REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.181 OF 2010

CHARLES WACHIRA NDERITU ……….....……..........…..………………APPELLANT

VERSUS
REPUBLIC……………………..………..….……….................................RESPONDENT

(An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.3671 of 2007 by Hon C.A. Otieno, Resident Magistrate, dated 28th May, 2010)

JUDGMENT

The appellant, **Charles Wachira Nderitu,** was tried by the court below (C.A. Otieno, RM) for the offence of causing death by dangerous driving contrary to **section 46** of the **Traffic Act**.

It was the prosecution case that on the 8th October, 2007 at about 8.00 p.m. along the Nakuru-Nairobi Highway near Kobil Petrol Station in Nakuru, the appellant, being the driver of motor vehicle Registration **No.KAX 352B Mitsubishi Canter**, drove the said motor vehicle in a manner which was dangerous to the public and caused it to collide with motor vehicle **No.KAG 995P Toyota Corolla** saloon thereby causing the death of the former Minister for Education, **Hon, Taita Towett** (the deceased).

The driver of KAG 995P **Mathew Thuita Kariuki** (Kariuki) recalled how he was driving towards Nakuru from Nairobi with the deceased and his personal assistant, **Peter Kimani Ngunyo** (Kimani) when he noticed **KAX 352B** overtaking other vehicles from the opposite direction. Kariuki applied his brakes to avoid a collision but it was too late as the two motor vehicles collided, head-on. All the passengers in **KAG 995P** sustained injuries and were hospitalized at the nearby Pine Breeze Hospital. While Kariuki and Kimani were later transferred to the Rift Valley Provincial General Hospital, the deceased was transferred to Evans Hospital where he died while undergoing treatment. The accident was reported to the police. **Cpl. Watson Kipkemoi** visited the scene and drew a sketch plan of the two motor vehicles at scene. **P.C. Samson Too** also took photographs of the scene.

From the position of the motor vehicles and the statements of the witnesses, Cpl. Kipkemoi decided to charge the appellant with the offence in question.

Testifying in his defence the appellant stated that as he drove from Nakuru towards Nairobi direction near Kobil Petrol Station, he noticed **KAG 995P** traveling from the opposite direction in a zig zag manner; that **KAG 995P** left its lane and crossed over to the lane on which the appellant was

traveling and there was a collision.

Although called by the prosecution as a witness, **PW4 Daniel Muchiri**, was the turnboy in the appellant's motor vehicle and his testimony naturally did not support the prosecution case as to how the accident occurred. According to him **KAG 995P** left its lane and approached **KAX 352B** as if it (KAG 995P) was going to the petrol station.

The learned trial magistrate considered the evidence presented before her and found that it proved the charges against the appellant who she convicted and sentenced to **18 months imprisonment**. She also disqualified him from holding a driving licence **for 3 years** from the date of the order.

Both the conviction and sentence aggrieved the appellant who has brought this appeal on five grounds which are condensed as follows:

i) that there was no evidence to prove that the appellant was negligent

ii) that the appellant's defence was not considered, and

iii) that the sentence was excessive and harsh.

Learned counsel for the appellant submitted that the prosecution witnesses gave incredible evidence as to the cause of the accident; that no evidence of recklessness was proved; that from the point of impact and the point where the motor vehicle finally rested, it is clear that **KAG 995P** crossed to the appellant's side of the road and hence was responsible for the accident.

On sentence, counsel submitted that it was harsh to impose a maximum imprisonment sentence and order the cancellation of the appellant's driving licence; that the norm is to impose a sentence of a fine unless there was evidence of recklessness, dangerousness, intoxication or that the accused was a repeat offender.

On his part learned counsel for the respondent submitted that from the evidence presented at the trial, the appellant caused the accident as he was overtaking other motor vehicles in disregard to the safety of the on-coming motor vehicles; that the sentence was appropriate in view of the appellant's reckless driving.

I have considered the foregoing submissions as well as the authorities cited. There is no doubt that there was a collision of motor vehicles, KAG 995P and KAX 352B; as a result of which the deceased died. The broad issue for determination is whether the death of the deceased was caused by the dangerous and reckless driving of the appellant.

As stated earlier, of the three occupants of KAG 995P, **Kariuki** (its driver) and **Kimani** lived to tell the tale. Their evidence is in agreement that KAX 352B was being driven on the lane of the on-coming traffic as it was overtaking other vehicles; that when the driver of KAX 352B noticed KAG 995P he attempted to return to his lane but it was too late as the latter vehicle was very close.

