REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI CRIMINAL DIVISION

CRIMINAL REVISION NO. 509 OF 2020

KINGSLEY OMONDI OGWENO ....APPLICANT

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentence in Criminal Case No. 21789 of 2011, the Chief Magistrate's Court at Nairobi, (Hon. H Onkwani, SRM).

RULING

1. The subject application herein is dated 28th February 2020. It is filed under the provisions of; section 362, 364 and 367 of the Criminal Procedure Code, (Cap 75) Laws of Kenya, and Article 50(2), 165(6) and 165(7) of the Constitution of Kenya, 2010.

2. The Applicant is seeking for orders as here below reproduced;

(a) That, the court file and all records of the proceedings in the Chief Magistrate's Court in Nairobi Traffic Case No. 21789, of 2011, be forthwith transmitted to this Honourable Court;

(b) That, pursuant to section 364 as read with section 357 of the Criminal Procedure Code (herein "the Code"), the Honourable court be pleased to stay and/or suspend the execution of sentence of the Applicant pending hearing and determination of this Application;

(c) That, pursuant to section 364 as read with section 357 of the Code; the Honourable court be pleased to order the release of the applicant on bail on such terms as may be just and appropriate in the circumstances pending hearing and determination of this application;

(d) That, this Honourable court be pleased to issue revisionary orders to reverse the finding and sentence of the learned Honourable trial Court Hon. H. Onkwani SRM and acquit and/or discharge the applicant; and

(e) That, in the alternative, this Honourable court be pleased to issue revisionary orders to reverse the findings and sentence of the learned Honourable trial Magistrate Hon. H. Onkwani and order retrial of the Applicant in the interest of fair administration of justice.

3. The application is supported by the affidavit of the even date, sworn by the Applicant and the following grounds;

(a) That, the trial and conviction of the Applicant herein is a nullity in law for failure by the trial court to comply with the express and mandatory provisions of section 200(3) of the Code;

(b) That, the trial court compromised and contravened the applicant's constitutional right to a fair trial and in particular the right to legal representation under; Article 50(2) (g) and 50 (2) (h) of the Constitution and thereby occasioning substantial injustice to the applicant;

(c) That, the trial court erred in law by convicting the applicant solely on the basis of prosecution evidence which did not prove the Applicant's guilt and/or the ingredients of the respective offences to the required standard of beyond reasonable doubt;

(d) That, the trial court grossly contravened the Applicant's right to a fair trial under Article 50 (2) (j) of the Constitution by

failing to safeguard and give effect to the Applicant's right to be informed in advance of the evidence the prosecution intended to rely on and the right to have reasonable access to that evidence;

(e) That, the trial court erred in law by completely disregarding the evidence led on behalf of the applicant;

(f) That, the trial court made manifest errors of fact; and

(g) That, the sentence meted on the Applicant in the circumstances was excessive.

4. The brief background facts of the case are that, on 19th December, 2011, the Applicant was arraigned in court, charged in a total of six counts with various offences, inter alia: -

Count I: Causing death by dangerous driving contrary to section 46 of the Traffic Act (Cap 403), Laws of Kenya;

Count II: Careless driving contrary to section 49(1) of the Traffic Act, (Cap 403), Laws of Kenya;

Count III: Using an insured motor vehicle on a public road contrary to section 4(1) of the Insurance Act, (Cap 405) Laws of Kenya;

In the alternative: Failing to display a certificate of insurance contrary to section 9(1) of the Insurance Act, (Cap 405), Laws of Kenya;

Count IV: Failing to stop after an accident contrary to section 73(1) of the Traffic Act (Cap 403) Laws of Kenya;

Count V: Driving a public service vehicle on a public road without a driver's public service licence contrary to section 98(1) of the Traffic Act (Cap 403) Laws of Kenya;

Count VI: Operating a motor vehicle on a public road without a prescribed badge contrary to section 98(5) of the Traffic Act (Cap 403) Laws of Kenya; and

Count VI: Operating a motor vehicle on a public road without a road service licence contrary to section 5(1) (b) of the Transport Licensing Act punishable by section (6) of the said Act (Cap 404), Laws of Kenya.

