



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC. APPLICATION NO. 135 OF 2016
PAUL NJIRU MURIITHI.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Tr. 249/2016 at Embu Chief Magistrate's Court by Hon. V. O. NYAKUNDI - RM on 3RD MAY, 2016)

ORDER IN REVISION(JUDGEMENT)

1. Paul Njiru Muriithi, the applicant has applied for revision of his sentence of 12 months imprisonment imposed upon him by the court of the Resident Magistrate at Embu on 3rd May, 2016, following his plea of guilty to a charge of careless driving contrary to Section 44 (1) and (2) of the Traffic Act (Cap. 403) Laws of Kenya.
2. The state through Ms Matere did not object to the sentence being revised.
3. The facts upon which the applicant was convicted on his own plea of guilty were that on 1st May 2016 at 11.26 am along Kubukubu road in Embu, personnel from the National Transport Safety Authority (NTSA) were manning the Embu- Meru road. In the course of their duty they stopped motor vehicle registration No. KAL 032F Toyota Saloon which was driven by the applicant. They then tested the applicant for alcohol. He was found to be drunk. His alcohol consumption exceeded 0.35 which is the limit required.
4. The principles applicable to these revisional proceedings are generally the same as those applicable to ordinary appellate proceedings. As revising court, I am required to scrutinize the principles upon which the trial court proceeded to sentence the applicant and satisfy myself that those principles were followed. According to *Wanjema v. R. (1971) EA 493* sentencing is a matter for the discretion of the court. An appeal court may only interfere with the sentence imposed by the trial court if the following factors are shown to exist:
 - i. if it shown that the trial court over looked some material factor.
 - ii. if it is shown that the trial court took into account some immaterial factor.
 - iii. If it is shown that the trial court acted on a wrong principle, or
 - iv. if it is shown that the sentence imposed is manifestly excessive in the circumstances of the case.

5. There is an additional criterion and that is, that an appeal court is entitled to interfere, where it is shown that the sentence imposed is manifestly lenient to the extent that it amounts to a miscarriage of justice.

6. Furthermore, in sentencing road traffic offenders, a court is required according to the Court of Appeal in *Orwenyo Missiani v R (1979) KLR 285* to impose a custodial sentence, where an offender drives under the influence of alcohol or drives recklessness.

7. According to the applicant in what he calls the “mitigating grounds” in support of his application for revision, he has stated the unchallengeable fact that he was sentenced to 12 months imprisonment without the option of a fine in ground 1. In ground 2, he has also stated the unchallengeable fact that he pleaded guilty to the charge, was remorseful and promised never to repeat the offence again. In ground 3, he has stated that he is a married man with three children, who solely depend on him as their bread winner. In ground 4, the applicant has stated that he is a first offender and is unemployed with his parents being peasant farmers. Furthermore, he has also stated that his spouse is a house wife and that his children depend on him for their school fees. Additionally, he has stated that the 12 months imprisonment will affect their well being. In ground 5, the applicant submitted that his sentence be reviewed with a view of imposing a reasonable fine or a non custodial sentence. In ground 6, he has stated that he will never repeat the commission of this offence.

8. I have considered the applicant's mitigation and the principles of law applicable in sentencing road traffic offenders. For reasons that will appear below in this judgement, I find that the position taken by both Ms Matere and the applicant that a fine be imposed instead of a custodial sentence cannot be justified in principle and I hereby reject their submissions in that regard.

9. The maximum sentence provided for by law in section 44 (1) and (2) of the Traffic Act is a fine not exceeding Kshs. 100,000/- or imprisonment for a term not exceeding two years or to both. In addition to the foregoing sentence, in terms of Section 44 (2), the court is also authorized to order disqualification for a period of 12 months or a longer period from the date of conviction for holding or obtaining a licence. I have considered the foregoing mitigating factors which the applicant has termed as mitigation grounds. In sentencing the applicant, the trial court considered his mitigation. The court found that the offence was premeditated. **This finding by the court that this offence was premeditated was a misdirection, that is curable in terms of section 382 Criminal Procedure Code.** The court went further to find that **“many Kenyans have been killed and mained(sic)by drunk drivers. A person who drinks should not drive. This offence does not merit a non custodial sentence”**. The issue for decision is whether the trial court committed any error of law or fact in sentencing the applicant as set out in *Wanjema v. R, supra*. I find that the trial court failed to disqualify the applicant from obtaining or having driving licence as mandatorily required by law for two or more years. It therefore follows that this was an omission which entitles this court to interfere according to *Wanjema v R, supra*. I therefore order the disqualification of the applicant from obtaining or having a driving licence for two years. This disqualification does not amount to enhancement of the sentence as contemplated by section 354 (3) (b) of the Criminal Procedure Code (Cap 75) Laws of Kenya. If it amounted to enhancement of the sentence, this court would be required to serve the appellant or his counsel with notice to show cause as to why the sentence should not be enhanced before proceeding to do so, according to the Court of Appeal in *Amritlal v R (1970) EA 401*.

10. Furthermore, According to *Orwenyo Misiani v R supra*, a custodial sentence is called for, where an offender is convicted of driving under the influence of alcohol. In this regard the trial court found that: **“many Kenyans have been killed and mained(sic)by drunk drivers. A person who drinks should not drive. This offence does not merit a non custodial sentence”**. This was a relevant consideration that was rightly taken into account. In driving while drunk the applicant was taking a great risk. He posed a danger both to himself and other road users. In the circumstances a custodial sentence was rightly imposed by the trial court as a deterrent both to the applicant and other potential offenders in order to effectively control this social problem.

11. The upshot of the foregoing is that the custodial sentence is hereby confirmed and the applicant is hereby disqualified from obtaining or having a driving licence for two years. The Deputy Registrar is directed to forward a copy of this judgement to the transport licensing authority to endorse the applicant's

driving licence in respect of the disqualification. The applicant's application is hereby dismissed in its entirety.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this 12th day of May **2016**

In the presence of both the applicant and Ms Manyala for the State.

Court clerk **R. Njue**

J. M. BWONWONGA

12/05/2016