



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL REVISION NO. 89 OF 2018**

**JEMES ONSARE ONDARI.....APPLICANT**

**=VRS=**

**THE REPUBLIC.....RESPONDENT**

**RULING**

The appellant in this case was charged with 4 counts, Count 1 being Riding a motor cycle on a public road while under the influence of alcohol contrary to Section 44 (1) of the Traffic Act. Count II – Riding a motor cycle on public road without a driving licence contrary to Section 103 B (5) as read with Section 103B (7) of the Traffic Amendment Act No. 37/2012, Count III – Riding a motor cycle on a public road without insurance contrary to Section 103 B (3) as read with Section 103 B (7) of the Traffic Amendment Act No. 37 of 2012. Count IV – failing to wear a helmet contrary to Section 103 B (1) as read with Section 103 B (7) of the Traffic Amendment Act No. 37 of 2012.

When he appeared before the Senior Resident Magistrate at Keroka on 8<sup>th</sup> November 2018, he pleaded guilty to all the charges. He also admitted to the correctness of the facts read to him whereupon the trial magistrate found him guilty and convicted him.

After hearing his plea in mitigation the trial magistrate sentenced the applicant as follows: -

**Count I – to serve 4 months’ imprisonment.**

**Counts II, III & IV – to serve 3 months in respect of each count.**

The trial magistrate then gave the applicant fourteen days to appeal. Instead of appealing, the applicant filed a certificate of “agency” (sic) seeking revision on the ground that he is a student at Thogoto TTC and his continued incarceration will jeopardize his studies.

In his supporting affidavit, the applicant deposes that the trial court erred in entering a plea of guilty which was unequivocal and that the sentences are irregular as the trial magistrate did not disclose whether they were to run consecutively or concurrently. He further deposes that being a first offender the trial magistrate ought to have considered either a fine or a non-custodial sentence and that the sentence imposed was harsh.

The applicant in this case pleaded guilty to the charges and when the facts were read to him he admitted the correctness of the same. The record shows that the languages used were English, Kiswahili and Ekegusii. The applicant therefore understood the charges as well as the facts. The plea herein was therefore unequivocal.

Whereas Section 348 of the Criminal Procedure Code provides that no appeal lies where an accused has pleaded guilty the same gives such an accused a right to appeal against the extent or legality of the sentence. The applicant in this case therefore had a right of appeal as to the extent or legality of the sentence and looking at his application and supporting affidavit, this indeed is an appeal. Section 364 (5) of the Criminal Procedure Code provides that where an appeal lies **“no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”**

Be that as it may, I have considered the application herein. The courts are now guided by the Judiciary Sentencing Policy Guidelines in matters sentencing. The policy guidelines while recognizing that sentencing is in the discretion of the court and remains sacrosanct **“seek to provide a coherent sentencing structure based on the principles of fairness, justice, proportionality and commitment to public safety.”** The guidelines are also **“expected to curb arbitrariness in sentencing and enhance public confidence in the criminal justice system.”**

Although Section 37 of the Penal Code and Section 14 of the Criminal Procedure Code leave it to the court to consider whether sentences shall run consecutively or concurrently and paragraph 14 of the Guidelines recognizes this, paragraph 7:13 provides that where offences emanate from a single transaction, the sentences should run concurrently. Paragraph 7:16 further provides that in determining the most appropriate term of imprisonment the court should follow the directions in paragraph 23.7 to 23.9 of the guidelines. Paragraphs 23.7 to 23.9 require the court to consider the aggravating and mitigating circumstances which may either increase the term or lessen the term. The courts are also required to follow guideline judgements from the superior courts. In **Gachege Vs. Wanjugu [1991] KLR** it was held: -

***“1. The practice where a person commits more than one offence at the same time and in the same transaction is, save in very exceptional circumstances, to impose concurrent sentences”.***

In the instant case, the trial magistrate did not indicate whether the prison terms were to run concurrently. The offences in all the four counts formed part of one transaction and there are no exceptional circumstances to order the terms of imprisonment to run consecutively. I accordingly order that the sentences imposed shall run concurrently. I shall not otherwise interfere with the sentence as the offences

committed are serious and the sentences should act as a deterrent. The Deputy Registrar to certify this ruling to the lower court and to the applicant.

**Signed and dated at Nyamira this 20<sup>th</sup> day of November 2018.**

**E. N. MAINA**

**JUDGE**