

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 58 OF 2013

(From the original conviction and sentence in criminal case no. 134 of 2013 the Principal Magistrate's Court at Kilifi before Hon. D. Kinaro – SRM)

ALFRED BARAKA KEAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged with two counts as follows:

1. Causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya. The particulars are that on the 8th day of June, 2013 at about 10.00am at Chumani along Kilifi-Malindi road within Kilifi County, being the driver of motorcycle KMCX 549N Baja Boxer rode the said motorcycle on the said road in a manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition and misuse of the road. In that he failed to keep distance and rammed into the rear of a motor vehicle KBM 901Y Nissan Matatu causing the death of one Jumatunje Rimba his passenger, injuries to himself and damages to both vehicles.
2. Driving without a driving licence contrary to Section 30(1) of the Traffic Act Cap 403 Laws of Kenya In that on the 8th day of June, 2013 at about 10.00am at Chumani along Kilifi-Malindi road within Kilifi county, being the rider of a motorcycle KMCX 549N Bajaj Boxer rode the said motorcycle on the said road, without a driving licence.
2. He pleaded guilty to both charges and was convicted. He was sentenced to serve 10 years imprisonment on count 1 and fined Shs. 20,000/- in default 3 months imprisonment on the second count. He now appeals to this court against conviction and sentence. However, during the oral argument of the appeal the former was abandoned. Counsel for the appellant submitted that the sentence was manifestly excessive and that the appellant was not given an opportunity to mitigate. That there was no evidence of previous convictions proven against him. Further, that there was no basis for the conclusion by the learned magistrate that the appellant was not remorseful. She urged the court to consider a non custodial sentence. The State submitted that the offences are prevalent but nonetheless left the matter to the court's discretion.
3. I have considered the record of the plea taking in light of the submissions made. From the record of the proceedings, it is apparent that the appellant was given a chance to mitigate but responded by saying: "Nothing to say in mitigation." Perhaps that is the reason for the court's conclusion that he was not remorseful. However, in the notes before the sentence, the learned magistrate noted correctly that traffic offences are rampant and that an innocent life had been lost in the material accident. There was no mention in the facts read to the court that the appellant was engaged in the business of boda boda (motorcycle taxi) or that his pillion passenger was a customer. It is not clear how the trial magistrate came to that conclusion.
4. That notwithstanding, I am of the view that the court was entitled to take into account the fact that

the accused by riding on the road while not being a licensed driver endangered his life, that of his passenger and other road users. This action constitutes an element of foolhardy risk taking on the part of the appellant. I do agree though that the maximum sentence awarded without the option of a fine was manifestly excessive in the circumstances of this case. This is because the appellant was a first offender and there was no basis for the finding against him that he was unremorseful.

5. In the case of **Ogalo Owuora v R [1954]E 1EACA 270** the court stated that a sentence imposed by the court will be altered by the appellate court if it is evident that the trial court acted on a wrong principle or overlooked some material facts or if the sentence is manifestly excessive.

In view of the foregoing, it is my considered opinion that this court ought to interfere by setting aside the custodial sentence on the first count and substituting therefor a fine of shs. 60,000/- in default to serve one year imprisonment from the date of this judgment.

Delivered and signed at Malindi this **20th** day of **December, 2013** in the presence of the appellant, Mr. Obaga holding brief for Miss Rono for the appellant, Miss Mathangani for the State

Court Clerk – John

C. W. Meoli

JUDGE