REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CORAM: F. AZANGALALA

HC. CRIMINAL APPEAL NO. 95 OF 2007

B E T W E E N

DOMINIC CHEGE.....APPELLANT

A N D

REPUBLIC.....RESPONDENT

[Being an appeal from the Judgment of the Chief Magistrate - A. O. Muchelule dated 1st November, 2007 – in Traffic Case No. 639 of 2003 at Eldoret Chief Magistrate's Court]

JUDGMENT

Dominic Chege Gathu, (hereinafter **"the appellant"**) was charged in the Chief Magistrate's Court at Eldoret with the offence of causing death by dangerous driving contrary to section 46 (1) of the Traffic Act (Cap 403 of the Laws of Kenya). It was alleged that the appellant on the 19th January,2003 at around 9.00 p.m., at Soin area, along Eldoret/Kapsabet road, within Uasin Gishu district of the Rift Valley Province, being a driver of motor vehicle registration umber KAG 179 H, Scania bus, did drive the said motor vehicle along the said road dangerously or in a manner which was dangerous to the public and other road users having regard to the circumstances of the case including the nature , condition and use of the road and the amount of traffic which was actually at the time or which might be expected to be on the road and thereby caused the death of **Sarah Jepkemoi Kimaru** (hereinafter **"the deceased"**).

The prosecution called five witnesses and after hearing their evidence, the learned Chief Magistrate found that the appellant had a case to answer and put him on his defence. The appellant made a sworn statement in which he denied committing the offence. Upon analyzing the evidence of the prosecution witnesses and that of the appellant, the court found the appellant guilty as charged. He was accordingly convicted and sentenced to serve 24 months in prison. His driving license was also cancelled and the appellant could only be eligible to get another license after 3 years of his conviction.

The appellant was not satisfied with his conviction and sentence and appealed to this court on some 11 grounds. The main issues raised are however that the charge was defective; that the evidence did not support the charge; that the case was not proved; that the defence was not considered and that the sentence was harsh and excessive in the circumstances.

During the hearing of the appeal, the appellant was represented by M/s **Mogure and Mr. Oluoch**, the learned Senior Deputy Prosecution Counsel, appeared for the Republic. Learned Counsel for the appellant submitted that the charge was duplex on the authority of **Mwaniki –vrs- Republic [2001] 1 EA 159;** that there were inconsistencies in the testimonies of P.W.4 and P.W.5 and that the appellant could not be blamed for the accident.

Mr. Oluoch, on his part, supported the conviction of the appellant and the sentence imposed upon him contending that all the elements of the offence were proved to the required standard and further that the appellant's own statement in defence suggested that he was at fault. With regard to the challenge made against the charge, the learned counsel for the state argued that the same was not duplex and that even if it had been, the appellant could not challenge the same now given that he was represented for the entire period of the trial.

As the first appellate court, it is my duty to re-examine and re-evaluate the evidence upon which the appellant was convicted and reach my own independent conclusion bearing in mind that I neither saw nor heard the witnesses testify and should give allowance for that (**See Okeno –vrs- Republic [1972] EA 32**). The prosecution case was briefly as follows: - The deceased before she met her death was an employee of Telkom Kenya. On the 19th January, 2003, she was driving a staff vehicle along Eldoret/Kapsabet road taking her colleagues to their homes. The colleagues included **Evalyn Chesang Kipserem** (P.W.1) and **Margaret Chelagat Koskey** (P.W.2). P.W.2 sat in the driver's cabin next to the deceased and P.W.1 sat behind the driver. When they reached Chines Garage P.W.2 saw an on-coming vehicle with full lights. The vehicle was in the lane of their vehicle and collided with it. P.W.2, lost consciousness for some time. She recalled that prior to the accident; their vehicle was being driven at a moderate speed. Their driver, the deceased, died on the spot. P.W.2, sustained a left hand fracture and soft tissue injuries to her legs. P.W.1 on her part did not see the on-coming vehicle before the collision. She found herself outside the vehicle and only saw an Akamba bus lying on their vehicle five minutes after the accident. She also realized that their driver had died. She too recalled that prior to the accident; their vehicle was being driven at a moderate speed. Prof. **Suiglana Koslova**, P.W.3, of Moi Teaching and Referral Hospital, performed a post mortem on the body of the deceased and opined that her death was due to a head injury which had caused bleeding in the brain.

