



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION 90 OF 2019

MIKAH NJOROGE KANGETHE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The ruling arises from an application for revision of sentence vide Chamber Summons filed under a certificate of urgency filed on 18th March, 2019. The applicant was charged with two counts, namely:

a. **Causing death by dangerous driving contrary to Section 46 of the Traffic Act, Cap 403, Laws of Kenya.** The particulars were that on the 18th day of March, 2018 at 1800hrs along Ngecha Road near Mwamuto within Nairobi County, the Applicant being the driver of motor vehicle registration number KBH 417Y make Nissan Matatu drove the said vehicle at a speed and in a manner which was dangerous to the public having regard to all circumstances of the case including the nature, condition and amount of traffic on the road expected at the time and lost control and as a result one male passenger namely Evans Chege Muchiri succumbed to the injuries while undergoing treatment in hospital.

b. **Driving a motor vehicle on a public road with some parts and equipment thereof not maintained in safe condition contrary to Section 55(1) of the said Traffic Act CAP 403 Laws of Kenya punishable by Section 58(1) of the said Act.** It was alleged that on the 18th day of March, 2018 at about 1800hrs along Ngencha Road near Mwamuto Junction within Nairobi County being the driver of a motor vehicle registration number KBH 417Y Nissan Matatu drove the said vehicle on a public road while some parts and equipment thereof did not comply with equipment in such a condition that the driving of the motor vehicle was not safe to road users or to person traveling in the said motor vehicle.

2. The Applicant denied the charges and at the conclusion of the trial was convicted and the court sentenced him, in the first count to pay a fine of Ksh. 500,000/- and in default to serve two half (2½) years imprisonment and in the second count to pay a fine of Kshs.100,000/- in default to serve one (1) year imprisonment. He was dissatisfied with the sentence which he seeks a revision of in this Court.

3. Under **Section 362 of the Criminal Procedure Code**, *“the High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose 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 such subordinate court.”*

4. Pursuant to the above, under **Section 364(1) (b) of the Code** the Court has powers to make any necessary alterations to the order or sentence under revision. That is to say that the *court is only permitted to interfere with a decision where there was an error in a legal principle, material factor or illegality or harshness that causes an injustice. I associate myself with the sentiments in the decision in Ogallo s/o Owuora 1954 24 EACA 70.* Where the court stated that:

“This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice”

5. The gist of the application is that the sentence be made to run consecutively and to have the time spent in custody considered to constitute part of the sentence. This prayer was unopposed by counsel for the Respondent, Miss Kibathi.

6. The application is grounded on the averments in the supporting affidavit sworn by the Applicant. It is stated that he is remorseful, that he never at all intended to cause the accident and that he was a first offender. It is further alluded that the court should pardon him because he is aged, now at 63 years, and that in any case the sentence was harsh and excessive in the circumstances.

7. With respect to Count I, **Section 46 of the Traffic Act** provides for an imprisonment sentence of up to 10 years. It does not provide for a fine. Since the court chose to impose a fine, the default sentence ought to have complied with Section 28(2) of the Penal Code. The same provides for a default sentence of a maximum imprisonment period of one (1) year where the fine imposed is Ksh. 50,000/and above. The Court nevertheless underscores the fact that a life was lost in the accident in which case deterrence and retribution as purposes for sentencing should be served.

8. As regards the second count, it is my view that the fine imposed was too harsh. The defect noted was in the vehicle brakes but again, the driver was not solely responsible for maintenance of the vehicle. He was a driver on employment and thus, largely, the owner ought to have maintained the vehicle in a serviceable condition. Furthermore, the manner in which the accident occurred clearly points that the Applicant did not intend it. It is on this basis that I shall revise that sentence downwards.

9. Taking all matters into consideration, I revise the sentence as follows:

a) In Count I, the Applicant shall pay a fine of Ksh. 500,000/ in default serve one (1) year imprisonment.

b) In Count II, the Applicant shall pay a fine of Kshs.20 000/-in default serve 6 months imprisonment.

10. The Applicant made a prayer to have the sentences run concurrently. **Section 28(2)(c)(i)** of the Penal Code provides that:

“(c) in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion -

(i) direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also (emphasis added).”

11. It follows from the above provision that the prayer that the sentences run concurrently is untenable.

12. **Section 46 of the Traffic Act** also directs that a person found guilty of the offence of causing death by dangerous driving shall be disqualified from handling or obtaining a driver's licence for a period of three (3) years from the date of the conviction or end of prison term. The date of effecting the disqualification shall be dependent on which period is later. The trial court failed to apply this provision. This Court is thus mandated whilst exercising its supervisory and revisionary powers over subordinate courts under Article 165 of the Constitution and Section 362 and 364 of the Criminal Procedure Code respectively to correct the error.

13. The Applicant was arrested on or around the date of the accident. It is clear is he took plea of 26th March, 2018. He has therefore been in custody for two (2) years four (4) months and two (2) days. I find that he has completed the sentence and should therefore be set at liberty unless otherwise lawfully held. I further order that he shall be disqualified to hold a driving licence for a period of three years commencing from the date his sentence was due to end, which is 26th September, 2019. This order be served upon the National Transport Safety Authority (NTSA) for compliance. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH JULY, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant in person.

2. Momanyi for the Respondent.