



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.880 OF 2018

JAMES NYERERE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, James Nyerere was convicted of the charge of **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act**. The trial court held that the prosecution was able to establish to the required standard of proof that the Applicant did on 1<sup>st</sup> January 2018, along Ronald Ngala Street in Nairobi County, caused the death of a pedestrian by the name Julius Gikonyo Kinunu (the deceased) when he drove motor vehicle Registration No.KBS 053X Isuzu matatu in such a dangerous and reckless manner that he sandwiched the deceased onto motor vehicle Registration No.KBX 521N which was stationary at the time. The Applicant was ordered to pay a fine of Kshs.600,000/- or in default ordered to serve three (3) years imprisonment.

The Applicant applied to this court to have the sentence that was imposed on him revised. He told the court that he ought to be sentenced to serve the period of one (1) year that he has been in prison. In his view, that constituted sufficient punishment. He told the court that he was the sole breadwinner of his young family constituting of three children. He is a single parent, his wife having died five years ago. During his incarceration, the children were being taken care of by his brother who was struggling financially. He urged the court to take into consideration that after the accident, he took the victim to hospital where he succumbed to his injuries. This showed his remorse for the accident that occurred. He told the court that he was a first offender and had prior to the accident driven for seventeen (17) years with a clean record. Mr. Momanyi for the State was not convinced that the sentence that was imposed by the trial court was either harsh or excessive. He urged the court to find that the default custodial sentence that was imposed on the Applicant fitted the crime.

This court has considered the Applicant's plea for revision of sentence. When the trial magistrate sentenced the Applicant to serve the custodial sentence, it was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal. 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, it was clear to this court that indeed the Applicant made a case for this court to consider the review of the default custodial sentence that was imposed on him. This court however takes note that a life was lost as a result of the Applicant's reckless and dangerous driving. Whereas the Applicant can plead with the court to give him a second chance at life, the deceased's life was cut short with no hope of him being given another chance at life. His family is suffering the consequences of the loss. Whereas this court may sympathize with the Applicant's mitigating circumstances, this court agrees with Mr. Momanyi that a custodial sentence was indeed called for.

In the premises therefore, this court will set aside the default custodial sentence that was imposed on the Applicant and substitute it with a sentence of this court of two (2) years imprisonment with effect from 6<sup>th</sup> September 2018 when the Applicant was sentenced by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF OCTOBER 2019.**

**L. KIMARU**

**JUDGE**