

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL REVISION NO. 140 OF 2009

NIXON OMWERI OCHAKOAPPLICANT
-VERSUS-
REPUBLIC RESPONDENT

RULING ON REVISION

On 12th November, 2009, **Nixon Omweri Ochako** was arraigned before the Senior Resident Magistrate's court at Keroka on 2 traffic charges of Driving a motor vehicle while fitted with a cracked windscreen contrary to section 55 (1) as read with section 58 (1) of the **Traffic Act** and Driving a Public service vehicle without drivers P.S.V Licence contrary to section 98 (1) of the **Traffic Act**.

The particulars in respect of count 1 aforesaid were that on 12th November, 2009 at about 11.45 a.m. along Keroka-Kisii road in Masaba District within Nyanza province being a driver of motor vehicle registration Number KAZ 723, Toyota Matatu, the applicant drove the said motor vehicle fitted with a cracked windscreen. With regard to the 2nd count, the particulars were that on the same date, place and time the applicant drove the same motor vehicle, without drivers P.S.V Licence.

The applicant pleaded guilty to the first count. Accordingly he was convicted on his own plea of guilty and sentenced to a fine of Kshs. 20,000/= in default, 6 months imprisonment. He was however discharged on count II. He duly paid the fine. However, the applicant feels that the sentence imposed as aforesaid was manifestly harsh and excessive. Accordingly by a letter dated 24th November, 2009 addressed to this court, he sought for revision.

Powers of revision are vested in this court vide section 362 of the **Criminal Procedure Code**. To invoke that jurisdiction this court must be satisfied that the order, finding or sentence made by the subordinate court for which revision is sought was incorrect, illegal, irregular and or was laced with impropriety. In this case, the applicant is complaining that the sentence imposed as aforesaid was manifestly harsh and excessive. That is not ground for revision. It would however have been had the sentence been illegal. The applicant indeed is not saying that the sentence imposed was illegal. Infact section 158 (1) of the **Traffic Act** being the penalty section of the offence that the applicant was charged with provides that the offender on being convicted shall be liable to a fine not exceeding four hundred thousand shillings or to imprisonment for a term not exceeding two years or to both. Considering the foregoing it is quite apparent that the sentence imposed by the learned magistrate was within the law and therefore legal. It must be appreciated that in sentencing, the trial court exercises some discretion. Unless such exercise is undertaken capriciously, it cannot be the subject of a complaint or revision. In this case it has not been demonstrated that in exercising it with regard to the sentence of the applicant as aforesaid, the learned magistrate exercised it injudiciously. In any event, an exercise of discretion can never be the subject of revision.

Finally, under section 364 (4) of the **Criminal Procedure code** it is expressly provided that “*...when an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed....*”. The applicant claims that the sentence imposed was manifestly harsh and excessive. This is appealable at the instance of the applicant. He opted not to do so. As this provision is couched in mandatory terms, revision is not an option for him.

For all the aforesaid reasons, I find and hold that this is not a fit and proper case for revision. It is denied.

Revision dated, signed and delivered at Kisii this 15th day of October, 2010.

ASIKE-MAKHANDIA
JUDGE