REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL REVISION NO. 9 OF 2017

DOUGLAS MBURU MACHARIA…….....APPLICANT

Versus

REPUBLIC…….…….....RESPONDENT

RULING

The applicant Douglas Mburu Macharia was indicted before the magistrate's court at Kajiado with five counts under the Traffic Act namely:

COUNT I: Failing to stop after being stopped by police officers in uniform contrary to section 52(1) (c) of the Traffic Act Chapter 403 Laws of Kenya.

COUNT II: Driving a motor vehicle on a public road fitted with one worn out tyre contrary to section 55(1) as read with section 58(1) of the Traffic Act Chapter 403 Laws of Kenya.

COUNT III: Driving a motor vehicle on a public road while without a valid inspection sticker contrary to section 17(A) (1) (b) of the Traffic Act Chapter 403 of the Laws of Kenya.

COUNT IV: Driving a motor vehicle on a public road without a driving licence contrary to section 30(1) of the Traffic Act Cap 403 Laws of Kenya.

Mr. Akula, the senior prosecution counsel did oppose the revision on the strength that the learned trial magistrate order on sentence as provided for under section 30(1) and section 2(1) (c) of the Traffic Act Cap. 403 of the Laws of Kenya.

The power of the high court to exercise revisionary powers is provided for under section 362 of the Criminal Procedure Code as read with section 364 of the code (Cap 75 of the Laws of Kenya). By virtue of section 362 of the Criminal Procedure Code the court is enjoined to call for and examine the record of subordinate court or tribunal for purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and or as to the regularity of such proceedings. The power of revisional jurisdiction is analogous to the supervisory jurisdiction provided for under Article 165(6) and (7) of the Constitution. That is the justification for the high court in certain instances is mandatory to act ***suo moto*** with any reference from aggrieved party. The jurisdiction enable the superior court in appropriate cases from the inferior court to examine the entire record to ensure that no such order, sentence, finding resulted in a miscarriage of justice.

The court addresses matters arising pursuant to section 362 by observing the provisions of section 380 and 382 of the Criminal Procedure Code. This is clearly stated as follows:

Under section 380 of the code:

> **"No finding, sentence or order of a criminal court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed took place in a wrong area, unless it appears that the error has occasioned a failure of justice."**

Section 382:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice."**

It appears from the provisions of section 380 and 382 of the Criminal Procedure Code this court in exercising revision over the subordinate court has to do so upon such terms as are just in the circumstances of each case. I must also say that the action by the court should be exercised only when it is necessary to serve the interest of justice.

What is being challenged herein is the exercise of discretion in passing sentence against the applicant/accused in Traffic Case No. 847 of 2017. In criminal cases the power to pass sentences to the offender who has been found guilty of a crime is at the heart of our criminal justice delivery. These matters of passing sentence are in the realm of exercise of discretion from time to time on such terms than are to be deemed as just.

The penal code Cap 63 of the Laws of Kenya and other statutory provisions creates a myriad offences with a corresponding sentences/penalty as prescribed by parliament. In the supreme court of India in the case of ***Alister Anthony Pareira v State of Maharashtra [2012] SC 3802*** in court dealing with the issue of objects of criminal law and sentencing observed as follows:

> **"One of the point objectives of the criminal law is imposition of an adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."**

I must presume that it is against this background the Judiciary came up with the Sentencing Policing Guidelines 2016 to address the challenges in the administration of criminal justice. The policy guidelines are underpinned in the constitution mere specifically Article 73 (1) (a) (iii), 8(iv) and Article 10(2). Article 73 deals with leadership and integrity and the manner in which state officers are required to exercise authority in a manner that brings dignity to the office and promotes public confidence.

In addition Article 10(2) provides for national values and principles of governance which course of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, good governance, integrity, transparency and accountability as natural values and principles of governance. That binds all state officers.

The sentencing policy therefore set to address and mitigate on the following risk factors:

(1) Align the sentencing provisions of the constitution.

(2) Guide the process of determining sentences.

(3) Link the sentencing process to the overrating objectives of sentencing.

(4) Address the disparities in sentencing by structuring the exercise of discretion.

(5) Provide a benchmark for assessing the exercise of discretion in sentencing.

(6) Address the over utilization of custodial sentences and promote the use of non-custodial sentences etc.

The sentencing policy framework also emphasis the concept of proportionality, uniformity and accountability in sentencing. The principle of proportionality was discussed in the persuasive authority in the case of ***Hoare v The Queen [1989] 167 CLR at pg 348*** where it was stated:

> **"That a basic principle in sentencing law is that a sentence of imprisonment imposed by the court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances."**

The law therefore on sentencing and exercise of discretion is well settled. In the present case the petitioner complains of two issues:

- That the learned trial magistrate erred in law and fact by imposing a sentence on Count I and IV which was irregular and improper.

It is not disputed that the applicant/petitioner was charged under section 30(1) and section 52(1) of the Traffic Act Cap 403 of the Laws of Kenya. The penalty under Count I is a fine of Ksh.50,000 in default six (6) months imprisonment. As regards Count IV the applicant/petitioner was liable to a fine of Ksh.20,000 in default three (3) months imprisonment.

On perusal of the record it is evident that at the onset the learned trial magistrate sentenced the applicant to an imprisonment term of six (6) moths without an option of a fine. In respect of Count IV the accused was also sentenced to six (6) months imprisonment.

The policy direction on a fine as punishment is for the court to exercise discretion by first giving precedence to a fine in place of custodial sentence. The matter before the trial court involved a traffic offence. The applicant/petitioner was a first offender as deduced from the record. He also prayed for leniency. All those factors were not taken into account by the learned trial magistrate in passing the sentence of twelve (12) months imprisonment.

In my view there is a serious anomaly for the learned trial magistrate to pass a sentence of imprisonment on count I and IV without an option of fine. The provisions of section 30 (1) of the Traffic Act prescribes a default sentence of three months in default of fine. The issue is at stake as raised by the applicant where did the learned trial magistrate import the extra three (3) months to meter out a six (6) months imprisonment period.

Regarding the provisions of Count I section 52(1) (c) – the penalty provided is a fine of Ksh.50,000 in default six (6) months. The learned trial magistrate erred in law in nor first considering the option of a fine but opted for a custodial sentence of six (6) months.

It is trite law that an appellate court does not alter sentence unless certain key principles clearly spelt out in the case of ***Ogalo S/O Owuora v Republic [1954] 21 EACA 270*** exist. In the stated case the court held:

> **"The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat difference sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v Republic [1950] 18 EACA 147*, it is evident that the judge**

has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that he sentence is manifestly excessive in view of the circumstances of the case."

Applying the above principles I respectively agree with the applicant assertion that the learned trial magistrate exercised discretion wrongly. The decision ultimately occasioned a miscarriage of justice. In that case pursuant to the jurisdiction of revision conferred upon this court under section 362 as read with section 364 of the Criminal Procedure Code the sentence on Count I and IV is a travesty of justice. In fact there were no reasons on record why the learned trial magistrate passed sentences in violation of the principles of proportionality and uniformity.

In view of the foregoing the order on sentence in respect to Count I and IV is reduced to the term of imprisonment already served. I make no further findings as regards to Count II and III save for the sentences to run concurrently.

It is so ordered.

Dated, delivered and signed in open court at Kajiado on 31/7/2017

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R. NYAKUNDI

JUDGE

<u>In the presence of:</u>

Mr. Arunga for Itaya for the applicant

Mr. Akula for the DPP

Applicant/petitioner

Mateli Court Assistant