5. The Applicant pleaded not guilty to all counts except count III, and was sentenced to pay a fine of; Kshs. 10,000 in default, to serve three (3) months imprisonment and explained to a right of appeal within 14 days. The rest of case then proceeded to full hearing. The prosecution called a total of nine (9) witnesses, while the accused testified on his own behalf and called one witness.

6. The prosecution case in brief was that, on 18th December, 2011, PW1, Anthony Munyiri Riri, was involved in an accident while driving motor vehicle Registration No. KBQ 714S Nissan Wing Road, along Uhuru Highway, after hitting a pole while avoiding an oncoming motor vehicle. He then stopped at Kobil Petrol Station to check the extent of the damage.

7. In the meantime, Police officers from Parliament Police Post went to attend to the scene and while inquiring from PW1 what had transpired, a Nissan motor vehicle Registration No, KAU 519F, driven by the Applicant, came at a high speed and hit the two officers.

8. PW 1 testified that, the impact was so serious, that one officer was thrown to the front of his motor vehicle and the other at the rear. That, three gentlemen inclusive of the Applicant alighted from the vehicle that hit the officers and when requested to rush the officers to hospital, they declined and took off.

9. However, the injured officers were rushed to Kenyatta National Hospital for treatment, unfortunately, Corporal Oruko did not make it. He passed on shortly after arrival at the hospital. The body was subjected to postmortem conducted by (PW9) Doctor Bernard Midia, a Pathologist at Kenyatta National Hospital, who concluded that, the deceased died of multiple injuries on the head, chest and pelvic due to motor vehicle accident. He signed and subsequently produced the relevant postmortem report on 20th December 2011.

10. In the meantime, PC Kirui remained admitted at Kenyatta National Hospital admitted at the ICU and upon discharge he was examined by; Dr Zephania Kamau who produced the P3 Form he filed and signed. That, upon investigations of the accident it was discovered that, the motor vehicle did not have an insurance cover at the time of the accident and neither did the Applicant have a public service licence or a prescribed badge. The accused was arrested and charged as aforesaid.

11. At the conclusion of the prosecution case, the Applicant was placed on his defense and the provisions of; section 211 of the Criminal Procedure Code explained to him. He testified that through a sworn statement that, on 18th December 2011, he was in possession of the subject motor vehicle that was involved in the accident with the officers. He was at Railway bus station when he realized that, the motor vehicle did not have insurance sticker. He decided to take it to Langata, where the owner was residing.

12. That while along Uhuru highway, he saw persons lying down on the road. He stopped to help the person, but when he was told to transport the victims to hospital, he inquired as to whether his motor vehicle would be cleaned but the people at the scene became violent. He left for Langata and parked the vehicle at Langata Prisons where it was normally parked. However, he was later summoned and told to record a statement and was subsequently charged.

13. Upon evaluation of the evidence, the trial court found the Applicant guilty and convicted him on the counts; I to V and sentenced him to serve accumulative ten (10) years imprisonment. He was acquitted on counts VI and VII, due to lack of sufficient evidence. It is against this conviction and sentence that the Applicant seeks for revision of the sentence. At the hearing of the application, the Learned Counsel Mr Omollo represented the Applicant and submitted in a nutshell that; the court is mandated under the provisions upon which the application is premised to call for the record of the subordinate court's file and satisfy itself of the correctness, legality and propriety of the findings, sentence or order of the trial court.

14. That, under the Constitution of Kenya, 2010, the High court is empowered to make orders that will serve the fair administration of justice. That, the proceedings herein are fatally irregular, as the mandatory provisions of; section 200 of the Code were not complied with, in that, the Applicant was not told of his right to cross examine the witnesses de novo. Further, the Applicant was not given access to evidence relied on in contravention of; Article 50 (2) of the Constitution of Kenya, 2010.

