

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 137 OF 2016

CHRISTOPHER MUTHOMI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

ORDER IN REVISION (JUDGMENT)

1. The applicant was convicted and sentenced to 12 months imprisonment in respect of careless driving by the court of the Resident Magistrate at Embu on 5th May, 2016. Additionally, his driving licence was suspended for 12 months to take effect after completing the term of imprisonment. The applicant has applied for revision of his sentence of twelve (12) months imprisonment.
2. In his notice of motion brought under section 362 of the CPC and the under Article 50 of the 2010 Constitution of Kenya and under all other enabling provisions of the law, the applicant has stated that the sentence imposed is the maximum and that he was not given an option of a non custodial sentence. He has further stated that the trial court did not take into account his mitigation. The applicant has also stated that he will have served the sentence before the revision is heard and determined.
3. The applicant has repeated the same issues in his supporting affidavit. More importantly, he has in paragraph 6 of his supporting affidavit urged this court to examine the correctness, legality or the propriety of the trial court given that the complainant is Hon. Julian Ndengeri, who is a colleague magistrate to the trial magistrate who passed the sentence in the instant case.
4. In his submissions in court, counsel has submitted that the sentence is manifestly excessive and should be set aside and in its place a non custodial sentence be imposed. He also submitted that this was a non injury sentence. He has also submitted that the applicant had a clean driving record of 10 years and was a first offender. Finally he cited ***Robert Wahome v R., being High Court of Kenya at Nairobi, Criminal Revision 29 of 2008.***
5. The state through MS Mbae conceded the application for revision.
6. In sentencing the applicant, the trial court found that the offence committed was “*one of the most serious one the place where the accident occurred is restrained by two road bumps. It is near or at the court land there are several other structures nearby such as a church, hotel, hospital. It is a place a prudent driver would be extremely cautious while driving on this road. The offence calls for custodial sentence*”. It is clear from these notes on sentence that the trial court did not take into account that the applicant was a first offender. It also did not take into account the mitigating factors of the applicant namely that he had a clean record of 10 years driving and was a married person with two children. There is no indication either that the trial court took into account the applicant had just lost a brother during that week. The applicant's plea for forgiveness was also not taken into account.
7. According to ***Wanjema V.R (1971)EA 493*** sentencing is a matter for discretion the trial court. An appeal court is not allowed to interfere with that discretion unless it is shown the trial court took into account some immaterial facts, or that it ignored some material factor or that it acted on a wrong principle. An additional criteria is that the sentence imposed is manifestly excessive or manifestly lenient to the extent that it amounts to a failure of justice.
8. It is clear from the matters taken into account by the trial court that it acted on wrong principles. Firstly, it did not take into account that the applicant was a first offender. It also did not take into account that he had 10 years clean period of driving and was a family person with two children. These misdirections call for intervention by this court. In the circumstances having considered the mitigation of the applicant, I find that this offence did not call for a custodial sentence.

Furthermore according to the Court of Appeal in *Orwenyo Missiani v R (1979) KLR 285* a custodial sentence is called for where the offender is convicted of driving under the influence of alcohol or is convicted of conscious recklessness. It therefore follows that the imposition of the custodial sentence of 12months imprisonment was wrong in law and hereby set it aside and in its place I substitute a sentence of a fine of Kshs. 16,000/- in default to 6 months imprisonment.

9. The sentence of suspending the driving licence of the applicant is also set aside and I substitute in its place a suspension of that license for one year from the date of conviction. I must point out here that a sentence once imposed takes effect immediately unless it is suspended. The trial court should not have suspended the sentence in respect of the driving licence to take effect upon completion of the term of imprisonment.

ORDER DATED, SIGNED and READ in open court at **EMBU** this **30th** day of **MAY 2016**

ORDERS ACCORDINGLY

In the presence of Mr. Mugendi for the applicant and Ms Mbae for the Respondent.

Court clerk Mr Nyaga

J.M. BWONWONGA

JUDGE

30.05.16