

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 272 OF 1982

MMBURURU KIOGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted on two counts under the Traffic Act (Cap 403) but this appeal concerns only the first count of careless driving contrary to Section 49(1) of the Traffic Act. The issue of notice was raised by the appellant. He was not served with a notice and he was of the view that notice was mandatory unless hindered by the conduct of the accused.

The learned State Counsel, in conceding the appeal, pointed out that a notice of intended prosecution was not issued and that Section 50 of the Traffic Act is mandatory. He went on to say that it was not clear if carelessness was proved as the appellant could not have been expected to see a person sleeping at the back of his car.

Section 50 of the Traffic Act (Cap 403) provides:

“Where a person is prosecuted for an offence under any of the sections of this Act, other than Section 46, relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving or to careless driving, he shall not be convicted unless –

- (a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the sections aforesaid would be considered; or
- (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or
- (c) within fourteen days a notice of the intended prosecution, specifying the nature of the alleged offence and the time and place where it is alleged to have been committed, was served on or sent by registered post to him or to the person registered as the owner of the vehicle at the time of the commission of the offence: Provided that –

(i) failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that –

- (a) neither the name and address of the accused nor the name and address of the registered owner of the vehicle could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or
- (b) the accused by his own conduct contributed to the failure; and

(ii) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved.”

In this appeal the appellant succeeded in showing that he was not served with a notice of intended prosecution. It has not been shown that he contributed to this failure. In *Greene v R* [1970] EA 62 at p 78 Spry JA reading the judgment of the Court of Appeal said:

“For these reasons, we think that there was failure to comply with the provisions of Section 50;

that consequently a prosecution did not lie and; that therefore this appeal must succeed.”

In the present appeal, the appellant was not served with a notice of intended prosecution. Hence, Section 50 of the Traffic Act was not complied with. It follows that the appellant’s conviction on the first count cannot stand. This appeal is therefore allowed in respect of the first count of careless driving contrary to Section 49(1) of the Traffic Act. The conviction is quashed and sentence set aside. The fine of Kshs 500 imposed should be refunded to the appellant.

Order accordingly.

Dated and delivered at Nyeri this 17th day of December, 1982.

O’Kubasu

JUDGE