REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 193 OF 2012

DAVID MBURU MUIRURI .....….. APPELLANT

VERSUS

REPUBLIC …….…….....…RESPONDENT

*(From original Conviction and Sentence in Traffic Case No. 474 of 2012 of the Principal Magistrate's Court at Voi – **Hon. Nyakundi - SRM**)*

JUDGMENT

The Appellant was Convicted and Sentenced to eighteen (18) months imprisonment for the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act. He pleaded guilty to the charge and was Convicted on his own plea.

The particulars of the charge are that:-

> ***"On the 24th day of August, 2012 at about 12:30 p.m. At Voi Bridge within Kasarani area Mombasa - Nairobi Highway Taita – Taveta County, being the driver of motor vehicle registration KBS 532 W Toyota Corrola Wish, drove the said motor vehicle along the said road without due care, attention and speed in that he lost control of the vehicle by veering off the road and rolling several times before landing into Voi River, whereby one KILLIAN MUCHONJI MWAWASI who was a passenger in the said vehicle sustained serious injuries and died while undergoing treatment at Voi District Hospital".***

It is common ground that a traffic accident did occur on the 24th day of August, 2012 wherein the Appellant was a driver of motor vehicle Registration number KBS 532 W Toyota Corolla Wish and in which one **KILLIAN MUCHONJI MWAWASI** was a passenger and died as a result of injuries sustained during that accident.

The brief facts of this case as captured by the trial magistrate at page 1 line 16 are as follows,

> ***"On the 24th day of August, 2012 at around 12:30 p.m., the Accused was driving motor vehicle registration number KBS 533 W Toyota Corolla Wish. When he reached the scene of the accident while heading from Mombasa to Nairobi, he lost control and the motor vehicle veered off the road and rolled several times before plunging into Voi River.***

As a result of the accident passengers on board suffered serious injuries and were taken to Moi District Hospital where they were treated and discharged except one KILLIAN MUCHONJI

MWAWASI who died while undergoing treatment at the Hospital ...”

The particulars of the charge read that,

> ***“Being the driver of motor vehicle registration number KBS 532 W Toyota Corolla Wish, drove the said motor vehicle along the said road without due care and attention and speed in that you lost control of the vehicle and veered off the road and rolled several times before landing into Voi River..”.***

The facts which were read to the Appellant do not show in which manner he was at fault in his driving.

Section 46 of the Traffic Act provides,

> ***“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..... 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 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 regard that offence ……..”.***

A perusal of the facts given by the prosecution do not clearly indicate that there was no mention as to the manner in which the appellant was driving.

It is not mentioned or shown whether the appellant drove the vehicle recklessly, whether he drove it at a speed or in a manner which was dangerous to the public.

In short the facts do not disclose the offence with which the appellant is charged. The state concedes to this appeal but submits that this is a proper case for retrial.

In the Court of Appeal for Eastern Africa case of **SALIM MUHSIN –VS- SALIM BIN MOHAMED** (original prosecutor) Criminal Appeal No. 63 of 1950 it was held,

> ***“The High Court has discretion to order for a retrial, but in this case the discretion had not been judicially exercised. The Conviction had been quashed by reason of misdirection by the magistrate. Although this may not have been the fault of the prosecution, the important consideration is that it was not the fault of the Accused”.***

Bearing in mind the circumstances obtaining in this case whereby a passenger passed on and the fact that the case did not proceed to full hearing and determination and the fact that the Appellant is out on bond. I deem this a good case for retrial.

It is accordingly proved that this appeal is found meritorious. The Conviction is quashed and Sentence is set aside. There will be a retrial.

The matter to be mentioned before the In charge Principal Magistrate's Court Voi on **9th April, 2014** for taking of plea. Bond terms to remain the same.

Judgment delivered dated and signed this **2nd** day of **April, 2014**.

…….....

M. MUYA

JUDGE

2ND APRIL, 2014

In the presence of:-

Learned Counsel for the State Miss Mwaura

Leaned Counsel for the Appellant Ngoiri Njoroge

Court clerk Musundi