Kamande v Republic (Criminal Appeal E042 of 2021)
[2022] KEHC 12947 (KLR) (21 September 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E042 OF 2021

JM MATIVO, J

SEPTEMBER 21, 2022

BETWEEN

LEONARD ALELA KAMANDE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Appeal against the Judgement, conviction and sentence in Traffic Case No 609 of 2017- Voi, Republic v Leonard Alela Kamande, delivered by Hon D Wangechi on 29.9.2021)

JUDGMENT

1. Leonard Alela Kamande (the appellant) was charged with 3 counts under the *Traffic Act*.[1] Count one was careless driving contrary to section 49 (1) (a) of the *Traffic Act*. Counts two and three were causing death by dangerous driving contrary to section 46 of the *Traffic Act*.

2. The particulars of the said offence(s) were that on October 3, 2017 at about 14.30 hours at Ndii area along Mombasa road in Taita Taveta county being the driver of motor vehicle registration number KBT 880 E make Ford, he drove the said motor vehicle along the said road without due care and attention, failed to keep to his proper lane, swerved to the right side and collided head on with motor vehicle registration number KBW 247 U Make Isuzu FRR and KBT 247 Y, Toyota Premio and caused injuries to a one STF and also he caused the deaths of MC and HMM.

3. This court's duty is to re-analyse, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify.[2]

1 Cap 403, Laws of Kenya.

2 See *Okeno v Republic* {1972) E.A, 32at page 36, *Pandya vs Republic* {1957} EA 336, *Shantilal M. Ruwala v Republic* {1957} EA 570 & *Peter vs Sunday Post* {1958} EA 424.

4. PW1, STF recalled that on the material day and time he was travelling from Nairobi to Mombasa with his two brothers, that he was driving motor vehicle registration number KBT 247 Y; and around Ndii area past Manyani, there was car in front of their vehicle which was also moving towards Mombasa and it was overtaking some tracks. It collided with the truck coming from the opposite direction, lost control and an object flew from the said car and smashed his vehicle's windscreen, it injured his eye and face and landed on the back seat. The car also hit his vehicle. Later the police recovered a car battery from his vehicle. He sustained a broken left hand and finger and acid burns on the hands. His two brothers were not seriously hurt so they were conscious. He too was conscious. He was in hospital for two weeks. He identified his P3 in court.

5. PW2, FTF recalled that he was travelling from Nairobi to Mombasa in KBT 247 Y together with PW1 and his brother. He was seated in the back seat, that he noticed a ford in front overtaking a truck, he heard emergency brakes and a loud bang and a flying object hit their car. The ford car was spinning towards their direction, it hit their car and they lost control. He sustained acid burns on the right hand and face.

6. PW3, Proxides Auma Juma recalled that on the material day she was traveling from Nairobi to Mombasa in the company of Vivian and her children MCH in a Ford vehicle which was over speeding. She said he could not recall what happened. She sustained fractures on both hands and right ribs.

7. PW4, Vivian Amagove recalled that she was travelling with her children MAC, CM and HM and her house help and Leonard Alela and his wife. They were travelling in motor vehicle KBT 880 E. She said that at Ndii area their car was hit from behind, it lost control and went in front of an oncoming canter. She came to in a car being taken to hospital. She said her eldest child Mary Ann died at the scene Hope and herself were taken to Hospital, but Hope also died.

8. PW5, A. Mwasi, the father of the dead children identified their bodies and witnessed the post mortem.

9. PW6, PC Bernard Mwangi was the investigating officer, he proceeded to the scene and found 3 vehicles. He said the appellant who was driving KBT 880 E was at the scene and he gave them an account of what happened; that he was overtaking when he collided with motor vehicle KBW 247 U which was travelling from Mombasa to Nairobi and the impact turned his motor vehicle towards Nairobi direction and his car battery flew and landed on KBT 247 Y, it hit PW1 on the eye. He said two minors died in the accident. He prepared the sketch maps. He produced the inspection reports for the vehicles, P3 form for PW1 and post mortem reports for the two minors. He blamed the appellant for the accident. He said at the scene he found bags of clothes, a can of red bull and some wine in KBY 247 Y.

