

HIGH COURT - DSM.

IN THE HIGH COURT OF TANZANIA

AT MBEYA

APPELLATE JURISDICTION

(MBEYA REGISTRY)

CRIMINAL APPEAL NO. 7 OF 1998

(ORIGINAL TRAFFIC CASE NO. 21 OF 1998 OF THE
DISTRICT COURT OF MBEYA DISTRICT AT MBEYA)

KIBONA WILLIAM.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MWIPOPO, J.

The appellant Kibona s/o William was convicted on two counts under the Road Traffic Act 1973 Sec. 55(1) (a), (b) and (c) and 41, 63 (2) (a) and 27 (1) (a). He pleaded guilty to both counts of failure to stop at a railway crossing and careless driving of a motor vehicle on a public road. He was sentenced to 6 months imprisonment in the first count and 12 months imprisonment on the 2nd count. He was also disqualified from driving by seizure of his driving licence for 12 months.

The learned Mr. Boniface (S.A.) has supported this appeal on the grounds that the offence of failure to stop at a railway crossing c/s 55 (1) (a), (b) and (c) must involve a motor vehicle plying on the road with passengers in it who are carried in the motor vehicle on hire or for a reward i.e. paying fare for the service whereas here the motor vehicle was a Company bus of Mbeya Cement Co. which was carrying workers of the company. The essence of this offence is preventive in order to avoid motor vehicles colliding with railway trains at railway crossing. It

looks absurd if passengers on hire or who have paid fare for being in a motor vehicle should be more protected than passengers in a motor vehicle who have not paid fare or hired the motor vehicle when crossing the railway line. The rationale of the offence must be to prevent loss of life and limbs of all passengers in a motor vehicle whether for a hire, reward, fare, or not so long as they are on board of a motor vehicle which is crossing a railway line. The driver of such motor vehicle must take extra care not to cross a Railway line without stopping first. Such a reward can be a free ride for workers in their employer's motor vehicle. In this case the workers of Mbeya Cement Company were given a reward of a free ride to and from work as a motivation for them to be punctual and efficient at work. So, this motor vehicle was for a reward covered by this section.

The second count of careless driving of a motor vehicle on a road c/s 41 of the same Road Traffic Act was wrongly evoked for no accident occurred causing any injuries to any person on the road (pedestrian), or to the passengers in the bus. So, as ^{correctly} presented by the learned Mr. Boniface (S.A.) this count cannot stand. The conviction is quashed and sentence of one year jail term is set aside.

But, the facts which the appellant accepted to be true disclose another equivalent offence of wrecklessly driving a motor vehicle c/s 42 (a) of the same Traffic Act 1973. The appellants explanation before this court was, (when asked by the court to show cause why should he not be convicted on this substitutable offence), that he was not careless since it is the police themselves who suddenly came out to stop him just as he was about to cross the railway line and that he had seen no train on the railway line cannot appease his wrecklessness for he is required

to stop at the railway crossing whether there is a train passing along the railway line or not. The Traffic Police on finding him proceeding to cross the railway line without stopping first had to intervene by stopping him so that they could arrest him and book him or even charge him in court for his failure to stop at the railway crossing, c/s 55(1) (a) or wreckless driving c/s 42 (a) of the same traffic act.

The crux of the problem does not lie in the fact that he was not wreckless by crossing the railway line without stopping but on the legal premise that since the same facts constitute the two offences the Republic through her public prosecutor should have opted to charge him with one offence only out of the two or to charge him with both counts in the alternative to one another. By framing the charge in the manner it was done, the prosecution has wrong fallen into the miserable pit of having duplex charges facing the appellant concurrently.

On appeal here, therefore this court has to remedy this technical malady of duplicity of charges and ~~connection~~ by opting for the more lenient and favourable count for the benefit of the accused/appellant. Between the two counts the 1st count is the less grave one than the second one because the first one attracts under s. 63(2)(b) & 27 (1)(a) of the Act a minimum fine of shs.15,000/= up to shs.50,000/= or a minimum imprisonment term of Two years to 5 years, plus a mandatory disqualification from obtaining a driving licence as well as cancelling the existing driving licence for a minimum period of 3 years. Whereas the 1st count of failure, to stop at a Railway crossing attracts ^{under} s. 63 (1) of the same Act merely a maximum fine of shs. 10,000/= or imprisonment of 2 years or both without the mandatory provision for cancellation of his driving licence.

I therefore opt to do good justice to the appellant by sustaining the conviction on the first count of failing to stop at the railway crossing. The sentence of 6 months imprisonment on the first count is also hereby reduced to 3 months imprisonment with a fine of shs.15,000/= in default of which he shall serve imprisonment term of 3 months imprisonment. The conviction of reckless driving contrary to section 42 (1)(a) & 27 (1)(a) of the same Act is quashed the sentence of 12 months imprisonment and disqualification from obtaining a licence and cancellation of his driving licence are set aside.

The 3 months imprisonment term shall be deemed to have been fully served by today. So I order for his immediate release from prison unless he fails to pay the fine of shs.15,000/= imposed now in which case he will have to serve the 3 months imprisonment in default of fine from now.


E.L.K. MWIPOPO

JUDGE

27/5/98

27/5/98

Mwipopo, J.

Appellant - Kibona William - present in person,

Mr. Nangela (S.A.) - present

C/C: Mrs. Mponzi

Court: Judgement delivered.

AT MBEYA

ELKM/ATM'lina.


E.L.K. MWIPOPO

JUDGE

27/5/98