



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.23 OF 2019**

**JOHN MWENDWA MUTHUI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

1. A brief outline of the case was that the applicant **John Mwendwa Muthui** was charged with the offence of causing death by dangerous driving c/s 46 of the Traffic Act in Criminal Case No. 493 of 2016 at Embu CMs Court;

2. The applicant was convicted and sentenced to serve a non-custodial sentence of two (2) years and was also disqualified from driving for three (3) years; whilst serving the sentence the applicant committed another offence of driving without a licence and was convicted to a custodial sentence of one (1) year; the trial court then revoked the non-custodial sentence based on the new developments and replaced it with a fine of Kshs.200,000/- or a default sentence of three (3) years and retained the order for the disqualification from driving for three (3) years;

3. Being aggrieved by the conviction and sentence, the applicant filed this instant application for the revision of the sentence imposed; at the hearing hereof the applicant was unrepresented and relied on his written submissions whereas the respondent was represented by Prosecuting Counsel Ms Chemenjo who made oral submissions; hereunder are the parties respective submissions;

**APPLICANT'S CASE**

4. The application is for review of sentence under the provisions of Section 362 and 367 of the Criminal Procedure Code and all enabling provisions of the law.

5. In his prayer for review of sentence the applicant stated that he was young, remorseful and had learnt from his mistakes and had reformed and pleaded for forgiveness and a second chance; he also prayed that the court takes into consideration that the two offences were related as both were traffic offences and urged the court to allow the sentences to run concurrently and to also consider the time already served as sufficient punishment and it be deemed as term served.

**RESPONDENT'S CASE**

6. In response counsel was opposed to the application for review and stated that the applicant had been convicted and sentenced to a non-custodial sentence and whilst serving the probationary sentence the applicant violated the probation order by committing another traffic offence;

7. Counsel submitted that the sentence imposed was lenient as the maximum sentence for the offence of causing death by dangerous driving is a term of ten (10) years; that the aggravating factor was that there was an unfortunate loss of a life; but was not opposed to the two sentences running concurrently and the commencement date be from the date of arrest;

**ISSUES FOR DETERMINATION**

8. After hearing the rival submissions this court has framed the following issues for determination which are as follows;

- i. Whether the trial court erred in imposing the fine and the default custodial sentence;
- ii. Whether the sentences be revised to run concurrently;

iii. Whether this is a suitable case for revision;

## **ANALYSIS**

### **Whether the trial court erred in invoking a fine and the default custodial sentence:**

9. Upon perusal of the court record this court notes that the applicant had been charged with the offence of causing death by dangerous driving c/s 46 of the Traffic Act in Criminal Case No. 493 of 2016 at Embu CMs Court and was convicted and sentenced to serve a non-custodial sentence of two (2) years as well as being disqualified from driving for three (3) years; whilst serving the sentence the applicant committed another traffic offence of driving without a licence and was convicted and to a custodial sentence of one (1) year; due to the breach of the terms of the probation terms the trial court revoked the non-custodial sentence and replaced it with a fine of Kshs.200,000/- or a default sentence of three (3) years and retained the order for the disqualification from driving for three (3) years;

10. The scope of this court's revisionary powers are that it can call for and examine the record of criminal proceedings of a subordinate court so as to satisfy itself as to the propriety and legality of the decision and that it has been made in accordance with the law; the applicable section for revision in this instance is found at Section 364 which reads as follows;

***“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—***

***(a) in the case of a conviction, exercise any of the powers conferred on it as a Court of Appeal by sections 354, 357 and 358, and may enhance the sentence;***

***(b) in the case of any other order other than an order of acquittal, alter or reverse the order.***

***(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:***

***Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.***

***(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.***

***(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.***

***(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”***

11. Therefore, in the event this court finds or is satisfied that there was any impropriety or illegality in the sentencing and that it has not been made in accordance with the law then in such cases this court can alter or reverse the order;

12. This court concurs with the respondent's submissions that the record speaks for itself and it is also not disputed that the applicant breached the terms and conditions upon which he was sentenced; and is satisfied that the sentencing court rightly re-activated the sentence by imposing a fine and a default sentence of three (3) years;

13. The applicant has not demonstrated how the trial court erred in revoking the non-custodial sentence and imposing the term of imprisonment or the illegality, impropriety or mistake that was committed when the sentence was meted out; the court record reflects that the trial court did not overlook any material factor when passing sentence and took into consideration the circumstances of the case and the mitigating factors; it is also noted that the trial court took into consideration the fact that the applicant was a first time offender and that he was remorseful;

14. The re-activated sentence is as provided by the law and it is found to be legal and lawful and that there is no reason found that justifies interference with the decision of the sentencing court;

### **Whether the sentences be revised to run concurrently:**

15. The applicant also had prayed that the sentences to run concurrently; and the respondent was not opposed to the sentences running concurrently as opposed to consecutively;

16. In this instance there were two (2) distinct offences for which the applicant was charged; the criminal transactions were committed on two diverse dates and at different times; the charges were not on the same Charge Sheet and the outcomes in the form of convictions were distinct and made on different dates; the only commonality of the two offences is that they were traffic offences;

17. The applicable law is found in the provisions of Section 14 of the Criminal Procedure Code provide for the circumstances under which sentences may be consecutive or concurrent; the section reads as follows;

***“Sentences in cases of conviction of several offences at one trial;-***

***(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.***

***(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.***

***(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—***

***(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or***

***(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.***

***(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.”***

18. This court also makes reference to the Court of Appeal case of **Peter Mbugua Kabui vs Republic [2016] eKLR** which stated as follows;

***“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”***

19. Though this application for the sentences to run concurrently was not opposed, this court reiterates the following factors that the two (2) offences for which the applicant was charged were separate and distinct; the criminal transactions were committed on two separate dates and at different times; the charges were not on the same Charge Sheet and the outcomes in the form of convictions were different and made on separate dates; the only commonality of the two offences is that they were traffic offences;

20. In the light of the forgoing this court is satisfied that this is not a suitable case for it to exercise its supervisory powers of revision for the sentences to run concurrently

21. The punishments which consist of imprisonment shall commence one after the expiration of the other; this court will nevertheless take into consideration the proportion of the partially completed non-custodial sentence which period shall be reduced from the sentence imposed of three (3) years; this period runs from the 13/02/2018 which is the date of conviction to the 29/05/2018 which is the date the probationary order was revoked; which translates to approximately three and a half months.

## **FINDINGS AND DETERMINATION**

22. For the foregoing reasons this court makes the following findings and determinations;

i. This court finds and it is satisfied that this is not a suitable case for it to exercise its supervisory powers of revision conferred under the provisions of Section 364 of the Criminal Procedure Code;

ii. The sentence imposed of Kshs.200,000/- or in default a custodial sentence of three (3) years and the disqualification from driving for a period of three (3) years is hereby upheld; the period proportional to the partially completed non-custodial sentence shall be reduced from the sentence;

iii. The review on the concurrent running of sentences is also found to be unmerited and is hereby disallowed.

Orders accordingly.

**Dated, Signed and Delivered Electronically due to the Pandemic at Nyeri this 19<sup>th</sup> day of November, 2020.**

**HON. LADY JUSTICE A. MSHILA**

**JUDGE**