10. In his sworn defence, the appellant stated that he was driving KBT 880 E carrying 3 adults and 3 children and at Kibwezi he noticed a motor vehicle KBT 247 Y behind him driven by PW1 and his brother. He said the vehicle hit his car from behind causing him to lose control and it hit an oncoming vehicle KBW 247 U and as a result of the impact, the vehicle turned and faced the opposite direction and the impact threw passengers in the vehicle out, killing one child died on the spot while the other died on arrival at the Agha Khan Hospital, Mombasa. Also, PW2 sustained injuries. He said the driver of the Premio was not called as a witness, and that he testified in a civil suit arising from the same accident and the court blamed PW1 100%, which decision was up held by the High Court on appeal. He produced the 2 judgments in court. He denied that he was over speeding.

11. In his judgment, the learned magistrate dismissed the charge of careless driving. On the two counts of causing death by dangerous driving, the learned magistrate cited several authorities which highlighted the standard of prove in cases of causing death by dangerous driving and after evaluating the evidence,

she concluded that the appellant was at fault. Regarding the findings in the civil suit, she noted that the civil suits were instituted 2015, while police investigations took longer. She cited *Savanah Hardware v EOO*[3] in support of the holding that liability in civil cases cannot be equated to liability in traffic offences and concluded that the high reliance on the civil case judgment was of no probative value in the traffic case. She convicted the appellant on the two counts of causing death by dangerous driving and sentenced him to pay a fine of Kshs 200,000/= for each count, in default, to serve one year imprisonment. Additionally, she cancelled his driving license and disqualified him from holding or obtaining a driving license for a period of three years from the date of the conviction.

12. The appellant seeks to overturn the verdict citing several grounds, namely:- (a) whether the prosecution proved the offence to the required standard; (b) whether the prosecution evidence was inconsistent; (c) whether the prosecution failed to call a key witness namely the driver of KBW 247 U; (d) whether the sentence is excessive; (e) whether it was improper for the trial court to impose separate sentences for each count of causing death when both offences arose from the same transaction; and; (f) whether the trial court erred by taking the opinion of the investigating officer as conclusive. He prays that the conviction and sentence to be set aside and the fine of Kshs 400,000/= be refunded. In the alternative, he prays that in the event the conviction is sustained, the sentence be set aside and be replaced with a fine of Kshs 50,000/= and the balance thereof be refunded.

13. In his submissions, the appellant's counsel cited *Paul Thiga Ngamenya v Republic*[4] in support of the proposition that the mere occurrence of an accident is not enough to prove a charge of causing death by dangerous driving under section 46 of the *Traffic Act*; that, evidence must disclose a dangerous situation and the driver must be shown to be guilty of a departure from the normal standard of driving expected of a reasonably prudent driver. He urged the court to re-evaluate the charges and the evidence and find that the magistrate erred in finding that the prosecution proved its case beyond reasonable doubt. He also argued that the charge sheet did not mention head on collision,

14. Additionally, the appellant's counsel submitted that the charge sheet and the evidence were at variance because from the charge sheet there was no allegation that the appellant was dangerously overtaking nor does it mention there was a head on collision. He argued that there was no evidence that the appellant swerved to the wrong lane. He submitted that the charge sheet did not meet the requirements of section 134 of the *Criminal Procedure Code*[5] because the particulars were at variance with the evidence and he cited *Hassan Jillo Banamak & another v Republic*.[6] Also, counsel argued that the trial court did not evaluate all the evidence but it casually accepted the evidence of PW1 and PW2 without cautioning itself that they were brothers. He submitted that the charge sheet did not mention overtaking yet the finding was premised on alleged overtaking. He argued that the magistrate disregarded the testimony of PW4 which he submitted contradicted the testimony of PW1 and PW2, but it corroborated the testimony of the appellant.

