



**Achega v Republic (Criminal Revision E185 of 2023)
[2023] KEHC 21393 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL REVISION E185 OF 2023**

DK KEMEL, J

JULY 28, 2023

BETWEEN

GREGORY OMBISA ACHEGA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein Gregory Ombisa Achega has through his learned counsel approached this court seeking a revision of the sentences imposed by the trial court on February 21, 2023. The grounds for the revision are *inter alia*; that the trial court erred in law when it failed to accord the Appellant an option of paying a fine as relates to sentences passed.in counts 1 and 2’ that the trial court was also wrong to decree that the Appellant serves a consecutive prison term under Count 3 to the offence preferred against the Appellant in the traffic cause yet all those arose under a single transaction. This court was urged to intervene in the process.
2. The Revision was canvassed by way of written submissions. Both counsels duly complied.
3. I have given due consideration to the request for revision of sentence as well as the submissions by learned counsels for the parties. This being the first appellate court, its role is well spelt out namely to evaluate the evidence tendered before the trial court and subject it to an independent analysis and thereafter arrive at its own conclusion as to whether to uphold the decision or finding of the trial court, See *Okeno -vs- Republic* (1975) EA 32. The issue for determination is whether the revision is merited.
4. The lower court record indicates that the Applicant was charged with three counts under the [Traffic Act](#) as follows: -



- i. Count 1 - Causing death by dangerous driving contrary to section 46 of the [Traffic Act](#).

The particulars are that on 29th day of November 2020 at Satellite area along Webuye – Kitale road , within Bungoma County , being the driver of motor vehicle registration number KCN 763B make Toyota Axio drove the said motor vehicle along the said road in a manner that was dangerous to the public having regard to all circumstances of the case including the nature, condition and use of the road and the manner of traffic which was actually at the time or which might reasonably be expected to be on the road, and thereby caused the death of Zuhra Chepkemioi who was a pedestrian.

- ii. Count 2- Driving under the influence of alcoholic drink contrary to section 44 (1) of the [Traffic Act](#).

The particulars are that on 29th day of November, 2020 at Satellite area along Webuye Kitale road within Bungoma County, being the driver of motor vehicle registration number KCN 763B make Toyota Axio drove the said vehicle along the said road while under the influence of alcoholic to wit 0.437 mg/I which is above the allowed 0.35mg/I for a private vehicle.

- iii. Count 3 – Careless driving contrary to section 49 (1) of the [Traffic Act](#).

The particulars are that on 29th November 2020 at Satellite area along Webuye-Kitale road within Bungoma county being the driver of motor vehicle registration number KCN 763B make Toyota Axio drove the said vehicle along the said road without due care and attention and without reasonable consideration for other persons using the said road thereby caused an accident by knocking down one John Pascal Wanyonyi who was a pedestrian who sustained injuries as a result of the accident.

5. After a full trial, the lower court sentenced the Applicant to four years’ imprisonment on count one as well as 18 months’ imprisonment on count two and a fine of Kshs. 50,000 or in default to serve six months’ imprisonment on count three. The trial court ordered that the first and second counts were to run concurrently while the third count was to run consecutively with counts one and two. The Applicant is aggrieved by these sentences and seeks this court to interfere with the same by granting an order for payment of a fine on counts one and two and further order that the sentence on the third count to run concurrently with the sentences on count one and two.

6. To begin with, it is trite that sentencing is a matter solely at the discretion of the trial court since it is that court which heard the case throughout and finally decided on the appropriate sentences to be imposed. Ordinarily, it is proper for the trial court to consider the issue of sentences and grant the appellate courts should be slow to interfere with such sentences unless it is shown that the same are manifestly excessive or that the trial court overlooked some material factors or acted on a wrong principle. The Court of Appeal in the case of [Bernard Kimani Gacheru -vs- Republic](#) (2002) Eklr held as follows:-

“It is now settled law following several authorities by this court and by the High court that sentence is matter that rests in the discretion of the trial court. Similarly sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless; that sentence is manifestly excessive in the circumstances of the case; or that the trial court overlooked some material factor, or took into account some wrong material



or acted on a wrong principle. Even if the Appellate court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated is shown to exist.”

