

REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.20 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. E. Cherono – SPM delivered on 11th December 2013 in Nairobi CM. TR. Case No.18028 of 2013)

PAUL ODERA ONYANGO.....
APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with the offence of **careless driving** contrary to **Section 49(1)** of the **Traffic Act**. The particulars of the offence were that on 28th August 2013 along Kinoo Road, Nairobi County, the Appellant, being the driver of motor vehicle Registration No.KAX 748B Toyota Sprinter drove the said motor vehicle without due care and attention to the other road users and thereby swerved off the road and hit a juvenile pedestrian namely Maxwell Kimiti, who at the time was on the pavement thereby causing him grievous harm. When the Appellant was arraigned before the trial magistrate’s court, he pleaded guilty to the charge. He was sentenced to pay a fine of Kshs.100,000/- or in default he was to serve twenty-four (24) months in prison. In addition, the Appellant’s driving licence was suspended for twelve (12) months. Aggrieved by the sentence, the Appellant filed an appeal to this court.

In his petition of appeal, the Appellant faulted the trial court for imposing a harsh fine and a default sentence despite the fact that he was a first offender. The Appellant was of the view that the sentence imposed was unlawful taking into consideration the applicable law. During the hearing of the appeal, Mr. Oyalo for the Appellant amplified this point. He submitted that **Section 49(1)** of the **Traffic Act** imposed a less severe sentence than the one that was imposed by the trial court taking into consideration the fact that the Appellant was a first offender. He took issue with the fact that the trial court made a big issue of the fact that the Appellant had not mitigated before he was sentenced. The trial court misconstrued the Appellant’s silence to mean that he was not remorseful. Learned counsel explained that the Appellant suffered from a congenital condition that impaired his ability to speak. Ms. Kimiri for the State conceded to the appeal on sentence. She stated that, being a first offender, the Appellant should have been sentenced to serve a less severe sentence than the one that was imposed by the trial court. She urged the court to impose an appropriate sentence.

Section 49(1) of the **Traffic Act** provides:

“Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable

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a) for a first offence to a term of imprisonment not exceeding one year or a fine not exceeding one hundred thousand shillings;

b) for a second or subsequent offence, to a term of imprisonment not exceeding two years or to a

fine not exceeding two hundred thousand shillings,”

In the present appeal, the Appellant is seeking this court’s intervention in regard to the exercise of discretion by the trial magistrate in sentencing. The law in that respect is clear: this court cannot interfere with the exercise of sentencing discretion by the trial magistrate unless it is established that the trial magistrate either erred in law or in principle in sentencing the Appellant. In the present case, it was evident that the trial court erred when it sentenced the Appellant to the maximum fine yet the Appellant was a first offender. There were no aggravating circumstances to warrant the court to impose the maximum sentence. It was apparent to this court that the trial court made an issue of the Appellant’s failure to mitigate to reach the finding that the Appellant was not remorseful for the offence that he had committed. The Appellant’s silence could not in the circumstances have been interpreted to be anything other than what it was: the Appellant’s chose to keep quiet as is his constitutional right to do. A negative inference cannot be drawn for the Appellant’s failure to mitigate before he was sentenced. This was an error in principle.

In the premises therefore, this court will allow the appeal on sentence. The fine imposed of Kshs.100,000/- is set aside and substituted by a sentence of this court sentencing the Appellant to pay a fine of Kshs.30,000/- or in default he shall serve three (3) months imprisonment. Since the Appellant paid the fine, he shall be refunded the sum of Kshs.70,000/-. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF MARCH 2017

L. KIMARU

JUDGE