



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 5 OF 2018.**

**CHARLES NYAIRO ABISI.....APPLICANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

**RULING.**

1. The Applicant herein brought the present application under Article 50(2) of the Constitution and Sections 362 and 364 of the Criminal Procedure Code seeking revision of his sentence. He was charged and convicted of committing the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act, CAP 403. He was sentenced to pay a fine of Kshs. 400,000/- in lieu of which he was to serve 3 years imprisonment. His driving licence was also canceled.

2. The Act provides for a punishment of imprisonment not exceeding 10 years and cancellation of a driving licence with a declaration that the convict is disqualified from holding or applying for a driving licence for a period of 3 years. The three year disqualification period is to commence either at the date of conviction or the end of the prison sentence, whichever is later.

3. The Applicant urges for a non-custodial sentence or the reduction of the fine to affordable levels. He further prayed for the court to reinstate his driving licence. The grounds upon which the application was based were first that his wife was aged and ailing from diabetes and she therefore needs his care. Secondly, that he was the sole breadwinner for a family with 10 children, 3 of whom were school-going. Further, that the sentence was punitive and excessive. The Application in question was supported by an affidavit sworn on 27<sup>th</sup> December, 2017 in which he reiterated the grounds set out in the application adding that his wife was ailing and attending a clinic at St. Mary's Gilgil Hospital and was currently bedridden.

4. Ms. Akunja for the Respondent opposed the application noting that the offence was serious as it resulted to the death of a person. Furthermore, the accident occurred at a zebra crossing where the Applicant ignored a stop sign leading to the deceased's demise. Further, that the Applicant was driving a defective motor vehicle at the time of the accident whose brakes were defective and its speed timer tampered with. She submitted that the sentence was sufficient as the law provides for a term of imprisonment of up to 10 years. With regard to the reinstatement of the driving licence she submitted that the Applicant ought to apply to the NTSA afresh for a driving licence.

5. In reply, the Applicant submitted that the motor vehicle inspector did not adduce any evidence of a digital print-out that the speed recorder was not working. Further that CCTV camera footage of the scene were never produced.

**DETERMINATION.**

6. The circumstances of case were that the Applicant caused the death of a pedestrian at a pedestrian crossing where officers from the National Transport and Safety Authority were controlling traffic. According to PW4 the Applicant changed lanes at the pedestrian crossing from the middle lane to the outer lane and hit the deceased who was standing with others waiting to cross. Although Ms. Akunja submitted that the braking system was faulty this appears to be contrary to the evidence of PW6 who tested the braking system and found that it was holding pressure. An issue also arose with regards to the speed governor from which the inspector could not recover data leading him to conclude that it had been tampered with. This lends credence to the submission questioning the road worthiness of the vehicle and therefore the need for a stringent sentence.

7. The Applicant has set out the issues affecting his family and while the court is sympathetic of their plight it must weigh this against the interest of justice and be guided by the law which emphasizes the punishment of the perpetrator in an effort to rehabilitate them and deter potential offenders.

8. The court has considered the fact that Section 46 of the Traffic Act provides for a sentence of imprisonment for a period not exceeding 10 years. In this case, the trial magistrate did not sentence the Applicant to a custodial sentence, instead sentencing him to a fine. In that case,

the default sentence ought to have complied Section 28(2) of the Penal Code. I accordingly set aside the sentence and I substitute it with an order that the Applicant shall pay a fine of K sh. 400,000/ in default serve 12 months imprisonment.

9. The Applicant urged the court to reinstate his driving licence and whilst it is clear that the licence was revoked, the trial magistrate failed to undertake her duty under the sentencing provision to disqualify the Applicant from holding or applying for a driving licence for a period of three years. Therefore, under the powers accorded to this court under Section 364 of the Criminal Procedure Code I order that the Applicant shall be disqualified from holding or applying for a driving licence for a period of three years commencing upon completion of his sentence. The order shall be forwarded to the Director-General, National Transport Safety Authority (NTSA) for compliance.

10. The Application is hereby dismissed.

**DATED and DELIVERED** this 23<sup>rd</sup> day of **May, 2018**.

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Applicant in person present.*
2. *Mr. Momanyi for the Respondent*