REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Traffic Appeal 140 of 2006

WASHINGTON KIMANI CHEGE…………………..……. APPELLANT

-AND-

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

(*Appeal from the Judgement of Senior Principal magistrate Ms. Mwangi dated 15th December, 2003 in Traffic Case No. 1596 of 2003 at the Kibera Law Courts)*

JUDGEMENT

The charge brought against the appellant was, causing death by dangerous driving contrary to s.46 of the Traffic Act (Cap.46, Laws of Kenya

The particulars were that the appellant, on 26th June, 1999 at about 1.00 p.m., near Fatima Clinic along Magadi Road in Kajiado District, being the driver of motor vehicle No. KVT 495 Toyota Carina Saloon, drove the said motor vehicle recklessly or at a speed or in a manner which was dangerous to the public, having regard to all circumstances of the case, including the nature, condition and use of the road and the amount of traffic which was on the road or which was reasonably expected to be on the road, losing control of the said motor vehicle and hitting a pedestrian namely *Isaac Warui* who died while undergoing treatment at Kenyatta National Hospital.

The appellant was charged with a second count of reckless driving contrary to s.47(1) of the Traffic Act (Cap.403, Laws of Kenya). The particulars were that he had driven the said motor vehicle recklessly and had hit a pedestrian namely *Monicah Wangari Kariuki* who was walking on the opposite side of the road, causing her slight injuries.

PW1, ***Monica Wangari*** testified that on 26th June, 1999 at 1.00 p.m. she had gone to visit her uncle ***Laban Karani*** and, at the gate, she met her cousin ***Isaac Warui Njenga*** (the deceased). As the two stood talking, they saw a motor vehicle speeding from the Kiserian direction; this motor vehicle, which was being driven by the appellant, lost control and headed towards PW1 and the deceased; it hit her lightly, but hit the deceased more squarely, tossing him up, after which he fell. The motor vehicle, which had three passengers left the road and was only stopped by a fence. At the time of this accident, there was no other motor vehicle on the road.

On cross-examination, PW1 said she and the deceased had been standing some 60ft from the road when the appellant's motor vehicle hit them. The witness said, the said motor vehicle had obtruded upon her and the deceased without any warning or hooting.

PW2 testified that on 26th June, 1999 at 1.00 p.m. he was at his place of work when he received word that ***Isaac Warui*** who used to be his worker had been hit by a motor vehicle and had fallen at the gate. The same vehicle causing the injuries was used, to take ***Isaac Warui*** to Kenyatta National Hospital, being driven by the appellant. There were no skid-marks showing how the motor vehicle had careered from the road to the *locus* where ***Isaac Warui*** had been found lying. The material day had been clear, and visibility was good. PW2 had not heard any hooting of the said motor vehicle about the time the accident occurred. The motor vehicle had hit a fence, and broken two posts in that fence.

PW3 learned of the accident only after it had taken place; and he went to City Mortuary on 6th July, 1999 to identify his nephew's body for post-mortem examination. Burial took place on 7th July, 1999.

PW4, the Police pathologist who conducted the post-mortem examination, gave the opinion that the cause of death was s*epticaemia* occasioned by the motor vehicle accident.

PW5, ***Cpl. Garrison Maina*** had visited the *locus in quo* with the appellant, and had drawn sketches. He found motor vehicle skid-marks at the scene; the fence had been hit; the point of impact was off the road, just next to the hedge; the skid-marks were 64 feet in length; the day was sunny and dry.

As the appellant raised the point that there was a second vehicle at the time of the accident, a KBS bus, PW5 investigated this claim, and got the answer that no KBS bus had been at the scene at the material time. The appellants' motor vehicle had left the road by as much as 67 ft. The deceased was found off the road. The appellant's motor vehicle had been stopped by the fence.

PW6, ***John Gakuru,*** who worked with KBS showed the Court the plying schedules for that bus company, on the route in question, and this did not show the presence of a KBS bus in the area of the *locus in quo* at the material time.

It was the defence case that the appellant had been driving along Magadi Road, near Fatima Clinic where a KBS bus was stationed, and he was driving at 40Kph; then the said KBS bus moved into the road, and forced the appellant to swerve into a dust road. The appellant said his motor vehicle was not stopped by the fence, but he himself stopped it. He admitted that the deceased had been hit by his motor vehicle, and that the *deceased was off the road*.