That evidence received support from the testimony of **Cpl. Kipkemoi** and that of **P.C. Too. Cpl. Kipkemoi** confirmed that KAG 995P was extensively damaged. That is clear from the photographs produced in evidence. It is also clear from those photographs that KAX 352B was damaged on the right front part. While KAG 995P was extensively damaged on the front part, it is apparent that the damage is concentrated to the right front part of the vehicle.

From the sketch plan the broken glasses and debris are on the right side as one faces Nairobi which means that the impact was on the lane of KAG 995P.

It was explained by **Kariuki** that the appellant tried to return to his correct lane just before the collision. That explains the final resting position of the two vehicles, in view of the size of KAX 352B

and the load it carried *vis 'a vis* the size of KAG 995P. The latter was pulled to the left side of the road facing the Nairobi direction due to the heavy impact.

The sketch plan further depicts the point of impact approximately 2.8m inside the lane of the on-coming traffic, that is, on KAG 995P's lane.

I am persuaded from evidence of **Cpl. Kipkemoi** and that of **P.C. Too** that the collision was on the path of KAG 995P. The two were independent witnesses. The explanation of the appellant that KAG 995P was being driven in a zig-zag manner is not convincing in light of the prosecution evidence.

There is evidence on record that there were many vehicles on the road at the time. If KAG 995P was being driven in the manner claimed by the appellant, one would have expected other vehicles to be involved. The damage on both vehicles, on the other hand, point to a head-on collision in consonance with the explanation of the prosecution witnesses.

PW4, Muchiri, the turn-boy in KAX 352B, explained that KAG 995B appeared to intend to enter a petrol station by being driven towards the lane of KAX 352B. That explanation cannot be credible as KAG 995B had already passed the petrol station. Although he was with the appellant in the same motor vehicle, he did not claim that KAG 995B was being driven in a zig-zag manner.

By attempting to overtake when it was unsafe to do so, the appellant failed to exercise due care and attention hence was reckless in his judgment and drove in a dangerous manner. I find no error in the judgment of the learned magistrate on the question of causation.

On sentence, it was submitted by the appellant's advocate that a custodial sentence was harsh and, a fine would have been appropriate. Counsel cited **Benjamin Robi Githenji v R**, Criminal Appeal No.636 of 2001. In that case Etyang, J quoted **Lanton L. J.** in **R v. Guilfayle** (1973) 2 All ER 844 in which the law on this aspect of the appeal was stated as follows:

"The experience of this court has been that there have been many variations in penalties. Some variations are inevitable because no two road accidents are alike, but there are limits to permissible variations and it may be helpful if this court indicates what they are. Cases of this kind fall in two broad categories. First, those in which the accident has arisen through momentary inattention or misjudgment. Secondly, those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or his passengers or with a degree of recklessness. A subdivision of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs.

Offenders too can be put into categories. A substantial number have good driving records, a fair number have driving records which reveal a propensity to disregard speed restrictions, road signs or to drive carelessly, and a few have records which show that they have no regard whatsoever for either the traffic law or the lives and safety of other road users. In the judgment of this court, an offender who has a good driving record should normally be fined and disqualified from holding or obtaining a driving licence for the minimum statutory period or a period not greatly exceeding it, unless of course there are special reasons for not disqualifying. If his driving record is indifferent the period of disqualification should be longer, say two or four years, and if it is bad, he should be put off the road for a long time.

For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, a custodial sentence with a long period of disqualification may be appropriate, and if this kind of driving is coupled with a bad record the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed."

In **Orweryo Misiani v R** 1979 KLR 285 the same principle was reiterated. It follows that, although the law provides for a custodial sentence, the practice by the courts has been to impose

alternative forms of punishment unless there is a compelling feature in the commission of the offence which would justify a custodial sentence. A custodial sentence will be imposed, for instance, where the suspect is proved to have been intoxicated or where the driving was reckless.

From the evidence on record, I am persuaded that the appellant was reckless in overtaking at 7.00 p.m. before ensuring that it was safe to do so. For the reasons stated, this appeal fails and is dismissed accordingly.

Dated and delivered at Nakuru this 23rd day of September, 2011.

W. OUKO
JUDGE