15. He argued that evidence full of fundamental inconsistencies and variations cannot prove a case and relied on *MW v Republic*.[7] He also argued that the prosecution failed to call a key witness, namely the

3 [2019] e KLR.

4 [2018] e KLR.

5 Cap 75, Laws of Kenya.

6 [2018] e KLR.

7 [2019] e KLR.

driver of KBW 247 U and relied on *Republic v Cliff Macharia Njeri*[8] in support of the proposition that the prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent, and where the evidence tendered is inadequate, the court may infer that the evidence of the uncalled witness would be adverse to the prosecution. (Also cited *Bukenya & others v Uganda*[9]).

16. Counsel submitted that the court misapplied the principles set out in *Savannah Hardware v EOO*[10] regarding the findings of liability in a civil suit. He argued that evidence which cannot sustain a civil case cannot sustain a traffic case. He argued that PW6 was not an eye witness, and that the court misdirected itself on the role of PW6 as an expert and failed to make its own finding as was held in *Francis Mburu Njoroge v Republic*.[11]

17. On sentence, counsel faulted the court for imposing separate sentences for counts 2 & 3 yet the deaths arose from the same accident. He relied on *Atito v Republic*[12] in support of the holding that it is the single act of dangerous driving which must be punished but not the consequences and no man should be punished twice for the same offence.

18. During the last mention all the parties said they had filed submissions and I requested them to forward soft copies to the court. However, by the time I wrote this judgment, the respondent's hard copy submissions were not in the court file nor had soft copy of the same being forwarded to the court as directed. Accordingly, I wrote this judgment without the benefit of considering the respondent's judgment.

19. I start this determination by reproducing the provisions of section 46 of the *Traffic Act* which provides: -

> 46. Causing death by driving or obstruction
>
> Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence whether or not the requirements of section 50 have been satisfied as regards that offence and be liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by Part VIII of cancelling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of three years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later.

20. It is well established that dangerous driving is based on a form of reckless conduct or a speed or in a manner which is dangerous to the public. As is readily apparent from a reading of section 46 of the *Traffic Act*, an act of dangerous operation of a motor vehicle necessarily falls below the standard of care

[8] [2017] e KLR.

[9] [1972] 1 EA 549.

[10] [2019] e KLR.

[11] [1987] e KLR.

[12] [1975] 1EA 278.

expected of a reasonably prudent driver; among other things, it is expected that a reasonably prudent driver will not drive "in a manner that is dangerous to the public" as proscribed by the provision. The converse, however, does not hold true.

21. An act of negligent driving will not necessarily constitute the offence of dangerous driving. The question raised in this appeal requires the court to reiterate the important distinction between civil negligence and negligence in a criminal setting. The latter has often been referred to as "penal negligence" so as not to confuse the category of negligence-based offences in a criminal setting with the particular offence of criminal negligence under section 46.

22. It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin *actus non facit reum nisi mens sit rea.*

23. The fact that driving is a regulated and voluntary activity plays a key role in the adoption of a modified objective test for the mens rea of dangerous driving. The licensing requirement impact on the question of *mens rea* in two principal ways. First, because driving can only be undertaken by those who have a licence, as a general rule, the law can take it as a given that those who drive are mentally and physically capable of doing so and that they are familiar with the requisite standard of care. As Cory J put it:- "As a result, it is unnecessary for a court to establish that the particular accused intended or was aware of the consequences of his or her driving." In other words, the driver's capacity and awareness can simply be inferred from the licensing requirements.

24. Second, there is no injustice in inferring the requisite mens rea from the voluntary act of driving because, as Cory J explained, "[l]icensed drivers choose to engage in the regulated activity of driving" and by doing so, "place themselves in a position of responsibility to other members of the public who use the roads." Hence, those who choose to engage in this inherently dangerous activity and fail to meet the requisite standard of care cannot be said to be morally innocent.