15. However, the Learned Counsel Ms Akunja for the Respondent, in response opposed the application and submitted orally that, the Applicant has not demonstrated the circumstances that will warrant interference with the sentence. The sentence is legal and proper. Further the trial court's record show that, the Applicant fled after the accident and therefore the ten (10) years imprisonment is warranted.

16. I have considered the application in total in the light of the arguments advanced and I find that, first and foremost, prayers (a), (b), (c), and (d) are spent, and/or overtaken by events. Thus, the only prayers remaining are prayers (e) and in the alternative prayer (f). Basically, the Applicant is seeking for revision of sentence and/or an order for; discharge, acquittal or re-trial. As such the issue of conviction does not arise.

17. Be that as it were, the powers of the High court in revision are contained in section 362 to 366 of the Code. Section 362 specifically provides as follows: -

> "*362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court"*

18. Upon invoking the above provisions, the High court has powers under section 364, of the Code as follows: -

> "*364. (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may -*
>
> > *(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by; section 354, 357 and 358, and may enhance sentence;*
> >
> > *(b) in the case of any other order than an order of acquittal, alter or reverse the order.*
>
> *(2). No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence.*
>
> *Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.*
>
> *(3). Where the sentence dealt with under this section has been passed by a Subordinate court, the High court shall not inflict a greater punishment for the offence which in the opinion of the High court the accused has committed than might have been inflicted by the court which imposed the sentence.*
>
> *(4). Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.*
>
> *(5) When an appeal arises 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."*

19. *In the instant matter, the Learned Counsel Mr Omollo argued that, before the court deals with the propriety of the sentence, it needs to address the legality of the proceedings leading to the conviction and sentence. However, the Respondent vehemently opposed that argument and stated that, the application is purely on sentence and not conviction. This court invited the applicant's learned counsel to respond to the submissions by the Respondent he said that, the Applicant* **would drop all other arguments on conviction and deal with revision of sentence only.**

20. Be that as it were, I shall in the interest of justice, address the issue raised by the Applicant. He argues that, his rights under section 200 of the Code were violated. I have considered trial court's record and note that, the plea was recorded by; Hon Grace Ngenye (SPM), (as she then was). The evidence of seven (7) prosecution witnesses was taken on diverse dates between; 1st March 2012 to 9th September, 2013, by Hon., E Nduva, (Ag PM). However, part of the court file record is missing but apparently, a ruling on whether the accused had case to answer was delivered by Hon E.C Cherono, SPM, in the absence of the Applicant, as he had allegedly absconded proceedings.

21. It is not clear as to whether the same was ever brought to his knowledge when he resurfaced, as the case proceeded on and a ruling delivered that he had a case to answer and was placed on his defence, this time, in his presence and proceeded to offer a defence. However, the first ruling should have been vacated but was not. The question is: was the Applicant prejudiced by the first ruling, he was not even

aware of.

22. Be that as it were, it is noteworthy that, the Applicant was arrested and aligned in court, before Hon Okwani SRM, who recorded the evidence of the pathologist. It is evident from the record that, the provisions of; section 200 of the Code were not explained to the applicant. The subject provisions states that; -

> *(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—*
>
> > *(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or*
> >
> > *(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.*
>
> *(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.*
>
> *(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, <u>the accused person may demand</u> that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.*
>
> > *(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, <u>the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial. (Emphasis added).</u>*

23. From the provisions above, the word used is "may", therefore the provisions are not mandatory as submitted by the applicant. Be that as it were, the question that arises is whether; the Applicant was prejudiced in the circumstances by non-compliance with the subject provisions? In my considered opinion, he was not prejudiced at all. First and foremost, the provisions of, section 200 of the Code, gives an accused person a right to demand that, any witness be re-summoned and re heard. The Applicant did not. Secondly, where the said provisions are not complied with, the High court has the power to establish whether the accused was in the circumstances "materially" prejudiced.

