



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.128 OF 2016

FREDRICK ODHIAMBO OYUGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Fredrick Odhiambo Oyugi was charged with **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act**. The particulars of the offence were that on 3<sup>rd</sup> December 2013 at 11.30 a.m. along Ring Road Kilimani, Nairobi County, the Applicant, being the driver of motor vehicle registration No. KUW 607 Toyota Pick-up drove the said motor vehicle in such a dangerous manner to the public that he caused it to swerve off on the left side of the road and thereby hit and caused the death of Harun Musau, a pedestrian who was walking on the pavement. The Applicant faced two (2) other counts of **driving a motor vehicle on a public road without a driving licence** contrary to **Section 30(1)** as read with **Section 41** of the **Traffic Act** and **failing to carry a driving licence** contrary to **Section 36(1)** of the **Traffic Act**. The Applicant pleaded not guilty to all the charges. After full trial, he was convicted on the 1<sup>st</sup> and 2<sup>nd</sup> counts. He was fined the sum of Kshs.200,000/- or in default he was ordered to serve three (3) years imprisonment. In respect of the 2<sup>nd</sup> count, he was ordered to pay a fine of Kshs.10,000/- or in default he was to serve three (3) months imprisonment.

The Applicant is not challenging his conviction. He is aggrieved by the sentence that was imposed upon him. In the application for revision presented before the court, the Applicant states that he is contrite and remorseful for the offence that he committed. He told the court that he had been in remand custody for a period of eighteen (18) months prior to his conviction by the trial court. He urged the court to take into account the period that he was in remand custody during trial. He also told the court that he was asthmatic and by virtue of the fact that he was convicted before remission was restored back, he was condemned to serve the entire period that he was sentenced by the trial court.

Ms. Aluda for the State opposed the application for reduction of sentence. She stated that the punishment that was imposed on the Applicant carried a maximum sentence of ten (10) years imprisonment. She urged the court to take into account the fact that a life was lost. In the circumstances therefore, the sentence of three (3) years imprisonment was lenient and in fact took into account the period that the Applicant had been in remand custody.

When the trial magistrate sentenced the Applicant to serve the custodial sentence, he was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal. In the present application, it was clear to this court that the trial court properly exercised its discretion in sentencing the Applicant. However, this court noted that the trial court did not take into account the fact that in such cases as the one that the Applicant faced, what is sought to be punished is the negligent conduct of the Applicant and not, *per se*, criminal intent. As was observed by the Court of Appeal in the case of **Orweryo Missiani –vs- Republic [1979] KLR 285** at page 289:

*“As regards the first question, it is relevant to consider the degree of blameworthiness on the part of the driver which has to be proved by the prosecution before he can be convicted of the offence of causing death by dangerous driving. In Republic –vs- Gosney [1971] All ER 220 it was held by the Court of Appeal, Criminal Division, that in order to justify a conviction there must have been a situation which, viewed objectively, was dangerous, and also some fault on the part of the driver. In regard to this element of fault, Megaw L.J, reading the judgment of the Court of Appeal, said (at page 224):*

*“Fault” certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame.....Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient.*

*This English decision was followed local in Atito –vs- The Republic [1975] EA 278.*

*The principles of sentencing in relation to this offence were considered by the Court of Appeal, Criminal Division in R –vs- Guilfayle [1973] 2 All ER 844. Lawton L J, delivering the judgment of the court, said (at page 844):*

*The experience of this court has been that there have been many variations in penalties. Some variations are inevitably because no two road accidents are alike, but there are limits to permissible variations and it may be helpful if this court indicates what they are. Cases of this kind fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment, and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or his passengers or with a degree of recklessness. A sub-division of this category is provided by the cases in which an accident has been caused or contributed to by the accused’s consumption of alcohol or drugs.”*

In the present application, it was clear to this court that had the trial court considered the above principle when sentencing the Applicant, the trial court would most probably have sentenced the Applicant to serve a less severe sentence than the one that was imposed. This court is also of the opinion that the period that the Applicant remained in remand custody pending his trial should have been properly taken into consideration before he was sentenced. In the premises therefore, this court is of the view that taking into consideration the nature of the offence that the Applicant was convicted of, and the period that he had been in remand custody before his conviction, and the period that he has served after his conviction, the Applicant has been sufficiently punished.

The Applicant’s custodial sentence therefore is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2016**

**L. KIMARU**

**JUDGE**