



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL REVISION NO. 91 OF 2015

(From Original conviction and sentence in Traffic Case No. 12 of 2015 of the Chief Magistrate's Court at Naivasha)

REPUBLIC.....APPLICANT

-VERSUS-

DAVID GITAU NGATA.....RESPONDENT

JUDGMENT

1. This is an application by the prosecution for revision of the sentence meted upon the accused/convict by the lower court.
2. The sentence imposed upon the accused was a fine of Kshs 20,000/= in default, 3 months imprisonment. In addition, the accused's driving licence was suspended for one year. The accused was involved in an accident and was charged with the offence of causing death by dangerous driving contrary to **Section 46 (1)** of the Traffic Act. The accused pleaded guilty to the charge on 22nd April, 2015, hence the sentence.
3. The state applied for review of the sentence as far back as 20th July, 2015 but the accused could not be traced until he was arrested in 2018.
4. The state seeks a more severe sentence arguing that **Section 46 (1)** of the Traffic Act provides for up to ten (10) years imprisonment particularly in light of the fact that a death occurred. The state cites the case of **Isaac Waithaka Njuguna v Republic [2006] KLR** where Makhandia, J. (as he then was) enhanced the sentence under **Section 46 (1)** from a Kshs 20,000/= fine to Shs 60,000/= and in default 12 months imprisonment. Licence disqualification was extended to 3 years. In that case there was a hearing.
5. The counsel for the Accused Reviewee argued that **Section 46 (1)** only provides for a maximum not minimum sentence. It is not indicated as a mandatory sentence. The sentence can be of ten years imprisonment, cancellation of driving licence and declaring the offender disqualified for holding or obtaining a driving licence for a period of three years.
6. Counsel argues that the state must prove that there was improper exercise of the lower court's discretion or misapplication of legal principles. He further pointed out that in the present case, the court must also take into account the facts that: the accused appeared in court in person; pleaded guilty; was a first offender. Further, the accused was also injured and was hospitalized for three months, one of which was spent in the Intensive Care Unit, and is still undergoing out-patient follow-up.
7. The Accused cited **Amos Mwengea v Republic [2015] eKLR** an appeal where Chepkwony J, stated that a court on appeal will only interfere with the trial court's discretion in sentencing if it was imposed against legal principles or where relevant factors were not considered or irrelevant and extraneous matters were considered; or where the sentence is manifestly excessive. In that case, the judge found that it had not been shown, for example, that the accused was driving under influence of alcohol. Further that by pleading guilty, the accused relieved the prosecution of the burden of having to undertake a full length trial.
8. Finally counsel cited the case of **Genesio Kariithi Wambu v Republic [2018] eKLR**, a criminal appeal, where Gitari J reduced a ten year sentence imposed on the accused for the deaths of two persons by dangerous driving. On appeal, the court meted a Kshs 100,000/= fine on each count and in default one year in prison. The licence suspension was reduced from three to two years.
9. I have carefully considered the authorities provided and the issues raised in the parties' submissions. **Section 364 (1) (a)** of the Criminal Procedure Code provides for review. The powers of the High Court on review where there has been a conviction, are the same as those of the court in respect of an appeal. The High Court may:
 - a) reverse the finding and sentence and acquit or discharge the accused or order him to be tried by a court of competent jurisdiction (**Section 354 (3) (a) (i)** of the Criminal Procedure Code).

b) alter the finding, maintain the sentence, or with or without altering finding, reduce or increase the sentence **Section 354 (3) (a) (ii)** of the Criminal Procedure Code).

c) Increase or reduce the three nature of the sentence and or finding **Section 354 (3) (a) (iii)** and **(b)** of the Criminal Procedure Code).

d) Take further evidence, if it thinks further evidence is necessary, and thereupon dispose the matter under **Section 358** of the Criminal Procedure Code.

10. What is before me is a simple application to enhance the sentence. The accused pleaded guilty in the first instance. He was a first offender and prayed for leniency. No reasons were stated by the trial court for the sentence imposed. The state says the sentence is too lenient. The accused says the law provides only for a penalty range of up to a maximum non-mandatory sentence of ten years imprisonment, and points out that the accused also suffered injuries.

11. The High Court's role in a revision is essentially a supervisory role over subordinate courts. It is to assess whether the lower court's orders are correct legal, proper or meet procedural requirements and the interests of justice, or whether they are marred by impropriety or are generally irregular.

12. In **Republic v. John Wambua Munyao & 3 Others [2018] eKLR** the court observed that:

“The High Court’s power of revision had the purpose of enabling the High Court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed on to the regularity or any proceedings of any subordinate court.”

13. In this case the facts were that the accused was driving motor vehicle KBQ 001C Prado and overtook a fleet of motor vehicles and collided head on with motor vehicle KAT 666E killing the driver instantly. This was reckless and careless and showed disregard for the safety of other road users and passengers. He took a deliberate risk driving at high speed to overtake against incoming vehicles. After the accident he was given a cash bail of Shs 30,000/= on site. In **R. v Guilfoyle [1973] 2 ALLER 844** it was held that:

“Those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, a custodial sentence with a long period of disqualification is appropriate.”

14. Taking into account the principle in **Republic v Guilfoyle [1973] 2 ALLER 844**, I think that the prosecution has raised a compelling reason to warrant review of the sentence that appears too lenient considering similar sentences passed in respect of similar offences. It is imperative that justice must be not only done but be seen to be done in an even and regular fashion in respect of similar offences.

15. a) I would therefore revise the sentence by imposing a fine on the accused of sixty (60,000/=) shillings in default a prison term of one year, which I hereby do.

b) Given that the accused had paid the previous fine imposed of Shs 20,000/=, I will allow that the additional amount of Shs 40,000/= fine be paid in two instalments over the next sixty days, failing which the default imprisonment term shall take effect.

c) The accused shall also report to Naivasha Police Station on Friday, every two weeks, until payment of the fine in full.

16. Orders accordingly.

Dated at Naivasha this 29th Day of July, 2019.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Abuga for the State/Applicant
2. Ngunjiri Advocate for the Respondent
3. David Gitau Ngata - Accused present
4. Court Clerk - Quinter Ogutu