24. In the instant matter, the accused did not cross examine any of the witnesses whose evidence was taken by the first trial Hon. Magistrate and neither did he cross examine the witness who testified after the subsequent Hon Magistrate took over the matter. What purpose then, would the recall of the witnesses and/or starting the case de novo serve? Furthermore, even, after he engaged a counsel for his defence case, no application was made to recall witnesses. It is presumed that, the counsel went through the record upon his engagement, and should have noted the Applicant did not exercise his right under the section 200 of the Code.

25. But even more importantly, the accused absconded proceedings from 23rd May, 2014, to 2nd March 2018, a period of almost four years, would it have been viable and/or in the interest of justice to recall the witnesses. The old adage states that "justice delayed is justice denied".

26. **Indeed,** the Court of Appeal in; *<u>Abdi Adan Mohamed V Republic (20170 e KLR</u>* relied on; *<u>Nyabutu & Another vs. Republic (2009) KLR 409,</u>* and stated that:

> "*By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. (See <u>Ndegwa v. R.</u> (1985) KLR 535).*

27. I therefore find and hold that, non-compliance with section 200 of the Code did not "materially" prejudice the applicant. However, this is not to condone the trial court's non observance thereof. As regards the issue of legal representation, the Applicant was well aware that, he could engage a lawyer and indeed, did so for the defence case.

28. Further, on the day of plea, he requested for witness statement and an order was granted to that effect. It is not indicated any way that, he ever complained throughout the trial he had not been given the same. His argument in relation to the same is thus an afterthought.

29. Finally, as regards, the merits of the case, I reiterate that, he has not challenged the conviction, but even if he did, I find no merit in the same. First and foremost, he did not rebut the prosecution witnesses by any cross examining and at no time did he put it to any witness that, he was not involved in the accident, I therefore find that, his defence was an afterthought and based on the evidence adduced, the conviction was safe.

30. That leads to the issue of sentence, the Learned Trial Magistrate while meting out the sentence stated as follows: -

> "*I note from the record that the accused person is serving a 12 months' imprisonment, the sentence was passed on the 2nd March 2018, when the accused person pleaded guilty to the offence of failing to attend court for the hearing of this case on various*

occasions from the year 2013, till the time of arrest on 19th February 2018, when he was prosecuted before the court. Having said so, I have considered the accused person's conduct in this proceedings. This matter occurred in the year 2011, the accused person caused the loss of life and the due process has taken 8 years."

31. Be that as it were, the principles that govern the power of the Appellate court to interfere with the sentence of the trial court are settled. The Appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material or acted on a wrong principle. Even if, the Appellate Court feels that, the sentence is heavy and that the Appellate court might itself not have passed that sentence, that alone is not sufficient ground for interfering with the discretion of the trial court on sentence. *(See: Ogola S/o Owoura Vs Reginum (1954) 21 270 and Bernard Kimani Gacheru V. Republic (2002) e KLR).*

32. Similarly, the Appellate court will only be entitled to interfere with the sentence imposed if it was not legal or was so harsh as to amount to miscarriage of justice and or if the court acted on the wrong principle or if the court exercised its discretion capriciously. (*See. Shadrack Kipchoge Kogo V R (2015) e* KLR*).*

33. In the instant matter, the Applicant herein has not raised any prevailing circumstances that would warrant the interference with the sentence meted. The offence of causing death by dangerous driving of which the Applicant was sentenced to serve ten (10) years imprisonment is provided for under section 46 of the Traffic Act where it states as follows: -

> "*Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence whether or not the requirements of; section 50 have been satisfied as regards that offence and be liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by Part VIII of cancelling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of three years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later.*

34. The Applicant was sentenced to a period of ten (10) years which is provided for under the law. In addition, his driving licence was cancelled for a maximum period of three (3) years. The sentence meted in that regard is; legal and lawful.

