



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Hon. D. K. Kemei - J)**

**CRIMINAL REVISION APPL. NO. E137 OF 2021**

**AMON KIPNGETICH TOO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant was convicted on his own plea of guilty under section 20(1) (a) as read with section 21(1) of the East African Community Vehicle Load Control Act 2016 for evading the weigh bridge. The trial court at **Mavoko Traffic Case No. TR/E.243 of 2021** sentenced him to 1(one) year imprisonment in default of paying Kshs. 500,000/- fine.

2. The Applicant vide the Notice of Motion dated 14.6.2021 supported by his affidavit sworn on the same day, is seeking the following orders:-

**(i) Spent**

**(ii) THAT the Honourable court be pleased to revise the sentence issued by the trial court in MAVOKO TRAFFIC E/243 OF 021 sentencing the Applicant herein to pay a fine of Kshs. 500,000/- or 1 (one) year imprisonment in default and in place substitute it with a sentence of Kshs. 100,000/- or 6(six) months imprisonment.**

**(iii) THAT costs of this Application be provided for.**

3. According to the Applicant, he is a man of modest means and bread winner of his family. He deponed that he works as a driver with a net pay is Kshs. 20,000/- which amount cannot offset the fine of Kshs. 500,000/-.

4. In his submissions, counsel for the Applicant submitted that the Applicant was the sole bread winner as per annexure 'AK2' attached to the application. According to counsel, the Applicant has a young family which warrants the court to intervene and revise the sentence to Kshs. 100,000/- or 6<sup>th</sup> months imprisonment. It was submitted that the applicant can't afford the fine and that he should be allowed to pay the fine that he is financially able to pay. It was finally submitted that the Applicant is very remorseful.

5. In his submissions, learned counsel for the prosecution submitted that the sentence imposed by the trial court was lawful and within the latitude provided by the Act. Reliance is placed on the cases of **Mokela vs The State (135/11) [2011] ZASCA 166** and **Bernard Kimani Gacheru vs Republic [2002] eKLR** on the proposition that sentencing solely rest in the discretion of the sentencing court. However, learned counsel was of the view that the fine imposed is excessive noting the harsh economic period we are in and thus urged the court to relook at the sentence imposed.

6. I have considered the application and submissions filed. The only issue for determination is *whether an order for revision is merited*.

7. Section 362 of the Criminal Procedure Code is clear on the scope of revision in criminal trials as follows:-

***“..... purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate Court.”***

8. The applicant had been charged under section 20. (1) as read with section 21(1)(a) of the East African Community Vehicle Control Load

Act 2016 which provide as follows: -

**S.20(1)(a) “A person commits an offence under this Act if that person— (a) being a transporter, bypasses, absconds or evades a weighbridge or weighing station;”**

9. The punishment for such an offence is provided for under section 21(1) of the same Act as follows:-

**“A person convicted of an offence under section 20 by a national court shall be liable to a fine not exceeding fifteen thousand US dollars or to imprisonment for a term not exceeding three years, or both.”**

10. The fine of Kshs. 500,000/- imposed by the trial magistrate was within the range. The Act provides that the fine should not exceed 15000 US Dollars which translates to approximately Kshs.1000,000/-. The trial magistrate therefore correctly sentenced the applicant within the law.

11. The Applicant has asked the court to revise the fine to Kshs. 100,000/ which he is ready and willing to pay or in default serve 6 months’ imprisonment. He pleads that he can only afford Kshs. 100,000/- based on his income. The prosecution suggested that the court should relook at the sentence for being excessive although the fine was lawful within the latitude provided under the 2016 Act on the ground that there are currently harsh economic times being faced.

12. Revision is discretionary. The court in the case of **BGM HCCR Revision No 27 of 2013 Martin Maruti Kituyi vs Republic** the court held that revision is discretionary.

13. As was stated by the High Court of Malaysia in **Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728** at 734, 735:

***“....The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...”***

14. The Applicant pleads that he can afford Kshs. 100,000/-. He has indicated that he is ready and willing to pay the same if this court imposes it. The prosecution’s view is that the sentence was excessive. In **Bernard Kimani Gacheru vs Republic [2002]eKLR** the court held as follows:

***“It is 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 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 consideration 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.”***

15. I have perused the lower court record and note that the applicant did present his mitigation before he was sentenced. The sentencing provision of the statute in question provides that a person convicted of such an offence is liable to pay a fine not exceeding fifteen thousand (15000) US dollars which at the current market exchange rate in terms of Kenyan shillings is in the region of about Kshs 1,500,000/ and that the sentence should not exceed three years imprisonment. Looking at the said penalty, the trial court has discretion to impose fines and imprisonment as long as the same does not exceed the limits provided. In the present case, the learned trial magistrate duly exercised her discretion and imposed the sentence now complained of. However, I find the sentence rather too excessive for a first offender and which must be interfered with in the interest of justice. Further, the hard economic times brought about by the Covid-19 pandemic must be taken into account. The applicant has presented his pay slip which shows that he earns a net sum of Kshs 22,675/ per month. The applicant has also indicated that he is the sole bread winner for his family and seeks this court to have mercy on him. It is also noted that the offence committed is that of evading a weighbridge and that the applicant is a first offender and is remorseful for the offence. It is also noted that the applicant has been in custody for about three months and that he is presumed to have learnt his lesson. Looking at all the circumstances of the case, I am satisfied that this is a case that merits a revision of sentence. The applicant’s conduct in seeking to make amends by offering to make amends by paying some reasonable fine even after serving part of the sentence merits consideration by this court.

16. In light of the foregoing, I find merit in the applicant’s application filed on 21/7/2021. The same is allowed. The orders made by the trial court in **Mavoko Traffic No.E243 of 2021** are hereby set aside and substituted with an order that the applicant herein is ordered to pay a fine of Kshs 100,000/ or in default serve six (6) months imprisonment and which sentence shall commence from the date of conviction namely 20/5/2021.

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 30TH DAY OF JULY, 2021.**

**D. K. Kemei**

**Judge**