



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 51 OF 2017**

*(From original Conviction and Sentence in Tr. Case No. 520 of 2015 of the Chief Magistrate's court at Kerugoya).*

**GENESIO KARIITHI WAMBU ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... PROSECUTION**

**JUDGMENT**

The appellant Genesio Kariithi Wambu was charged with two counts of causing death by dangerous driving contrary to **Section 46(1) of the Traffic Act Cap 403 Laws of Kenya** in Traffic Case No. 520/15 before S.R.M Kerugoya Courts. It was alleged that on 8/8/2015 the appellant drove a motor vehicle registration number KBJ 824 T Toyota Matatu along Kutus- Kianyaga road in a manner which was dangerous and caused the deaths of Paul Mugo Nyaga and Duncan Nyaga Mugo who were a rider and his pillion passenger respectively of Motor Cycle registration number KMCH 629 D make Focin.

The appellant pleaded not guilty and after a full trial he was found guilty, convicted and sentenced to ten years imprisonment in respect of all the two counts since the accident occurred in the same transaction/scene. The driving licence was suspended for a period of three years.

The appellant was aggrieved by both the conviction and sentence and filed a petition of appeal which raised seven grounds. He prayed that the appeal be allowed, the conviction be quashed and sentence be set aside.

When the appeal came up for hearing the appellant abandoned all the other grounds and argued the ground that the sentence was for too excessive and illegal in that it was an omnibus sentence.

The state conceded to the appeal on the sentence because the maximum sentence is ten years. That the appellant was given a maximum sentence despite being a 1<sup>st</sup> offender. That the court ought to have considered the mitigation and the aspect of a 1<sup>st</sup> offender. No option of a fine was given.

Though the appellant abandoned the appeal on conviction, this being a 1<sup>st</sup> appellate court, it has a duty to consider the evidence analyse and evaluate it then come up with its own independent finding. This was held in the case of **Okeno -v- R 1972 E. A 32**. I will deal with two aspect of the proceedings that is-

1. The charges against the appellant.
2. Sentence.

**The charges.**

The appellant was charged under section **46(1) of the Traffic Act**.

The Act does not have such a provision. The offence of causing death by dangerous driving is provided for under section 46 of the Act. The appellant was tried under the provision. There was no prejudice. The proper charge was section 46 and the sub-section should be removed where it appears.

**Sentence:**

The appellant was sentenced to serve ten years imprisonment.

The trial Magistrate stated –

***“Therefore a custodial sentence cannot suffice and the accused is hereby committed to serve 10 years imprisonment in respect of all the two counts since the accident occurred in the same transaction/scene.”***

The dictionary meaning of the word suffice is enough or adequate. That is to say, if one says that something will suffice, you mean it will be enough to achieve a purpose or to fulfill a need. So when the trial Magistrate stated that a **“custodial sentence cannot suffice”** and went ahead to impose a custodial sentence, she must have, with respect, used the word ‘suffice’ in ignorance. This is because she went ahead and imposed a custodial sentence. The trial Magistrate had discretion in sentencing the appellant. The discretion must be exercised judiciously. Where the discretion is not exercised fairly and is based on wrong principles the appellate court will interfere with the sentence.

The appellant was sentenced to serve ten years. This sentence was an omnibus sentence as it was one sentence for two distinct charges. Where more than one offence is committed in the same transaction, upon conviction, the person charged is supposed to be sentenced separately on each count with an order that the sentence would run either concurrently or consecutively. Where several charges arise from the same transaction like in this case where two deaths occurred from the same accident, the appellant ought to have been sentenced on each count and the sentence to run concurrently. The sentence imposed by the trial Magistrate was clearly wrong.

