



**Muthiani v Republic (Criminal Appeal E005 of 2021)
[2021] KEHC 121 (KLR) (6 October 2021) (Judgment)**

Neutral citation: [2021] KEHC 121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E005 OF 2021
DAS MAJANJA, J
OCTOBER 6, 2021**

BETWEEN

TIM JOHNSON MUMO MUTHIANI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.B.M. Ekbubi, PM dated 18th January 2021 in Traffic Case No. 885 of 2016 at the Magistrates Court at Thika)

JUDGMENT

1. The Appellant, TIM JOHNSON MUMO MUTHIANI, was convicted of four counts of causing death by dangerous driving contrary to section 46 of the *Traffic Act* (Chapter 403 of the Laws of Kenya), the offence of reckless driving contrary to section 47(1) of the *Traffic Act* and; the offence of driving a motor vehicle on the public road while under the influence of alcohol contrary to section 45 of the *Traffic Act*.
2. The trial magistrate sentenced the Appellant to five years' imprisonment in respect of the first four counts, which sentences were to run consecutively; a fine of KES 30,000.00 in respect of count five and in default, one-year imprisonment and; a fine of KES 40,000.00 in respect of count six and in default, one-year imprisonment.
3. The Appellant is aggrieved with this decision and has appealed against both the conviction and sentence, which he seeks to set aside through his appeal set out in the Petition of Appeal dated 29th January 2021. He also relies on his written submissions which were highlighted by his counsel. The Respondent opposed the appeal through the oral submissions of its counsel.
4. This is the first appellate court and in *Okeno v. Republic* [1972] EA. 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions without overlooking the conclusions



of the trial court bearing in mind that it neither heard or saw the witnesses testify. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions and there is nothing objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision (see David Njuguna Wairimu v Republic KSM CA CRA No. 28 of 2009 [2010] eKLR)

5. In light of the aforesaid, I now proceed to determine the Appellant's appeal which is premised on eight grounds but which have been condensed to two, at least going by the Appellant's submissions. The issues falling for determination are in respect of section 211 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) ("the CPC") and the severity of sentence passed by the subordinate court
6. Counsel for the Appellant submitted that the options available to the Appellant under section 211 of the CPC were never explained to him by the learned trial court. This was after the Appellant's counsel failed to appear in court and no reasons were given for his absence. The Appellant's attempt at seeking to adjourn the hearing was rebuffed by the trial court which ruled that the matter proceeds for the Appellant's defence hearing. The Appellant elected to remain silent and await the judgment.
7. Section 211(1) of the CPC provides as follows:
 211. Defence
 - (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).
8. From the above provision, it is clear that the court has a mandatory duty to again explain the substance of the charge and also inform the accused of the right to give evidence on oath in which case he or she will be liable to cross-examination, or to make a statement an unsworn statement. The court is also obligated to ask the accused whether they have any witnesses to examine or other evidence to adduce in their defence, and the court shall then hear the accused and their witnesses and other evidence.
9. While the record does not have a verbatim record of the explanation and information in respect of section 211(1) above being given to the Appellant before being placed on his defence, I note that from the record, the Appellant's counsel stated that the Appellant was to give a sworn statement. This, in my view, is a confirmation that the trial magistrate met the requirements under section 211 of the CPC otherwise Appellant's counsel, who I presume must have been well versed with procedure, would have objected. The Appellant, who knew that he was placed on his defence and that he was going to give sworn evidence, chose to not do so and elected to remain silent and await judgment. I find that once the Appellant has been placed on his defence, the trial court was not obligated to rehash the provisions of section 211 of the CPC since this had already been done once he was placed on his defence earlier.
10. Failure to record the exact words of section 211 of the CPC did not prejudice the Appellant and if at all there was such an omission, then it is curable by section



11. Such an error is curable under section 382 of the Criminal Procedure Code which provides;

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, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

12. Turning to the sentence, Counsel for the Appellant submitted that the sentence on counts 1-4 were manifestly harsh, excessive, erroneous and not in tandem with established principles of sentencing particularly where the offences charged were committed in the same transaction as opposed to being committed distinctly. Counsel stated that the duplicity of counts in the offence of causing death by dangerous driving was erroneous and ultimately resulted in the passing of sentences highly prejudicial to the Appellant, who ended up being punished four times for the same offence, which was a grave injustice. Counsel submitted that the sentence meted out for each of the counts ought to run concurrently and not consecutively since all the deaths resulted from a singular transaction as such cannot be treated as distinct offences.

13. Counsel for the Respondent conceded to the Appellant's counsel submission by stating that the sentence as meted out on the four counts was excessive as it was a single accident.

14. Germane to this determination is Section 14 of the CPC which provides as follows:

14. Sentences in cases of conviction of several offences at one trial

- (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
- (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.
- (3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—
 - (a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or
 - (b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.



- (4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.
15. This court, in *Samuel Kinyua Kirimania v Republic* KMBU HCCRA No. 26 of 2017 [2018] eKLR held as follows:
7. As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act or transaction, a concurrent sentence should be imposed. However, if the accused commits separate and distinct offences in different criminal transactions, even though the charges are tried in one trial, it is not illegal to mete out a consecutive term of imprisonment (see *BMN v Republic* NYR CA Criminal Appeal No. 97 of 2013 [2014] eKLR). This is also emphasized Paras. 7.13 and 7.14 of the Sentencing Policy Guidelines, 2016 which provide as follows;
- 7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively.
- 7.14 The discretion to impose concurrent or consecutive sentences lies in the court.
- 8 The phrase ‘same transaction rule’ was discussed in *Nathani v Republic* [1965] EA 777 where the court stated as follows:
- If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.
16. The facts of the case from the record indicate that the said offences were committed in the same accident that occurred on 15th May 2016 at about 9.20 pm along the Eastern Bypass, near Delta Petrol Station in Ruiru sub-county within Kiambu County involving motor vehicle registration number KCG 624Q, TATA Tipper Lorry and Toyota Corolla motor vehicle registration number KAM 327. Since there were a series of offences committed at the same time in the same accident, it follows that a concurrent sentence was appropriate.
17. In any event, I find that the consecutive sentences meted by the learned trial magistrate aggregate to 20 years that were beyond the subordinate’s court jurisdiction and therefore cannot stand.
18. On what is the appropriate sentence in respect of all the counts, I find that the total aggregate terms of imprisonment of five years are appropriate and commensurate to the offences and the circumstances of the case.
19. The net effect of my findings above is that the Appellant’s appeal partly succeeds in respect of the sentence. I substitute the trial court’s sentence on Counts 1, 2, 3, and 4 with that that of five years in respect of each count, which sentence shall run concurrently from the date of the trial court’s judgment.

SIGNED AT NAIROBI

D.S. MAJANJA



JUDGE

DATED AND DELIVERED AT KIAMBU THIS 6TH DAY OF OCTOBER 2021.

M. KASANGO

JUDGE

Appellant in person.

Mr Kasyoka instructed by the Office of the Director of Public Prosecutions for the Respondent.

