REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.342 OF 2019

DAVID KIMANI NJUGUNA....................APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING

The Applicant, David Kimani Njuguna was charged with seven counts of **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act**. The particulars of the offences were that on 27th April 2012 at about 7.30 a.m. along Thika Super Highway near Clay Works in Nairobi County, the Applicant being the driver of motor vehicle registration No.KAA 273P Isuzu lorry, drove the said motor vehicle in a manner that was dangerous to the public and other road users and caused an accident by running over seven pedestrians who were fatally injured. When the Applicant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged. He was ordered to pay a fine of Kshs.100,000/- in each of the seven counts or in default serve two (2) years imprisonment in each of the counts. The sentences were ordered to run consecutively. The Applicant was aggrieved by his sentence. He has applied to this court to have the same revised.

In his application before court, the Applicant urged the court to revise the sentence on the grounds that the same was manifestly excessive, improper and harsh in the circumstances. He was aggrieved that he had been sentenced to pay fines for the several counts yet the accident that caused the death of the deceased persons was one. He faulted the trial court for failing to take into account the pre-sentence report that was presented before court which clearly showed that the Applicant was remorseful and had not intended to cause the accident. The Applicant pointed out that he was a young man who had a young family who solely depended on him for their sustenance. The fines imposed in effect condemned him to serve the default custodial sentence. He asked the court to revise the same.

During the hearing of the application, this court heard oral rival submission made by Mr. Njuguna for the Applicant and by Mr. Momanyi for the State. Mr. Njuguna submitted that the fines that were imposed were manifestly excessive in the circumstances taking into consideration that the accident that led to the deaths of the deceased persons was one. He urged the court to be persuaded by the decision in **Charles Muriuki Wahome v Republic [2017] eKLR** and **Atito v Republic [1975] EA 278** for the preposition that the punishment meted on the Applicant was unlawful. Learned counsel further urged the court to accept the sum of Kshs.200,000/- that had been deposited as cash bail to constitute the appropriate fine to be imposed on the Applicant. The economic circumstances of the Applicant was such that he could not afford to pay the fines that were imposed by the trial court. He pleaded with the court to take into consideration the mitigating circumstances of the Applicant and accordingly revise the sentence.

Mr. Momanyi for the State partly opposed the application. Whereas he was of the view that the default sentences which were ordered to run consecutively should have been ordered to be served concurrently, he submitted that the fines and the default sentences ordered by the trial court ought to be maintained. He submitted that the circumstances in which the accident occurred clearly showed that the Applicant was at fault. A deterrent sentence was called for. He explained that the Applicant ran over six passengers who had just alighted from a matatu causing their deaths. There existed no mitigating circumstances that would persuade the court to revise the sentence imposed by the trial court. Other than the concession made, learned prosecutor urged the court to dismiss the application.

The Applicant seeks to have the exercise of the sentencing discretion of the trial court reconsidered in this application for revision. The trial court was exercising judicial discretion when it sentenced the Applicant. This court can only interfere with such exercise of sentencing discretion in circumstances that are now settled in law. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

> ***"As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will***

normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000 this Court stated thus:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, 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, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist."***

In the present application, the prosecution conceded that the order that was made by the trial court that stated that the default custodial sentences to be served consecutively and not concurrently was illegal. Indeed, this court agrees with the learned prosecutor that the circumstances in which the accident occurred did not warrant for an order for the sentences to run consecutively instead of concurrently. That being the case, the order made by the trial court that the default sentences run consecutively instead of concurrently is set aside.

The issue that remains for determination by the court is whether the fines imposed by the trial court were justified in the circumstances. The Applicant, through counsel, argued that the fines that were imposed by the trial court were such that it condemned the Applicant to serve the default custodial sentences in prison. The Applicant urged the court to take into consideration his economic circumstances as evidenced by the pre-sentence report that was presented to court. Mr. Momanyi was of the view that the fines imposed should not be interfered with. This court is of the view that the fines imposed indeed were harsh and excessive taking into account the fact that it was one accident that led to the deaths of the deceased persons. This court agrees with Ngenye - Macharia, J in her decision in **Charles Muriuki Wahome v Republic [2017] eKLR** where she held thus:

> ***"Before I delve into the main issues for determination it is important that I point out that in a charge of causing death by dangerous driving, no matter how many deaths are occasioned, if they occur in the same accident, the accused ought to be charge with one count of causing death of dangerous driving. In the single count the deceased passengers of persons should then be named. The framing of more than one count where the deaths occur in the same accident implies that there existed several accidents in which the deaths were occasioned. In so doing, the ultimate result is that it impacts on the sentence imposed on the accused; which shall depend on the number of counts in which the accused is convicted. This is highly prejudicial to the accused and occasions him injustice especially where the trial court passes consecutive sentences. It follows that the accused is punished twice for the same offence; of dangerous driving. See Atito v. Republic [1975] EA 278. In which the then East African Court of Appeal held:***
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> > ***"No man is to be punished twice for the same office, the offence in this case being dangerous driving and causing death. The number of deaths caused is immaterial."***
>
> ***This scenario obtains in the instant case. The Appellant was charged with two counts of causing death by dangerous driving yet the deaths were occasioned in the same act of dangerous driving thereby rendering the second count duplicitous. For this reason, should the court uphold the conviction, the same shall apply only with respect to one count."***

In the premises therefore, this court will set aside the fines that were imposed by the trial court and substitute it with one fine of Kshs.200,000/-. The Applicant deposited the sum of Kshs.200,000/- as cash bail. This sum was surrendered to the court by the Applicant as part of the fine that was initially imposed by the trial court. This court deems this sum as having settled the fine imposed by this court. The Applicant is therefore ordered released from prison and set at liberty forthwith. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF APRIL 2020

L. KIMARU

JUDGE