



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL REVISION NO. 12 OF 2019

BETWEEN

JOEL KIPTOO MISOI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Being an Appeal from the Decision of Hon Onkoba Mogire Senior Resident Magistrate

on the SPM's Court on 13th February 2019 in Criminal Case 401 of 2018)

J U D G M E N T

1. The Court has before it an application for a revision of the sentence. The Application states:

Being the applicant aggrieved by sentence passed upon me by Hon. Onkoba (SRM) at Voi Law courts on 13th February 2019 where I was sentence to five (5) years imprisonment for an offence of causing death by dangerous driving c/sect 46 of the Traffic Act CAP 403 Laws of Kenya hereby apply for revision of the following grounds:

1. That I was sentence to five (5) years imprisonment which was extremely harsh considering that I pleaded guilty in the first instance, I was remorseful and I have never been charged with a criminal offence in any court of law.

2. The learned trial magistrate did not consider my mitigation circumstances of which I am a young man 38 years old, I have a young family with a wife who has no source of income except for my earnings and I have three children all of school going age and who are suffering because of my mistakes.

3. That my children are quite young and I do not wish for them to be brought up without parental support,

4. That I am entrusted three of my late brother's children who are all in school and I support both my sister in law and her children as she is also unemployed

5. That I am remorseful for the offence that I committed and I seek forgiveness from this Honourable court and pray for leniency from this Honourable Court.

6. That I pray that this Honourable court considers granting me an option of fine noting that though an offence was committed I had no motive to commit the same which the learned trial magistrate failed to take consideration of.

7. That I was convicted out of my own plea of guilty and I do pray this honourable court to consider that I am a first offender and vow never repeat the offence and consider my humble application

REASONS WHEREOF *the applicant prays this honourable court of justice to give a reduction of the sentence from five (5) years and also set a default option of a fine as well.*

2. The Applicant was charged with the Offence of "Causing Death by Dangerous Driving Contrary to **Section 46** of the **Traffic Act Cap 403 Laws of Kenya**. The Particulars of the Offence were that **JOEL KIPTOO MISOI**: On the 8th day of November, 2018 at about 0600 hours

at canaan area along Mombasa-Nairobi road in Taita Taveta county, being the driver of motor vehicle registration number KCM 308X/ZF 7961 make MERCEDES AXOR did drive the said motor vehicle along the said road at a speed and in a manner which was dangerous to other road users having regards to all the circumstances of the case including nature, condition and use of the road and amount of traffic present or expected on the road at that particular time, you failed to keep to your proper traffic by swerving to the right whereby you collided head on with an oncoming motor vehicle registration number KBY 783Q/ZD 5937 make MAN and caused the death of driver THOMAS MWAISAKA MUOKA.

3. The Applicant was arrested on the same day. He remained in custody until the conclusion of the trial on 13th February 2019, that is for 4 months. He was sentenced to a term of 5 years imprisonment with no option of a fine. The Applicant is now held in Manyani Maximum GK Prison.

4. Although the Application relates only to the question of sentence. The way the SRM's Court has handled this matter raises cause for concern. Firstly, the Accused pleaded guilty. However, the Trial Magistrate failed to record any statement of facts relating to that plea. The Particulars of the offence state that the Applicant was driving at a dangerous speed. However, before he passed sentence the Trial Magistrate did not record the speed that the Accused admitted travelling at. By the same token, he did not confirm the time and place of the accident. These details have implications for any claims that are made on the insurance as well as the appropriate sentence.

5. It seems the Trial Magistrate relied only and entirely on the Prosecution Exhibits which were not received into evidence, nor explained. PExh 1 is a Certificate of Examination and Test of Vehicle KBV 783Q Form VT A No.94930. The Registered Owner of the vehicle was not recorded. There is no record whether the vehicle was insured or not. The assessment is that the vehicle is written off. The Applicant tells the Court the vehicle belongs to East African Roadways and was insured by Jubilee Insurance.

6. The Applicant tells the Court that the vehicle he was driving was his employer's vehicle and he was driving it in the course of his duties. He said he has been a driver for 15 years and has never had an accident before.

7. The outcome of this accident was particularly tragic, however, a Court must sentence on principle. The Court must take into account the characteristics of the offence. In this case the Trial Magistrate did not record any particulars, for example the speed travelled, the point of impact on the road. Although there was a plea of guilty, that cannot be perceived to be an admission of the prosecution's evidence – in particular if there is absolutely no indication on the file that the evidence was in fact shown to the Accused at the time. The injuries suffered by the driver of the second vehicle, although horrific also raise up their own questions. Although it is said that the fire was caused by the collision and emanated from the fuel tank, the Report records the tank was punctured. It had not disintegrated as would be expected in an explosion. Further, the postmortem points to the fire being most intense inside the cab, for example the rib cage and thigh bones are missing but the spine and internal organs are not. That is surprising if the fire came from behind. Again, the trial magistrate did not record agreed facts on that account. Nor did he record any reasons whatsoever for refusing a fine.

8. This Court directed the probation service to prepare a report on re-sentencing. The Report record that the Applicant and his family wish to reconcile with and provide some support to the family of the Deceased. Negotiation have been ongoing during the hearing of this application but they have not been concluded. The Report from the Probation Services recommends that the applicant be given the option of a fine.

9. The Court also notes what the Applicant says and his demeanour that he is truly remorseful about the accident and the outcome for the Deceased.

10. In the circumstances, the sentence of the Trial Court is set aside for the reasons explained above. This Court reduces the sentence of imprisonment to two years with the option of a fine of KShs.200,000/=.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Delivered dated and signed at Voi this the 12th day of November, 2019

In the Presence of:

Court Assistant: Josephat Mavu

Appellant in Person

Respondent: Ms Mukangu