25. Certain kinds of activities involve the control of technology (cars, explosives, firearms) with the inherent potential to do such serious damage to life and limb that the law is justified in paying special attention to the individuals in control. Failing to act in a way which indicates respect for the inherent potential for harm of those technologies, after having voluntarily assumed control of them (no one has to drive, use explosives, or keep guns) is legitimately regarded as criminal.

26. As we can see from the above discussion, the adoption of an objective test for negligence-based offences such as dangerous operation of a motor vehicle does not obviate the *mens rea* requirement. Fault is still very much a necessary part of the equation. However, because of the licensing requirement, which "assures . . . a reasonable standard of physical health and capability, mental health and a knowledge of the reasonable standard required of all licensed drivers," from a logical standpoint, criminal fault can be based on the voluntary undertaking of the activity, the presumed capacity to properly do so, and the failure to meet the requisite standard of care.[13]

27. However, I must make it clear that the requisite mens rea may only be found when there is a "marked departure" from the standard of care expected of a reasonable person in the circumstances of the accused. This modification to the usual civil test for negligence is mandated by the criminal setting. It is only when there is a "marked departure" that the conduct demonstrates sufficient blameworthiness to support a finding of penal liability. Therefore, the notion that mens rea should be assessed by objectively measuring the driver's conduct against the standard of a reasonably prudent driver.

13 *See R. v. Beatty, [2008] 1 SCR 49.*

28. In a civil setting, it does not matter how far the driver fell short of the standard of reasonable care required by law. The extent of the driver's liability depends not on the degree of negligence, but on the amount of damage done. Also, the mental state (or lack thereof) of the tortfeasor is immaterial, except in respect of punitive damages. In a criminal setting, the driver's mental state does matter because the punishment of an innocent person is contrary to fundamental principles of criminal justice. The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment.

29. For that reason, the objective test, as modified to suit the criminal setting, requires proof of a marked departure from the standard of care that a reasonable person would observe in all the circumstances. As stated earlier, it is only when there is a marked departure from the norm that objectively dangerous conduct demonstrates sufficient blameworthiness to support a finding of penal liability. With the marked departure, the act of dangerous driving is accompanied with the presence of sufficient mens rea and the offence is made out.

30. The underlying premise for finding fault based on objectively dangerous conduct that constitutes a marked departure from the norm is that a reasonable person in the position of the accused would have been aware of the risk posed by the manner of driving and would not have undertaken the activity. However, there will be circumstances where this underlying premise cannot be sustained because a reasonable person in the position of the accused would not have been aware of the risk or, alternatively, would not have been able to avoid creating the danger. Of course, it is not open to the driver to simply say that he or she gave no thought to the manner of driving because the fault lies in the failure to bring to the dangerous activity the expected degree of thought and attention that it required. It would be a denial of common sense for a driver, whose conduct was objectively dangerous, to be acquitted on the ground that he was not thinking of his manner of driving at the time of the accident.

31. I have said enough about the applicable tests. I will consider the evidence tendered in the lower court. PW6, the Investigating Officer visited the scene. He found the appellant at the scene. In his own words the appellant told him he was overtaking, that he collided with an oncoming vehicle, that he lost control, the car battery flew out and landed on the other car which lost control. This testimony supported the testimony of PW1 and PW2. The sketch maps support what was at the scene. The appellant's attempt to seek refuge in the findings on liability in the civil trial is weakened by several realities. One, the civil trial took place before the investigations in the traffic offence were completed. Two, as explained above, the tests in civil proceedings are different from criminal standards.