35. However, the reason why the trial court imposed the maximum sentence of ten years was because of what the court referred to as; "the Applicant's conduct after the accident when he failed to stop and during the trial, when he absconded". But it is noteworthy that, the Applicant had already been punished for that conduct. He was fined a sum of; Kshs 100,000.00 in default to serve twelve (12) months' imprisonment for absconding from the trial. Indeed, at the time the sentence herein was being meted, he was already serving the twelve (12) months' sentence. Therefore, that fact should have been considered.

36. In addition, the trial court stated that, the Applicant was not a first offender as he was serving a sentence but, that sentence arose in this particular matter. It was not in a previous case not related to this matter. In the same vein, **the Sentencing Policy Guidelines** provides that: -

> "*Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending."*

37. However, I agree with the Learned Trial Magistrate and indeed note that, the offence herein was serious by any means and/or standards, in view of the fact that there was loss of life and therefore inevitably called for a custodial sentence. In addition, the discretion of the Trial Magistrate to impose a sentence is unfettered and any challenge to the sentence is better heard on appeal and not by revision.

38. However, taking into account that, the Applicant has already been punished and sentenced for the "unbecoming conduct, of fleeing after the accident and absconding proceedings" and his driving licence cancelled for the maximum period of three (3) years with effect after he serves the sentence, then the maximum sentence of ten (10) years on count one, was rather excessive.

39. I also note that, the sentence imposed on count one as per the court record is quite unclear. In the proceedings and typed copies of judgment and sentence, the trial court stated as follows: -

> "*Count I: Accused to serve 16 years' imprisonment and the court shall exercise the powers granted under Part VII to cancel, accused person driving licence for a period of three years starting from the date of accused completes his jail sentence"*

40. *The trial court then concluded sentencing by stating that: -*

> "*The sentences are to run concurrently the accused person is to serve a cumulative jail sentence of 1ten (10) years' imprisonment. Accused has a right of appeal within 14 days"*

41. It is therefore not clear as to whether the Applicant was sentenced to sixteen (16) years imprisonment or ten (10) years imprisonment, on count one. Be that as it were, the parties herein have conceded that, the sentence was ten (10) years imprisonment. It was not sixteen (16)

years imprisonment, if it was sixteen (16) years imprisonment, it would be illegal, as the maximum sentence provided under the law for the offence is; (10) years imprisonment. Therefore, the sentence on count, I should read ten (10) and not sixteen (16) years imprisonment.

42. In the same vein, I realize that the Applicant had already been fined Kshs 10,000, in default, serve three (3) months imprisonment on count III, on the day of plea and yet another fine of, Kshs 5, 000, in default to serve two (2) months was imposed after judgment. This subsequent sentence is therefore, superfluous and has no relevance to any charge. I accordingly set it aside and if the fine is paid, it should be refunded.

43. Finally having considered the sentences meted herein and the reasons I have stated above, that, the Applicant has already been punished for his conduct and the fact that, he is a first offender as far as the case herein is concerned, and though not to justify the " criminal acts" of the Applicant, hopefully the victims will be compensated through civil proceedings, I am inclined to revise the sentence imposed on count one (1), from a jail sentence of ten (10) years imprisonment to a jail term of seven (7) years.

44. I accordingly order that, the sentence of trial court on that count be substituted with a custodial sentence of; seven (7) years imprisonment. Consequently, the Applicant will serve accumulative sentence of; seven (7) years imprisonment, to run concurrently with the sentences imposed on the other counts, before judgment.

45. It is so ordered.

Dated, delivered and signed on this 1st day of February, 2021 virtually.

GRACE L NZIOKA

JUDGE

In the presence of;

Mr Omollo----------------------------- for the Applicant

MsKibathi--------------------------- for the Respondent

Rose------------------------------------- Court Assistant