James Njau Kariki, (P.W.4), a gazetted motor vehicle examiner examined the vehicles which were involved in the accident and noted that all vehicles had no pre-accident defects which could have contributed to the accident. Vehicle registration number KAG 179U Toyota Van were extensively damaged as a result of the accident.

P.C. **Thomas Otieno**, (P.W.5), then at Eldoret highway Traffic Base visited the scene, drew a sketch plan, caused the vehicles to be taken to Eldoret Police Station and arranged their inspection by – P.W.4. He produced the Inspection reports. In his view, the bus KAG 179h hit the Land Cruiser KAN 154 Y which was on its correct side of the road.

In his sworn statement, the appellant, as already stated, denied committing the offence.

The above is a summary of the case before the learned Chief Magistrate. Did that evidence support the charge? Before considering that ultimate issue, I shall first dispose of the appellant's objection against the charge sheet. Counsel for the appellant relied upon the case of **Mwaniki –vrs Republic** (Supra) in support of the appellant's argument that the charge was duplex. In that case, it was held as follows:-

" Where two or more offences were charged in the alternative in one count, the charge was bad for duplicity and a substantial defect was created that must be assumed to be embarrassing or prejudicial to an accused as he would not know what he was charged for and if convicted, of what he had been convicted".

The court further stated that section 46 of the Traffic Act creates four distinct offences namely:

(ii) Reckless driving;
(ii) Driving at a speed;
(iii) Driving in such a manner;
(iv) Living a vehicle on the road in a manner or in such condition as to be dangerous to the public.

The appellant was charged among other things for driving dangerously or in a manner which was dangerous to the public. The phrasing of the charge may be clumsy but no two offences were alleged in the alternative. Section 46 of the said Act uses "in a manner which is dangerous to the public." It is like stating in a robbery charge – dangerous or offensive weapon. The charge merely described the same offence twice over. That being my view, I do not find the charge duplex. In any event, the appellant was neither embarrassed or prejudiced and that is why no objection was raised against the charge at the trial. As to whether the prosecution adduced evidence which supported the charge, the testimonies of P.W.2 and P.W.5 were crucial. P.w.2 was an eye witness. She stated in part as follows:-

"On reaching Chines Garage, I saw an on-coming motor vehicle. We were along Eldoret /Kapsabet road. I saw the oncoming motor vehicle with full lights. The motor vehicle was on our lane. We were on the left lane to Kapsabet. After I saw the on-coming vehicle, there was an accident. ------ ----------
Prior to the accident, our motor vehicle was being driven at a moderate speed.…"

The testimony of P.W.2 proved to the required standard that the deceased drove at a moderate speed on her correct side of the road and the on-coming vehicle was driven with full lights on its wrong side of the road. The oncoming vehicle was therefore driven in a manner dangerous to the public. P.w.5 supported P.w.2. In view of the observations made at the scene, he concluded that the bus KAG 179 H hit the Land Cruiser on its correct side of the road. It is significant that he visited the scene within about 30 minutes of the accident. The appellant himself confirmed that he was the driver of the bus. He could not slow down or stop completely when he reached the accident scene. Instead of doing so he drove into the lane of the Land Cruiser and collided with it causing the death of its driver.

In view of what I have found above, I do not find any merit in any of the grounds of appeal. The criticism leveled against the trial court's findings and how the findings were arrived at is not well taken. I have not detected any shifting of the burden of proof, reliance on inadmissible evidence or failure to consider the defence. I have also not detected any breach of the appellant's fair trial rights under the Constitution. In the end, the appeal against conviction is dismissed. With regard to sentence, the same has already been served and was in any event lawful. The conviction of the appellant is upheld and the sentence affirmed. Right of appeal explained.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF MAY 2011.

F. AZANGALALA

JUDGE

Read in the presence of:

1. Mr. Kiboi holding brief for Mr. Nyachiro for the appellant and
2. Mr. Oluoch, Senior Deputy Prosecution Counsel, for the state.

F. AZANGALALA

JUDGE.