REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 35 OF 2019

DANIEL WESONGA ....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(From the original conviction and sentence in Traffic case No.751 of 2019 of the Chief Magistrate's Court at Busia by Hon. Lucy Ambasi– Chief Magistrate)

JUDGMENT

1. **Daniel Wesonga,** the appellant herein, was convicted in three counts. In count one the offence was riding a motor cycle on a public road without driving licence contrary to section 103 B (5) as read with section 103B (7) of the Traffic Act.

2. In count two the offence was riding a motor cycle on a public road without insurance contrary to section 103 B (3) as read with section 103B (7) of the Traffic Act.

3. In count three the offence was riding a motor cycle on a public road without wearing a helmet contrary to section 103 B (2) as read with section 103B (7) of the Traffic Act.

4. The particulars were that on the 6th November 2019 along Kisumu-Busia road, within Busia County, the appellant being a rider of motor cycle registration number KMCN 944N rode it without a licence, insurance and without a helmet.

5. The appellant pleaded guilty and was sentenced to six months' imprisonment on each count one and two. In count three, he was sentenced to serve 14 days' imprisonment. The sentence was ordered to run concurrently. He appeals against the sentence.

6. The appellant's concern is that he was not given an option of a fine.

7. Mr. Gacharia, learned counsel, conceded the appeal.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

9. Before I address the whether the appellant ought to have been given an option of a fine, I want to comment on the manner the plea was taken. I have reproduced the proceedings herein below.

> **6.11.19**
>
> **Coram Before: Hon. Mrs. Lucy Ambasi, CM**
>
> **Ngari – State Counsel**
>
> **Mudoto & Diana – Court Assistants**
>
> **Charges read out to accused and every element explained in a language that he understands and he pleads thereof:**
>
> **Count i – True**

Count ii – True

Count iii– True

Rode KMCN 944N on 6.11.2019 without a Driving License, Insurance Helmet.

Plea of guilty entered.

<u>MITIGATION</u>

Court: Offence prevalent and a danger to other road users. 6 months imprisonment on Count 1 & 2 and 14 days for Count iii. To run concurrently.

Further, banned until he obtains a valid driving licence. Right of appeal 14 days.

10. The following errors occurred:

a) It was not indicated what language was used in reading the charges to the appellant.

b) What is purported to be facts are so skimpy and one does understand what the rush was for.

c) Mitigation is supposed to come from an accused person and not from the court. The appellant was denied a chance to mitigate.

d) The record is so untidy to an extent that what is called mitigation is merged with the sentence.

Since the appellant appealed against sentence only, I would not say more.

11. The penalty for the offences the appellant was charged with is provided for under section 103B (7) of the Traffic Act. It states:

> **A person who contravenes or fails to comply with the provisions of this section commits an offence and is liable to a fine not exceeding ten thousand shillings or, in default of payment, to imprisonment for a term not exceeding twelve months.**

12. Instances when an appellate court would interfere with the discretion of a trial court on the issue of sentence were clearly defined by the Court of in the case of in. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. Those circumstances were well illustrated in the case **of Ogalo Son of Owuora vs. Republic (1954) 21 EACA 270** as follows:

> **The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James vs Rex (1950), 18 EACA 147*, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R vs. Shershewsity (1912) C.CA 28 T.LR 364.***

13. The prosecution did not state whether the appellant had a previous record. The cardinal principle in sentencing just like in medical, is to start with the first line of treatment. Unless an accused is a repeat offender or the offence is aggravated, he ought to be given the option of a fine where it is provided for like in this case. For this reason, I am persuaded to interfere with the sentence meted out by the trial court in counts one and two. I accordingly set the sentences aside and substitute the same with a fine of Kshs. 3000/= on each count or serve three months imprisonment on each count. The sentence in count three was served for he spent 14 days in prison before he was released on bond pending appeal.

14. The appeal on sentence is therefore is therefore allowed.

DELIVERED and **SIGNED** at **BUSIA** this **21st** Day of January**, 2020**

KIARIE WAWERU KIARIE

JUDGE