7. A perusal of the lower court record reveals that the Applicant’s mitigation was duly considered by the trial magistrate. The Applicant was sentenced to serve four years’ imprisonment on count one. Under section 46 of the [Traffic Act](#), the maximum sentence is ten years imprisonment. Indeed, the circumstances warranted a term of imprisonment since the applicant had caused the death of a pedestrian through dangerous driving. It transpired that the Applicant had been over speeding at the time and was under influence of excess alcohol. The fact that the Applicant hit the pedestrians on the opposite side of the highway, is a clear indication that he was not in full control of his vehicle.

The four years’ imprisonment for the first count is not excessive in my considered view since the learned trial magistrate considered all the circumstances of the case. It is also instructive that the Applicant was driving excessive speed as shown by the 30-meter skid marks. He is said to have left his left lane and knocked the deceased and other pedestrian on the opposite lanes off the road. It is noted that the trial court did not proceed to debar the Applicant by cancelling his driving license for a certain period as mandated under section 46 of the Act. I am satisfied that the sentence on count one was not excessive in the circumstances.

8. As regards the second count, it is noted that any person who contravenes section 44 (1) of the [Traffic Act](#) shall be guilty of an offence and is liable to a fine not exceeding Kshs. 100,000/- or to imprisonment for a term not exceeding two years or to both. The Applicant was sentenced to eighteen months imprisonment without an option of a fine. Indeed, he was entitled to be given an option of a fine as provided for. I am inclined to interfere with the sentence herein and substitute the same with an order of a fine of Kshs. 50,000/- or in default to serve twelve months’ imprisonment which shall run consecutively with the sentence on count one.

9. As regards the third count, the applicant was ordered to pay a fine of Kshs. 50,000/- or in default to serve six months’ imprisonment. Under section 49 (1) of the [Traffic Act](#), any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and is liable for a first offence to a term of imprisonment not exceeding one year or a fine not exceeding Kshs. 100,000/-. I find the sentence imposed is within the terms provided for under the Act and is not excessive in any way. I see no reason to interfere with the said sentence.

10. It is noted that the Applicant has taken issue with the trial court’s order that the sentence on count three to run consecutively with the sentences on count one and two. The Applicant contends that the sentences should run concurrently since the offences arose within the same cause of action. Reliance was placed in the case of [Peter Mbugua Kabui -vs- Republic](#) (2016) eKLR. Learned Counsel for the Respondent also sought reliance in the aforesaid authority and further relied on section 14 of the [Criminal Procedure Code](#) as well as the Judiciary sentencing policy Guidelines. As earlier noted, sentencing is at the discretion of the trial court. Section 14 of the Criminal Procedure Code provides that punishments consisting of imprisonment shall commence after the expiration of the other in the order the court may direct unless the court directs that the punishments shall run concurrently. Again, under the Judiciary [Sentencing Policy Guidelines](#) (7.14), the discretion to impose concurrent or consecutive sentence lies in the court. In the case cited by the parties herein namely Peter Mbugua Kabui -vs Republic (supra), the court held that if a separate and distinct offences are committed in different criminal transactions even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.



From the foregoing, I am unable to find fault with the learned trial magistrate's order that the third count do run consecutively with the other counts as there was nothing wrong with such an order stemming from the exercise of discretion by the trial court after considering all the circumstances of the case.

11. In the result, the request for review succeeds only to the extent that the sentence on count two is set aside and substituted with an order that the Applicant pays a fine of Kshs. 50,000 and in default to serve twelve months' imprisonment. The said sentence will run consecutively with sentence on count one. All the other request are dismissed.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY, 2023

D KEMEI

JUDGE

In the presence of :-

Makokha for Wanyonyi for Applicant

Ayekha for Respondent

Kizito Court Assistant**

