



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 134 OF 2015**

**GODFREY KAHURO KAMIRI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrates' Court at Makadara Traffic Case No. 7782 of 2009 delivered by Hon. A. W. Maina, RM on 20<sup>th</sup> August, 2015)*

**JUDGMENT**

Godfrey Kahiro Kamiri, the Appellant herein was charged with two counts of causing death by dangerous driving Contrary to **Section 46 of the Traffic Act Cap 403 Laws of Kenya**. The particulars of both counts were that on the 15<sup>th</sup> May, 2009 at about 5.45 a.m. at Chokaa in Ruai Kayole Division, within Nairobi Area being the driver of motor vehicle Reg. No. KAP 308P Toyota Corolla Saloon having regard to all the circumstances of the case including the nature, condition and use of the road and amount of traffic which was reasonably expected to be on the road caused the death of Teresiah Kabira and Esther Njeri Wanjiru respectively.

The Appellant was convicted in both counts after a full trial. He was sentenced to serve four years imprisonment on each of the counts and sentences were to run concurrently. He was dissatisfied with both the conviction and sentence as a result of which he preferred the instant appeal. He set out ten grounds of appeal in his Petition of Appeal filed on 26<sup>th</sup> August, 2015.

While I would have wished to go through the grounds of appeal as well as the evidence before arriving at a decision on this appeal, I have noted grave anomalies in the proceedings which vitiated the entire trial thus rendering it a nullity. The trial was initially handled by learned magistrate, Hon. Lorot who took the evidence of PW1 on 18<sup>th</sup> February, 2010. Thereafter, on 6<sup>th</sup> September, 2010 the matter was mentioned before the then Hon. Muya, Chief Magistrate (now a judge) and the Appellant being absent a warrant of arrest was issued. He extended the warrant of arrest on 20<sup>th</sup> September, 2010 and forfeited the Appellant's cash bail. The matter was stood over for mention on 4<sup>th</sup> October, 2010. On this date the proceedings of the day were recorded as follows:

***"4/10/2010***

***Before: Hon. M. Muya CM***

***Prosecutor: CI Mukui***

***Court Clerk: Christine/Esther***

***Accused on bond under warrant of arrest***

***Interpretation: English/Kiswahili***

***File closed ready court case withdrawn under Section 87(a) CPC.”***

At that point, the Appellant stood discharged and if the proceedings were to continue, fresh plea ought to have been taken. For avoidance of doubt **Section 87(a) of the Criminal Procedure Code** provides as follows:

***“In a trial before a subordinate court, a public prosecutor may, with the consent of the court or on the instructions of the Attorney General at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal –***

***a) If it is made before the accused person is called upon to make his defence, he shall be discharged but discharge an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.”***

Since the proceedings thereafter continued with the trial, it follows that the prosecution did not intend to entirely discharge the Appellant from the offence. As I have noted, the legal requirement if the proceedings were to continue was to take fresh plea. Unfortunately, on the next date in court, that is 7<sup>th</sup> December, 2010 the court proceeded with the matter as if the case had not been withdrawn. Thus, the omission to take plea afresh rendered any subsequent proceedings after 4<sup>th</sup> October, 2010 null and void. I need not emphasize therefore that the trial was a nullity.

The above notwithstanding, the record also shows that Section 200 of the Criminal Procedure Code was not complied with when Hon. A. W. Macharia, Resident Magistrate took over the conduct of the trial on 2<sup>nd</sup> March, 2015. I would however wish to point out that the evidence of PW7 was taken by Hon. D. Kinaro and not Hon. W. Macharia as shown in the typed proceedings. This fact is confirmed upon cross-checking with the handwritten proceedings. That said though, this court would not delve into evaluating whether or not the evidence on record, if a retrial is ordered, would most likely result in a conviction. I state so because should the police decide to recharge the Appellant, my comments would most likely influence the trial. For the same reasons, it would not be prudent to go into great length attempting to evaluate the submissions made before this court.

In the end, this appeal succeeds on grounds that the entire trial conducted after 4<sup>th</sup> October, 2010 was a nullity. I quash both the conviction and set aside the respective sentences imposed. The Appellant is forthwith set free unless otherwise lawfully held. It is so ordered.

**Dated and Delivered at Nairobi this 27<sup>th</sup> day of September, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

- 1. M. Wandugi for the Appellant*
- 2. Miss Atina for the Respondent.*