32. Three, a trier of fact may convict if satisfied beyond a reasonable doubt that, viewed objectively, the accused was driving in a manner that was dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place. Four, in making the assessment, the trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation. Five, if an explanation is offered by the accused, such as a sudden and unexpected onset of illness, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

33. Six, the offence is defined by the words of the legislative provision, not by the common law standard for civil negligence. In order to determine the *actus reus*, the conduct must therefore be measured as against the wording of section 46. Although the offence is negligence-based, this is an important distinction. As we have seen, conduct that constitutes dangerous operation of a motor vehicle as defined under section 46 will necessarily fall below the standard expected of a reasonably prudent driver.

34. Seven, as the words of the provision make plain, it is the manner in which the motor vehicle was operated that is at issue, not the consequence of the driving. The consequence, as here where death was caused, may make the offence a more serious one, but it has no bearing on the question whether the offence of dangerous operation of a motor vehicle has been made out or not. Again, this is also an important distinction. If the focus is improperly placed on the consequence, it almost begs the question to then ask whether an act that killed someone was dangerous. The court must not leap to its conclusion about the manner of driving based on the consequence. There must be a meaningful inquiry into the manner of driving. The consequence, of course, may assist in assessing the risk involved, but it does not answer the question whether or not the vehicle was operated in a manner dangerous to the public. Viewed from the tests discussed above and the evidence tendered, I find no basis to fault the trial Magistrate for returning a verdict of guilty.

35. I also find no merit in the argument that the evidence tendered varied with the particulars of the charge sheet. On the contrary, the charge sheet disclosed an offence known to the law and the evidence tendered including the defence were geared to proving or disproving the said offence respectively.

36. The petitioner's counsel argued that the trial court did not evaluate all the evidence and that she disregarded the evidence of PW4 which contradicted the testimony of PW1 and PW4. When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.[14]

37. The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. However, the best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.[15]

38. By requiring the trial court to consider and weigh all evidence is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led.[16] In order to apply the above-mentioned legal principles to the facts of this case, this court must determine, as regards the conviction in the first place, what the evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decisions / findings or judgment.[17]

14 As Nugent J (as he then was) in *S v Van der Meyden* 1999 (1) SACR 447 (W) stated at 450.

15 As was stated in *S vs Singh* 1975 (1) SA 227 (N) at 228

16 *Mofokeng vs S* (A170/2013) [2015] ZAFSHC 13 (5 February 2015).

17 Ibid.

39. In other words, this court must consider whether the magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the convictions and sentence. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence.[18]

40. Stated differently, in order to determine whether there is any merit in any of the submissions made by the respective parties in this appeal, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the said judgment.[19] This means that if a court of appeal is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. The appeal court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection's, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal.[20] I have gone through the submissions and evidence tendered before the trial court. I have also read the judgment, the evaluation of the evidence and submissions and the reasons for the decision. I am satisfied that the learned magistrate considered all the material before her. I find no merit in the argument that the lower court disregarded the testimony of PW4.

41. The appellant's counsel submitted that the prosecution evidence was full of contradictions. The court's duty is to determine whether there were contradictions in the evidence tendered, and if so, whether the contradictions (if any), are so material that the trial magistrate ought to have rejected the evidence. As was held by Ugandan Court of Appeal in *Twehangane Alfred v Uganda*,[21] it is not every contradiction that warrants rejection of evidence. The court stated: -

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

42. It's true that, inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.[22] The question to be addressed is whether the contradictions mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the

18 Ibid.

19 Ibid.

20 Ibid.

21 *Crim. App. No 139 of 2001, [2003] UGCA, 6.*

22 See *Uganda vs Rutaro* {1976} HCB; *Uganda vs George W. Yiga* {1979} HCB 217

charge. Defining contradictions, the Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria*[23] stated:-

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

43. In the above cited, it was held that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.[24] It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.[25] The appellant's attempt to discredit the prosecution evidence citing inconsistencies does not pass the tests in the above cases.

