REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL MISCELLANEOUS APPLICATION NO. 222 OF 2019

DISMAS GITENGE MOTONGWA...APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING

This matter now comes up for the application of the applicant, DISMAS GITENGE MOTONGWA dated and filed on 26.9.2019. The application is brought basically under section 362 and 364 of the Criminal Procedure Code, Cap 75 Laws of Kenya. The main prayer on the application (prayer 2) seeks that;

> "***That this Honourable court be pleased to revise, vacate, vary and or set aside the Honourable E Riany's (Senior Resident Magistrate) custodial sentence of 3 years and 6 months herein together with the orders cancelling the Applicant's driving licence, dated 1.7.2019 in Milimani Traffic Case No. 10798/2018, Republic Versus Dismas Gitenge Motongwa and in turn commit him to payment of a fine or a non-custodial sentence or any other term that this court deems fit and just in the interest of justice."***

The applicant had been charged before the lower court in the said Traffic Case No. 10798/2018 with 3 counts. On count I, he faced a charge of causing death by dangerous driving contrary to section 46 of the penal code. on count II, he was charged with the offence of giving false information to a person employed in public service contrary to section 129 (a) of the Penal Code. lastly, on count III, he faced a charge of failing to stop for which he was sentenced upon his own plea of guilty. On counts I and II, and upon hearing of the same, the applicant was convicted and sentenced to serve 3 years imprisonment and 6 months imprisonment respectively. The sentences were ordered to run concurrently. These 2 sentences are the subject of this present application for revision.

The applicant duly filed his submissions herein. I have perused and considered the same. I must say that in the said submissions, the applicant has raised several issues of evidence that in my view do not come under or support the applicant's present application for revision. Such issues not relevant to this application as raised by the applicant in his submissions include:

> ***i) The issue of influence of the media in the trial/.***
>
> ***ii) Whether the trial was speculative.***
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> ***iii) Contradictions during trial.***
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> ***iv) Whether the case was proved beyond any reasonable doubt as required by law.***
>
> ***v) Involvement of external influence in his trial.***

All these issues raised, do not relate to the application before the court. I shall refrain from considering the same, especially in view of the fact that the court has not been told if the applicant has filed any appeal challenging his conviction. This application relates only to sentence.

The applicant has submitted that the sentence meted out on him was harsh and excessive. That he was not handed an option of fine and his driver's licence was also ordered to be cancelled. He also reiterated the mitigating factors he had raised before the trial court i.e that he was a first offender, that he had served the country as a prison officer for 18 years rising through the ranks to be a sergeant, receiving various recommendations and recognitions, training and skills and that he was always been diligent. He pleaded to be given a second chance.

The applicant also urged that the period he has served in prison be considered in the sentence, being 15 months. He relied on the ***Francis Karioko Muruatetu*** case. He also urged the court to consider his circumstances during his incarceration and the effects of his imprisonment

of his family.

The prosecution has opposed this application and filed submissions. In the submissions, it was maintained that the case before the lower court was proved beyond any reasonable doubt as required in law. And that the court had meted out a lenient sentence in the circumstances. It was urged that this application be dismissed.

I have considered the 2 rival submissions. I have also considered the proceedings before the lower court and the judgment and the sentence proceedings. On count I, the applicant was charged with causing death with dangerous driving contrary to section 46 of the Traffic Act. The said section reads;

> "***Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having to all the circumstances of the case, including the nature, the condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road ….. shall be liable to imprisonment for a term not exceeding 10 years and the court shall exercise the power conferred by part VIII of cancelling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of 3 years starting from the date of conviction or the end of any prison whichever is the later."***

This section of the Traffic Act dictates on at least 2 salient elements of the sentence. First, that depending on the circumstances of each case, the sentence for causing death by dangerous driving is a term not more that 10 years imprisonment. Therein, there is no provision for an alternative of a fine for this offence. Second, this section directs the court (shall) to exercise the power under Part VIII of cancellation of the licence and disqualification of the offender for 3 years. in this case, a sentence of 3 years imprisonment was meted out together with the order of cancellation of the licence of the applicant.

