



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 33 OF 2017**

**REPUBLIC.....APPELLANT**

**VERSUS**

**ISLAM YAHYA.....RESPONDENT**

**(Being Appeal from the Original Sentence in Traffic Case No. 547 of 2017 in the**

**Chief Magistrate’s Court at Malindi before Hon. C. O. Nyawiri (SRM)**

**dated 6<sup>th</sup> November 2017 )**

**CORAM: Hon. Justice Reuben Nyakundi**

**Mr. Mwangi for the State**

**Mr. Mburu for the respondent**

**J U D G M E N T**

In this appeal, the state is questioning the exercise of discretion by the Learned trial Magistrate in discharging the respondent under Section 35 (1) of the Code instead of imposing a fine for the traffic offence as charged. The appeal was disposed of by way of written submissions from both counsels. The issues raised therein would form part of determination by this Court without necessarily going into accurate details.

**Resolution**

Given the wide range of submissions made by the appellant counsel by the same token, this Court delves into the practical approach to how Judges and Magistrate exercise discretion in judicial – making process.

The approach is based on both realistic and formalistic models as well as the Judges or Magistrates opinion. By formalistic model, Judges decide cases by ascertaining the facts and applying the Law whereas the realistic model tend to lean the decision making process of Judges through a judicial hunch. In the scope of the realists approach, Judges are not bound by rules of the Law, but have absolute discretion when determining the outcome of the case. (See John Dickson, Legal Rules, Their Function in the process of **Decision 79 Penn L. Rev. 833 {1931} Oliver Wendell on the path of the Law 10 Harvard L. Review 457** emphasizes the unconscious factors that influence a Judge:

**“The language of judicial decision is mainly the language of logic, and the logical method, and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is nor the destiny of man. Behind the logical form lies a Judgment as to the relative worth and importance of compelling legislative grounds, often an inarticulate and unconscious Judgment, it is true, and yet the very root and nerve of the whole proceeding. The very considerations which Judges most rarely mention and always with apology, are the secret root from which the Law draws all the juices of life. I mean, of course, considerations of what is experiment for the community concerned. Every important principle which is developed by litigation is in fact and at the bottom the result of more or less definitely understood views or public policy most generally, to be sure, under our practice and traditions, the unconscious result of instructive preferences and inarticulated convictions. Not only does the external environment provide a wealth of tools for storing experience and methods for doing manipulations and calculations, it also constrains the reasoning process.”**

Similarly, **Posner on Frontier of Legal Theory 3 {2001} Legal Realism** had this to say:

**“The Judges essential activity is the making of a large number of decisions in rapid succession with very little feedback concerning the correctness or consequences of the decisions. He or she does not have the luxury of withholding decisions while persuaded by objectively convincing arguments that the decision will be correct, and no more wants to wallow in uncertainty and regrets, than a Law student wants to retake an exam in his mind after having taken it in the examination room.”**

Fundamentally, it is that discretion on alternative sentence, appellant is asking this Court to review. It must however always be remembered that the purpose of a good judicial decision is for the advancement of justice which a judicial officer is enjoined to administer under the Constitution and enabling statutes.

In **Ballentine’s Law Dictionary** the word judicial means **“characterizing whatever emanates from a Judge as such or whatever proceeds from Courts of justice.”** While Blacks Law Dictionary defines Judgment as **“the official and authentic decision of a Court of Justice.”**

In my view, simply stated judging is not a matter of applying readily ascertained legal rules to individual cases. The Judges by the power of discretion must exercise independent Judgment that is shaped by the unique circumstances of the case, their personalities, experience and worldview.

Returning to this appeal, the appellant has failed to demonstrate that the Learned trial Magistrate took into account wrong principles, acted unreasonably, illegally or her decision was non-responsive to the Law and precedents, when one reflects on sentence, empirical studies encourage other alternatives models of sentencing which also serve the ends of justice. The cost of fines and imprisonment worldwide is hard to calculate equally important is the aspect whether the respondent was capable financially to raise monetary value of the fine to be imposed by the Court. A second danger is that the fine initiative once adopted has a default clause of imprisonment. Given that perspective Courts should tread carefully to limit the circumstances under which imprisonment is justified. The result is that the appeal lacks merit. It is good for dismissal.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF DECEMBER, 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Mwangi for the state
2. The respondent