REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL REVISION CASE NO 13 OF 1990

REPUBLIC …….…. APPLICANT

VERSUS

ABEID……..…… RESPONDENT

(From original conviction and sentence (I Indeche Esq SRM) in Traffic Case No 21172 of 1989 of the Principal Magistrate's Court at Mombasa)

JUDGMENT

The accused was on 9/4/90 convicted for four counts of causing death by dangerous driving contrary to section 46 of the Traffic Act. The sentence passed is:

> "accused fined Shs 10,000/- in default to serve 1 year imprisonment. The fine is for both counts".

That sentence was passed on 9/4/90 at about 2.40 p.m. A fine of shs 10,000/- was paid on 10/4/90. The record does not show that the accused was committed to prison on 9/4/90 until the fine was paid on 10/4/90.

By a letter dated 25/4/90 Mr Metho, the learned Principal State Counsel wrote to the Deputy Registrar of this court. In substance, Mr Metho informed the Deputy Registrar that the accused caused the death of five people who were members of the same family and other four people were seriously injured and that the prosecution takes great exception to the sentence meted which is manifestly inadequate and amounts to a miscarriage of justice. He requested the Deputy Registrar to issue a notice to show cause why the sentence should not be enhanced.

The Deputy Registrar duly registered a revision case and issued notice to the accused to show cause why the sentence should not be enhanced. Mr Metho and two advocates representing the accused appeared before me on 9/7/90. Mr Metho informed the court that after the sentence was passed, he received a letter from the firm of advocates M/s Marende and Taib Advocates, informing him that the relatives of deceased persons were dissatisfied and that he should look at the record and see if the matter could be brought to court. He studied the record and found merit in the complaint and then wrote to court.

He then referred to the irregularities in sentencing. The first one is that though the accused was convicted for all the four counts, sentences were not passed for all counts and that even the sentence of a fine is vague because it does not show whether the fine was the total of one count or for each of the two counts.

Mr Metho also drew to the attention of the court the fact that the order for mandatory disqualification from holding a driving licence was not made. He submitted that the sentence was manifestly inadequate and lenient. He however stated that he was not pressing so hard for a custodial sentence as the vehicle in

front of the vehicle of the appellant stopped suddenly making the accused to swerve to the right the conclusion being that the accused did not take a deliberate risk.

Mr Gakuhi for the accused replied that Mr Metho had no right to be heard in court and in any case as provided in section 364(5) of the Criminal procedure Code, revision should not be entertained as the state had a right of appeal which it failed to exercise.

Mr Gakuhi, however, conceded that there were irregularities in the sentencing in that no disqualification order was made and the accused was not fined in respect of each of the four counts.

As regards the sentence of a fine imposed, Mr Gakuhi stated that the case of *Orweryo Missian v R* [1979] KLR 285 applies to the facts of this case and as there was neither intoxication, recklessness or deliberate risk, taking a custodial sentence is not merited in this case.

It is true as Mr Gakuhi argues that section 364(5) of the Criminal Procedure Code provides that when an appeal lies from a finding, sentence or order and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who would have appealed.

It is also true that section 365 Criminal Procedure Code does not give any party when court is exercising revisionary jurisdiction to be heard. But the proviso to that section gives the High Court discretion to hear any party. Further, it is mandatory under section 364(2) that before an order prejudicial to the accused is made, he shall be afforded an opportunity to be heard.

In *R v Ajit Singh* [1957] EA 822, a full High Court bench considered the provisions of the then section 363(5) of Criminal Procedure Code which is similar to the current section 364(5) of the Criminal Procedure Code. In that case, the revision case was initiated by a letter from the Attorney- General to Registrar of the High Court. When the case came for revision a single Judge allowed both the counsel for the crown and for the accused to address the court before he adjourned the case to a full bench. The full High Court bench also heard both the accused's counsel and the counsel for the Crown.

The full Bench decided that section 363(5) was not intended to preclude the Supreme Court from considering the correctness of a finding sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. I think that that case correctly states the law for if it were not so, the court would be fettered in its wide discretion given by section 362 of Criminal Procedure Code to supervise records in criminal proceedings. In any case, it would appear that Mr Metho did not get the instructions from the Director of Public Prosecutions to appeal but acted as a result of complaint by relatives of deceased persons through their advocates. Those relatives had no right of appeal and Mr Metho was merely forwarding their complaint to court.

As regards the right to be heard, Mr Gakuhi did not raise the objection as a preliminary point. The court has its wide discretion to allow a party to address it. On 10/5/90 I directed the Deputy Registrar to inform the Attorney-General and lawyers to appear before the court. If court did not wish Mr Metho to address the court, it would have stopped him. Mr Gakuhi had a chance to reply and I do not think that address of Mr Metho has prejudiced the accused and I would say, it has helped the court.

Moreover, now that the court has knowledge of the record of the lower court, and it has been conceded that the record has irregularities, the court has power to exercise the revisionary jurisdiction. The powers of the court in exercising revisionary jurisdiction are specified in section 364(1) of Criminal Procedure Code and include the powers specified in section 354(3) of the Criminal Procedure Code. It can reduce or increase the sentence or alter the nature of the sentence.

However, the principle is that an appellate court should not interfere with the discretion which the trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into consideration some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive or manifestly lenient in the circumstances of the case.

The learned magistrate found as a fact that the accident occurred on the busy Mombasa–Malindi road on a straight stretch. The road is a tarmac road and there was no rain to make the road slippery. It was evident that the lorry that the appellant was driving towards Malindi crossed from its correct side to the offside and collided with the oncoming vehicle which was carrying the deceased persons and dragged it for a distance. There was evidence that the accused was driving behind two vehicles. The vehicle which was in front stopped to pick a pedestrian. The vehicle then following stopped and the accused's lorry swerved to the offside thereby colliding with the oncoming vehicle.

The accused stated that he swerved to the right to avoid hitting the vehicle ahead.

The learned magistrate however after analyzing the evidence came to the conclusion that the fact that the accused swerved showed that he was not keeping the statutory distance between his lorry and the vehicle ahead. The learned magistrate further concluded that the accused was in fact driving at high speed and in fact was overtaking when it was not safe to overtake and without regard to other road users. It is clear from the findings of fact made by the learned magistrate that this was grossly bad driving – speeding, overtaking which shows recklessness and deliberate risk taking and which resulted in a horrifying accident and fatalities. This was not an inadvertent accident. The manner in which the accused was driving was worse than in the case of *Wanjama v R* [1971] EA 493 where a custodial sentence was given.

It is notorious that in our country so many people are losing their lives in road accidents. For that reason, the Parliament by the Traffic (Amendment) Act No 1 of 1986, increased penalty from 5 to 10 years and provided a mandatory cancelling of driving licence and disqualification from driving.

It is in the interest of the public that in the circumstances of this case, a custodial sentence should have been imposed. I am however mindful of the fact that it is the act of driving which should be punished and not the result of the accident. In revision therefore, I set aside the sentence imposed by the learned magistrate and in substitute a sentence of 21/2 years imprisonment in respect of each of the four counts but the sentences to run concurrently. I further cancel the accused's driving licence and disqualify him from holding a driving licence for 3 years from the date of conviction – that is 9/4/90.

The fine already paid to be refunded to the accused.

Dated and Delivered at Mombasa this 12th Day of July, 1990

E.M. GITHINJI

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JUDGE