



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 12 OF 2016**

*(An appeal from the judgment of the Resident Magistrate, Embu in TR. Case No. 151 of 2016 dated 8/3/2016)*

**BENJAMIN IRERI..... APPELLANT**

**VERSUS**

**PROSECUTION.....RESPONDENT**

**J U D G M E N T**

1. This is an appeal against the decision of Hon. V.O. Nyakundi Resident Magistrate Embu delivered on 8/3/2016 in Traffic case No. 151 of 2016. The appellant abandoned grounds 1 & 2 and proceeded to argue ground 3 and 4 which are to the effect that the magistrate erred in law by sentencing the appellant to a custodial sentence of 12 months imprisonment without the option of non custodial sentence and that he failed to exercise his discretion judiciously.
2. In the oral submissions the appellant stated that he was sentenced to serve 12 months imprisonment for the offence of driving under the influence of alcohol. Section 44 of the Traffic Act provides for sentence of a fine of Kshs.100,000/= and imprisonment not exceeding two years.
3. It is argued that the imprisonment sentence was harsh and excessive. The appellant was a first offender and there were no compelling reasons to give him a custodial sentence.
4. The appellant relied on the case of **PAUL NJIRU MURIITHI VS DIRECTOR OF PUBLIC PROSECUTIONS NYERI CRIMINAL APPLICATION NUMBER 9 OF 2016** where the court held that the appellants appeal had high chances of success as the offence did provide an option of fine but the applicant was not given that option.
5. The state counsel conceded to the application for the reason that section 44 (1) of the traffic act is clear that the offender shall be fined or imprisoned for a period not exceeding two years. Being a first offender the court should have given him a non custodial sentence.
6. The accused was convicted on his own plea of guilty. The facts of the case was that on 8/3/2016 around 1.40 a.m. he was driving motor vehicle registration number KAY 912 X Toyota matatu along Nairobi road when he was stopped by an NTSA officer. An alcoblow auto test was done and it was confirmed he was drunk to the level required by the law to constitute an offence. He admitted the facts of the case.
7. Section 44(1) Any person who, when driving or attempting to drive, or when in charge of a motor vehicle on a road or other public place, is under the influence of drink or a drug to such an extent as to be

incapable of having proper control of the vehicle, shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

8. In the Court of Appeal case of **GEORGE OPONDO ODHIAMBO VS REPUBLIC [2009] eKLR** the court cited the Court of Appeal decision of **ORWENYO MISSIANI VS REPUBLIC [1979] KLR 285 at page 290** where it was held:-

9. *“the people who commit traffic offences do not have the propensity for committing them neither are they crimes that are committed for gain, revenge, lust or to emulate other criminals. In such cases except where the accused has been reckless in his driving or has had selfish disregard for the safety of other road users a custodial sentence does not necessarily serve the interest of justice as well as the interest of the public.”*

10. In this case, the prosecutor said that the accused was a first offender. The magistrate in sentencing the accused said the offence was serious and that the accused was carrying passengers. He further stated that many people have perished on the road due to drunken driving.

11. The facts of the case did not say that the accused was carrying any passengers at that hour 1.40 a.m. This is an extraneous matter which the magistrate brought in during sentencing. It is not disputed that the accused was a Public Service Vehicle (PSV) driver and for this reason he carries a heavy responsibility to exercise a duty care to his passengers at all times.

12. The responsibility is what the court considered in imposing a custodial sentence which was in order. The fact that he was a first offender was not taken into consideration. Being a first offender and in the absence of any aggravating circumstances, the court ought to have considered the option of fine.

13. I find that the magistrate failed to take into consideration the fact that the appellant was a first offender and that the sentence provided for an option of fine. This led to an excessive sentence considering the circumstances of the case.

14. For this reason, this court has a duty to correct the sentence of twelve months imposed. The appellant was convicted on 8/3/2016 and has now served eight (8) months imprisonment which is more than he deserves. He ought to have been given a fine. I reduce the sentence to the period already served.

15. The appellant shall be released forthwith unless otherwise lawfully held.

16. The appeal is allowed.

17. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF NOVEMBER, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Nandwa for Respondent**

**Mr. Mugendi for the Appellant**

**Appellant present**