Section 135 of the Criminal Procedure Code provides for joinder of counts. It states:

**“135.(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.**

**(2) where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count”**

I now turn to the appeal on the sentence. The appellant was a 1<sup>st</sup> offender and sole breadwinner of his family. The court was referred to the decision of this court in the case of Anthony Munyi Kibuthi –v- Republic Misc. Cr. Application No. 3/2017 where I stated that the trial Magistrate should have considered an option of a fine in view of the mitigating factors. In the case of Samuel Karanja Kimani –v- Republic (2016)eKLR the court stated:

**On sentence, the Appellant is on firmer ground. It was clear to this court that the trial court erred when it sentenced the Appellant to serve a custodial sentence without an option of fine. In traffic cases, unless the prosecution establishes an element of extreme carelessness or recklessness that clearly shows that the driver of motor vehicle did not have any regard to the safety of other road users, then a person convicted for any traffic offence should be given an option of a fine or other sentence apart from custodial sentence. In Orwenyo Missiani –vs- Republic [1976 – 80] 1KLR 1446 at page 1453, the court cited the decision of Madan and Chesoni JJ (as they were) in Govid Shamji –vs- Republic where it was held thus:**

*“The offence of causing death by dangerous driving is not an ordinary time of crime. While it cannot be given an aura of protection by putting it in a glass case of its own, the people who commit this offence do not have a propensity for it, neither is it a type of crime committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interest of justice as well as the interest of public. There are of course cases where a custodial sentence is merited, for example, where there is a compelling feature such as an element of intoxication or recklessness.”*

**In the present appeal, the Appellant stated that he had a clean driving record of ten years at the time of the accident. He pleads with the court to exercise leniency on him in view of the fact that he had spent three months serving the sentence before he was released on bail pending the hearing of this appeal. This court is of the opinion that the circumstances of this case did not warrant the Appellant to be sentenced to serve a custodial sentence without an option of fine. There existed no aggravating circumstances to call for such sentence.**

**the premises therefore, the Appellant’s appeal on sentence succeeds as a result of which the custodial sentence imposed on the Appellant by the trial court is hereby set aside and substituted by a sentence of this court sentencing the Appellant to pay a consolidated fine of Kshs. 200,000/- or in default the Appellant shall serve two years imprisonment in addition to the three months that he had already served in custody. It is so ordered.**

The appellant was remorseful, he was a 1<sup>st</sup> offender. He had no intention to cause the accident. The state relied on a persuasive decision in the case of Amos Mwenega Mutua –v- Republic CR. Appeal No. 61/2015 H. C. Mombasa.

The court stated that the offence of causing death by dangerous driving carries a maximum sentence of ten years but not a mandatory sentence and proceeded to review the sentence by giving an option of a fine.

The appellant was not intoxicated. However from the record the appellant is said to have been over speeding. The evidence of PW-9-Boniface Ojwang the motor vehicle inspector was that the vehicle the appellant was driving was defective as the speed governor was not producing data. The Investigating Officer Vincent Ndunga (PW-7) also testified that the vehicle was overtaking and was at a high speed owing to the last resting position.

The trial Magistrate in her notes on sentencing found that the vehicle was defective since the mileage could not read as the speed governor was not operation. This is my view as an aggravating factor as the vehicle which was a public service vehicle did not have a speed governor. The accident was caused by over speeding while trying to overtake. Be thus as it may the court ought to have considered the mitigation and

the fact that the appellant was a first offender. The sentence of ten years was harsh and manifestly excessive. The appellate court will interfere with the sentence where the sentence is harsh and excessive in the circumstances of the case. The state has conceded the appeal on the sentence.

**IN CONCLUSION:**

The proper charge for the offence of causing death by dangerous driving in Section 46 of the Traffic Act.

The appellant ought to have been sentenced on each count.

I allow the appeal on the sentence.

The appellant will pay a fine of Kshs 100,000/- on each count or in default serve one year imprisonment on each count. Since he has already served one year in prison, he will pay the fine on the 2<sup>nd</sup> count only and in default one year in prison. The time served to be taken as the default sentence on the 1<sup>st</sup> count.

The order suspending the driving licence for a period of 3 years reduced to two(2) years.

**Dated and delivered at Kerugoya this 31<sup>st</sup> day of July 2018.**

**L. W. GITARI**

**JUDGE**