44. The appellant faulted the prosecution for allegedly failing to call a crucial witness, namely, the driver of KBW 247 U. The starting point is that section 143 of the *Evidence Act*[26] provides that "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact." The Court of Appeal in Julius Kalewa Mutunga v Republic[27] stated as follows: -

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

45. The appellant's counsel relied on B*ukenya & Others v Uganda*[28] in which the former East African Court of Appeal laid down the following principles: -

    i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

    ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

    iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

[23] {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.

[24] See *Osetola vs State* {2012} 17 NWLR (Pt1329) 251.

[25] See *Theophilus vs State* {1996} 1 nwlr (Pt.423) 139.

[26] Cap 80, Laws of Kenya.

[27] Criminal Appeal No. 31 of 2005

[28] {1972} E.A.549.

46. However, counsel omitted to mention the fact that in the above case, the court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. As Mahoney J said, the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance.[29] This position was cited with approval by Miler JA in *Hewett v Medical Board of Western Australia*.[30] It is stated in cross on evidence.[31]

47. The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer. This position was upheld in the following cases, namely; *Schellenberg v Tunnel Holdings*,[32] *Ronchi v Portland Smelter Services Ltd*[33] and *Hesse Blind Roller Company Pty Ltd v Hamitovski*[34] and its also reiterated in cross on evidence.[35] When no challenge is made to the evidence of witnesses who are called, the principle in *Jones v Dunkel* cannot be applied to make an inference in respect of other witnesses who could have been called to give the same evidence.[36]

48. A look at the record shows that the prosecution evidence established the tests discussed earlier. As explained in cross on evidence[37] and the authorities cited above, the rule does not require a party to give merely cumulative evidence. In order for the principle to apply, the evidence of the missing witness must be such as would have elucidated a matter.[38]The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case.

49. In conclusion, I find it necessary to recall the words of the South African case of *Ricky Ganda v The State*[39]thus held:-

> "...The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to

29 *Fabre v Arenales* {1992} 27 NSWLR 437, 449-450, Priestly and Sheller JJA agreeing).

30 {2004} WASCA 170.

31 7th Edition, Page 1215, by Heydon J D.

32 Cubillo (No. 2) 355

33 {2005} VSCA 83

34 {2006} VSCA 121 28

35 Supra at page 1215

36 See Cross on Evidence,Supra.

37 Supra.

38 See *Payne vs Parker*, 202 Cubillo)No. 2) 360.

39 {2012} ZAFSHC 59, Free State High Court, Bloemfontein.

consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses....it is acceptable in totality in evaluating the evidence to consider the inherent probabilities....

The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt"

50. To sustain an acquittal, the explanation offered by an accused person must cast reasonable doubts on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[40]

51. Regarding sentence, the appellant faults the trial court for imposing a sentence on the two counts of causing death by dangerous driving, arguing that the two deaths occurred as a result of the same transaction. Section 135 of the *Criminal Procedure Code* provides for joinder of counts. It reads: -

135. (1)Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

(2) where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count."

52. As was held in *Genesio Kariithi Wambu v Republic*[41] "where more than one offence is committed in the same transaction, upon conviction, the person charged is supposed to be sentenced separately on each count with an order that the sentence would run either concurrently or consecutively. Where several charges arise from the same transaction like in this case where two deaths occurred from the same accident, the appellant ought to have been sentenced on each count and the sentence to run concurrently. The sentence imposed by the trial magistrate was clearly wrong." The appellant was sentenced to pa a fine of Kshs 200,000/= for each count and in default to serve a jail term of one year imprisonment.

53. Flowing from my re-evaluation of the evidence, analysis of the law and authorities, I find no reason to interfere with both the conviction and sentence. The upshot is that this appeal is dismissed.

Right of appeal 14 days

SIGNED AND DATED AT VOI THIS 19TH DAY OF SEPTEMBER 2022.

JOHN M. MATIVO

.....

JUDGE

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 21STDAY OF SEPTEMBER 2022.

OLGA SEWE

[40] Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary

[41] [2018] e KLR.

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JUDGE

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR