rule 6(4)(f) does not exist in the Rules and it seems to me that the person who drafted the chargesheet inserted figure 6 before 4(f) and without that figure 6 4(f) creates the offence charged. That was merely a technical error. It was not a case where the offence charged on the particulars does not exist. In *Abdulrasul G Sabur v R* [1958] EA 126, 2 similar error. It was held to be curable. This case is distinguishable from *Viram Rennil Odreda & Anor v R* [1959] EA 231 where the offence charged did not exist at the time it was alleged to have been committed.

The instant case is also distinguishable from the case of *Uganda v Keneri Opidi* [1965] EA 614 where the accused was charged with a non-existent offence in the Traffic Ordinance and where also the particulars of the charge did not disclose any offence under any section of the Traffic Ordinance.

In the present case, the defect is merely technical and not fundamental and it did not cause a failure of justice. Seemingly, the error was due to the fact that the heading of the Rules is “Rules under section 6”.

Mr Suchak did not cite any authorities to support the assertion that the sentence is illegal because the Minister has no power under S 6 of the Ferries Rules to make Rule 8 of the Ferries Rules providing for penalty for breach of the Ferries Rules. Under S 6 of the Ferries Act, the Minister has power to make Rules for

“regulating and controlling the embarkation and disembarkation of persons, animals, goods and vehiclesin connection with ferry, boats”.

If the Minister has such powers then he has power to provide punishment for the breach of the Rules. The Ferries Rules are subsidiary legislation. Most of the Acts of Parliament have the enabling section similar to S 6 of the Ferries Rules and where rules are made under the enabling section they invariably contain a penalty clause similar to sub-rule 8 of the Ferries Rules. It requires therefore ample authorities to declare sub-rule 8 of the Ferries Rules a nullity which declaration would have far reaching consequences.

Mr Suchak argues that the plea of “it is true” is equivocal. In *Wanjiru v R* [1975] EA 5, the court stated at page 6 E-F, “.....the words “it is true” are poor foundation for a conviction and they ought to be explored in all save the simplest of charges. And where they are relied upon, a court should readily permit a change of plea where the facts are challenged or there is a possibility of misunderstanding”.

In *Kato v R* [1971] EA 542, the plea of “it is true” to charges of forgery and uttering a forged document were held to be sufficient to amount to a plea of guilty since every ingredient of the charge had not been explained to the appellant. In that appeal it was argued that the appellant pleaded: “it is not true” but trial magistrate wrongly recorded them as “it is true”. In that case, it was also conceded by State that the facts admitted by appellant did not correspond to the facts in the counts and that the document was not in fact forged.

In the present case the charge was simple and a straightforward – driving on board the ferry with passengers on board. It was not a technical offence involving a charge with several ingredients. The learned magistrate recorded that he read over the charge and explained it to the appellant.

The words of the appellant that “I agree” after the statement that facts are per charge sheet implicitly shows that those facts in the charge sheet were read to him and he agreed with them. The facts in the charge sheet were comprehensive in relation to the charge. They stated the date of the offence, the place, the name of the ferry, that appellant was a driver, the registration number of the vehicle he was driving and that he did not cause the passengers to alight.

The mitigation of appellant indicates that the charge was properly explained. There is nothing he said in mitigation which is inconsistent with a plea of guilty. Ignorance of the law is no excuse.

The plea of guilty is being challenged on technical grounds. Otherwise the facts are stated in the particulars of the charge have not been challenged nor is claimed as in *Kato v R*, (*supra*) that there was a misunderstanding.

The State supports the conviction considering that charge was simple, straightforward and non technical. I am satisfied that the plea of guilty was unequivocal in all the circumstances of the case.

It is further argued that the appellant was not given adequate time to reflect on the charge or seek advice of an advocate. The offence was committed at 9.30 am. The record does not show what time the plea was taken. As this was a simple charge and the appellant did not ask the court that plea be postponed or that he be given a chance to consult an advocate, I think that this ground has no merit. The Rules provide for a sentence of a fine of shs 200/- in default.

The learned magistrate passed a sentence of a fine of shs 800/- in default 2 months’ imprisonment. The sentence was therefore illegal. The fine of shs 800/- was paid immediately.

For reasons stated, I dismiss appeal against conviction. I allow appeal against sentence, set aside the sentence of a fine of shs 800/- and substitute thereof a sentence of a fine of shs 200/- in default 2 months’ imprisonment. The balance of shs 600/- shall be refunded to the appellant.

Dated and Delivered at Mombasa this 16th Day of June, 1989

E.M. GITHINJI

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JUDGE