The issue is whether the sentence was harsh and excessive. Section 46 of the Traffic Act give the maximum sentence that the court can mete out for this offence as 10 years imprisonment. This means that the sentencing court is given the discretion to decide on the sentence depending on the circumstances of each case. I have considered the proceedings of the lower court. It is clear that the applicant was accorded the opportunity to mitigate which he did in court on 24.6.2019. The court proceeded to obtain an impact assessment report. The said report dated 1.7.2019 was filed in court and the court considered the report before passing the sentence. In the sentencing proceedings, the trial magistrate clearly noted the aggravating circumstances in this particular case including:-

> ***i) The pain and anguish of the victim's family***
>
> ***ii) The behavior of the applicant after the accident including***
>
> > - ***Ferrying the body away for 3 kilometres without 1 leg.***
> >
> > - ***Dumping the body and walking away***
> >
> > - ***Reporting that he had knocked down a cow***
> >
> > - ***Going back to pick the number plate on a motor vehicle.***
>
> ***iii) The fact that the deceased was 6 weeks pregnant.***
>
> ***iv) Failing to offer any apologies to the family of the deceased,***

There is no doubt that the sentence of 3 years imprisonment and cancellation of the licence was proper, legal and within the law. In view of the circumstances of this case as brought out during the trial, judgment and in the victim's impact Report filed in court, I am convinced that the sentence passed was reasonable in the circumstances. It was neither harsh nor excessive as pleaded by the applicant.

I have otherwise also considered the additional mitigation of the applicant on his remorse, his diligent service as a prison officer, the trainings and courses he has undergone, the awards, and the impact his incarceration has had on his family and his own life. On a scale, I find that the aggravating factors in this matter outweigh the factors of mitigation that the applicant has raised.

Regarding count II, the applicant was charged with giving false information to a person employed in the public service contrary to section 129 of the Penal Code. he was sentenced to serve 6 months imprisonment against the maximum sentence provided of 3 years imprisonment. In no way has this court been convinced that this sentence is harsh and excessive.

In the submissions of the applicant, the applicant has also urged that this court do apply the principle and ration decidendi in the Supreme Court case of ***Francis Karioko Muruatetu and Others Versus Republic (2017)eKLR***, with respect, these 2 cases are distinguishable. Whereas the Muruatetu case gave directions on resentencing to account for the period served while in custody, by this admission, the applicant had posted bail while he awaited the outcome of his trial. This court therefore declines to apply the principles laid down in that case in considering the 15 months the applicant has served in prison so far, in reviewing his sentence if at all.

Lastly, on the principles of sentencing, this court is guided by the Court of Appeal decision in ***Ahmad Abolfathi Mohamed and another versus Republic, Criminal Appeal No. 135/2016***, at page 25, thus;

> ***“as what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this court will normally not interfere with the exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle, ignored material factors, took into account irrelevant considerations, or on the whole that the sentence is manifestly excessive.”***

It is the same principle that was re-iterated in the case of ***Benard Kimani Gacheru versus Republic (Criminal Appeal No. 188/2000)***, that;

“It is not now settled law, following several authorities by this court, and by the High Court, that sentence is a 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 the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factors, or took into account some wrong material or acted on a wrong principle. Even if the appellate court feels that the sentence is heary and that the appellate court might itself not have passed the sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentences unless, any one of the matters already stated is shown to exist.”

Under section 362 of the Criminal Procedure Code, under which this application has been brought, it is incumbent upon the applicant to prove to this court the incorrectness, the illegality or impropriety of the order of the trial court on the sentenced aggrieved of. The applicant has failed in this regard, with the resultant being that this application dated 26.9.2019 must fail. I accordingly find no merit in this application and dismiss it wholly. Ordered accordingly.

D. O. OGEMBO

JUDGE

24.5.2021.

Court:

Ruling read out in presence appellant (Kitengela Prison) and Mr. Naulikha for the state.

It is noted that this Ruling took long to deliver due to Covid 19 related restrictions and disruptions

D. O. OGEMBO

JUDGE

24.5.2021.