



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. E054 OF 2021**

**KELVIN MUTUNGI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant was arrested on 8<sup>th</sup> February 2021 and arraigned at the Chief Magistrate’s Court at Makadara, vide the traffic case number 247 of 2021, charged with the offence of; contravening the provisions of; Legal Notice No. 50 of 2020, to carry fifty percent of the licenced carrying capacity, contrary to Rule 5(3) (a) as read with Rule (11) of the said; “Legal Notice of the Public Health Act, Cap 242 of the Laws of Kenya”.
2. The particulars of the charge read that, on 8<sup>th</sup> day of February 2020, at Makadara Sub-County within Nairobi County, being the driver of motor vehicle registration number; KBT 614Q Isuzu Mini-bus, a 32 seater Public Service Vehicle, was found carrying 46 passengers instead of; 28 which was more than the fifty percent licensed capacity of the said motor vehicle, in contravention to the said Act.
3. The charge was read to the applicant and he pleaded guilty thereto. The facts were also read and he confirmed that, they were correct. Subsequently, he was convicted on his own plea of guilty. In mitigation, he informed the court that, he was sorry.
4. In considering the sentence, the Honourable Learned Magistrate observed that, the applicant had carried eighteen (18) more passengers than the required number and after considering the punishment provided by the law for the offence sentenced him as aforesaid; to pay a fine of; Fifty Thousand Shillings (Kshs 50,000 .00) in default to serve one (1) year imprisonment.
5. On 22<sup>nd</sup> February 2021, the applicant filed a notice of motion application seeking that, the court invokes the provisions of “section 333 in respect to the sentence” imposed upon him and be pleased to note that, he has been in custody for a period of three (3) weeks after sentence.
6. The application is supported with an affidavit of even date sworn by the applicant wherein he merely reiterates in the subject affidavit the averments in the notice of motion application, save to add that; he is remorseful for his actions and will not repeat the offence again. That, he is the sole bread winner of his young family, with young school going children, as his wife is jobless, and cannot afford to pay school fees.
7. In addition, he is suffering from acute/chronic medical condition, and can benefit from home care to avoid triggering factors which may predispose him to future development of terminal illness. Further, his continued incarceration in prison has made him suffer mentally. He prays for a non-custodial sentence to take care of his representatives and get proper medical attention.
8. However, the application was opposed by the Respondent who filed grounds of opposition dated 19<sup>th</sup> April 2021, reproduced here below;
  - a) *That the Application lacks merit and is ill-advised*
  - b) *That the sentence meted by the trial court is proper and sound in law*
  - c) *That the sentenced meted by the trial court is not excessive in the circumstances*
  - d) *That the Applicant has not demonstrated reasonable grounds upon which the honourable court can revise and or vary the trial court sentence*

e) That the Applicant was charged with breach of regulation to cushion covid 19 pandemic ravaging the country and pleaded guilty.

9. The application was disposed by the parties addressing the court orally. However, the applicant did not submit much, save to rely on the documents filed. The Respondents learned counsel Mr Kiragu however, submitted that, the application lacks merit. That the offence is serious as the applicant risked the lives of nineteen (19) passengers during the COVID-19 pandemic. As a result, he exposed all Kenyans to a risk. Finally, there is no evidence of the alleged chronic disease.

10. I have considered the application in the light of the arguments and/or submissions by the respective parties. I find that, the applicant pleaded guilty to the charges and was properly convicted. He is not challenging the conviction though. However, he prays that, the court revisits the sentence. He relies on the provisions of; section 333(2) of the Criminal Procedure Code.

11. These provisions provide as follows:

*“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.*

*Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody. (emphasis added)”*

12. Having considered the aforesaid provisions, I find the court is implored to take into account the period a convict has spent in custody during sentencing. However, it suffices to note that, the applicant was arrested on 8<sup>th</sup> February 2021, arraigned in court on the same date and sentenced instantly, therefore, those provisions do not apply and the applicant cannot benefit therefrom.

13. Similarly, I find that, although the applicant alludes to having family responsibility and poor medical conditions, but there is no evidence to support the same.

14. Finally, I concur with the sentiments of the respondent that, the offence the applicant committed is serious, taking into account the circumstances under which it was committed. It is a matter of public knowledge that, the Ministry of Public Health has given guidelines and safety measures to observe to contain the spread of COVID-19 Pandemic. One of these precautionary measures is social distancing. By carrying the excess passengers, the applicant was bluntly breaching these safety measures with impunity. Therefore, he deserved a deterrence sentence.

15. However, I find that, under Rule 11 of the Rules of the Legal Notice No. 50 of 2020, the penalty provided for breach of any of the Rules thereunder, is a fine not exceeding, Twenty Thousand Shillings (Kshs 20,000. 00), or imprisonment period of a period not exceeding six months or both.

16. I therefore find that, sentenced herein to pay a fine of; Fifty Thousand Shillings (Kshs 50,000.00) in default serve a custodial period of one (1) year imprisonment is unlawful. In that regard, pursuant to the powers given to this court under article 165 (3), of the Constitution, and Section 362 and 364 of the Criminal Procedure Code, I hereby set aside the sentence imposed by the trial court and substitute it with a sentence of; Twenty Thousand Shillings (Kshs 20,000. 00), in default to serve a custodial sentence of six months from the date of sentence in the trial court; being the 8<sup>th</sup> day of February 2021.

17. It is so ordered.

**Dated, delivered virtually on this 26<sup>th</sup> day of April 2021 and signed.**

**GRACE L. NZIOKA**

**JUDGE.**

In the presence of: -

Applicant present in person

Ms Akunja for the Respondent

Edwin – Court Assistant