



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 119 OF 2018**

**BETWEEN**

**CALCOL AMOTH SEWE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the sentence in Kisumu Traffic Case Number 154 of 2018 by Hon. B. Omollo (RM)  
on 25<sup>th</sup> June, 2018)*

**JUDGMENT**

**The Trial**

1. The Appellant herein **EDWIN NAMUSASI WAFULA** has filed this appeal against conviction and sentence on a charge of exceeding maximum speed limit contrary to section 42(3) of the Traffic Act (hereinafter referred to as *the Act*). The brief particulars of the charges are that:-

**On 19<sup>th</sup> February, 2018 the Appellant drove M/V KAJ 673S at a speed greater than such speed prescribed as the maximum speed for the said motor vehicle by driving at 64 kph instead of 50kmh**

**Prosecution case**

2. The first witness for the prosecution produced 2 printed photographs produced from the speed camera showing that the **M/V KAJ 673S** was being driven at between 63 kph and 64 kph.

3. At the close of the prosecution case, the Appellant was ruled to have a case to answer and was placed on his defence. The Appellant does not deny that he was driving **M/V KAJ 673S** along Kisumu Nairobi Road at Nyamasaria area on the material date and time but denied that he was speeding.

4. *In a judgment delivered on M/V KAJ 673S*, appellant was convicted and fined Kshs. 20,000/-.

**The appeal**

5. Aggrieved by sentence, the appellant lodged the instant appeal on 27<sup>th</sup> December, 2018. When the appeal came up for hearing on 23<sup>rd</sup> July, 2019, Appellant chose to wholly rely on the grounds of appeal

and also on his written submissions. Ms Gathu. Counsel for the state opposed the appeal and also relied on the written submissions

### **Analysis and determination**

6. On first appeal, the high court is called upon to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that: -

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

7. The trial court found that the evidence by PW1 was corroborated by the evidence contained in the two photographs which are a printout of the speed gun and I find that the holding was well founded.

8. As regard sentence, this court is aware that it cannot interfere with the exercise of discretion by the trial magistrate’s court when sentencing the Appellant. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No.135 of 2016** (unreported) held at Page 25 of its judgment as follows:

**“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle, ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000 this Court stated thus:**

**“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 the 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 account, 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. (See also Wanjema v. Republic [1971] E.A.493.”**

9. Section 42 of *the Act* (3) provides that

**No person shall drive, or, being the owner or person in charge of a vehicle, cause or permit any other person to drive, any vehicle at a speed exceeding fifty kilometres per hour or any road within the boundaries of any trading centre, township, municipality or city:**

**Provided that the highway authority shall erect and maintain traffic signs as prescribed so as plainly to indicate to drivers entering or leaving such roads or areas where the fifty kilometer per hour speed limit restriction begins and ends.**

10. The foregoing section makes it mandatory for highway authority to erect and maintain traffic signs as prescribed so as plainly to indicate to drivers entering or leaving such roads or areas where the fifty kilometer per hour speed limit restriction begins and ends.

11. The Appellant stated that he did not see the 50 kmh traffic sign and the onus was on the prosecution to prove that there was such a sign which evidence they failed to adduce. To my mind, the evidence of the

speed that a driver was driving cannot stand alone without evidence that the area was clearly marked with a speed sign as prescribed so as to plainly indicate to drivers entering or leaving such roads or areas.

12. From the foregoing, I find that the prosecution case was not proved beyond any reasonable doubt.

**DISPOSITION**

13. For the foregoing reasons, the appeal succeeds. The conviction is quashed and the sentence set aside. It is ordered that the fine paid by the Appellant be refunded to him.

**DELIVERED AND SIGNED AT KISUMU THIS 21<sup>st</sup> DAY OF November 2019**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistants - Amondi/Okodoi**

**Appellant - Present in person**

**For the State - Ms. Gathu**