DW2, the appellant's wife, said her husband's car had been obstructed by a bus, and this is what led to him hitting the deceased.

The learned Magistrate took note of certain features in the accident which would show carelessness on the part of the appellant as he drove his motor vehicle on the material date. The motor vehicle was not stopped by the appellant; it had hit a fence and broken fence posts, as testified by PW3.

The learned Magistrate concluded from the evidence, and rightly, in my opinion, that the appellant's motor vehicle left the road, careered outside, and fatally injured the deceased; this is equally acknowledged by both DW1 and DW2 in their sworn testimonies.

The trial Court had "no doubt that any prudent and careful driver…, had he been doing the speed [of 40Kph as the appellant claims], would have been able to control the motor vehicle after the alleged obstruction." The Court noted from the testimonies:

"***The day was clear, visibility good, as even the defence acknowledged…He did in fact [drive] the motor vehicle recklessly and in a manner dangerous to the public…and thus Count No.1 is proved beyond reasonable doubt***."

The learned Magistrate found count 2 of the charge to have been time-barred, and acquitted the appellant under s.215 of the Criminal Procedure Code (Cap.75).

Learned counsel ***Mr. Isindu*** urged that the trial Court, in convicting the appellant, had relied on

contradictory evidence which did not prove the offence beyond reasonable doubt.

Mr. Isindu contested the investigating officer's testimony, on the basis that witnesses who pointed out the scene of the accident had not been called. He cited the authority, ***Bukenya & Others v. Uganda*** [1972] E.A. 549 to support the contention that the appeal should succeed, *for want of such other evidence* being tendered by the prosecution.

Counsel submitted that four different offences existed under s.46 of the Traffic Act (Cap.403): (i) causing death by dangerous driving; (ii) driving a vehicle carelessly; (iii) driving at dangerous speeds; (iv) leaving a vehicle dangerously on the road. He urged that the prosecution ought to have elected which of the four offences the appellant was being charged with. Only if the wrongful acts are intertwined, can the charges be conjunctively framed; and ***R. v. De Commarmond*** [1959] E.A. 64 was relied on, here. Counsel urged that the charge was bad for duplicity.

Learned State Counsel ***Ms. Gakobo*** submitted that sufficient evidence had been adduced, proving the offence charged: PW1 had been at the scene, and saw the appellant's motor vehicle approach at speed, lose control, and hit her and the deceased. There was, counsel urged, no inconsistency in PW1's testimony; the accident took place at 1.00 p.m., on a clear and dry day; at that time there was no other motor vehicle on the road; PW1 and the deceased had been standing clear of the road. The testimony of PW5 supported that of PW1; PW5 visited the scene and drew sketches; he found that the point of impact was 64ft from the edge of the tarmac. PW5 found that the appellant's motor vehicle had no pre-accident defects. This, counsel submitted, led to the logical conclusion that only the appellant's carelessness could explain the accident.

On the question of duplicity in the charge, ***Ms. Gakobo*** submitted that the statement of offence was clear in the charge sheet; and the evidence as adduced showed that the offence as charged, was clearly defined. In any event, counsel urged, even were duplicity to be found in the charge, it could not be said that any prejudice had been caused to the appellant. Counsel submitted that by virtue of *s.382 of the Criminal Procedure Code (Cap.75)* no judgement could be vitiated on account of an error in the charge – unless *a failure of justice* has resulted. Since the appellant had been represented by counsel throughout, ***Ms. Gakobo*** submitted, any defect such as would prejudice the appellant, would have been raised at an earlier stage, but the issue of duplicity in the charge had not been raised.

Learned counsel urged that if duplicity would now be found in the charge, the effect would be *curable under s.382 of the Criminal Procedure Code,* and would not vitiate the conviction.

Counsel referred to the case ***Shah v. Republic*** [1969] E.A. 197 in which it had been held that a *duplex charge does not necessarily vitiate conviction*; and the pertinent question should be, whether there has been a *miscarriage of justice.*

Ms. Gakobo submitted that the trial Court had adequately considered the defence case, and had properly rejected the same. She urged that the conviction was safe and was based on sound evidence.

After considering the evidence tendered before the trial Court, the assessment of the same, and the judgement rendered by the trial Court, and after adverting to the submissions of counsel herein, I have come to the conclusion that the merits of the case establish the commission of the offence charged before the trial Court, by the appellant herein. I will take judicial notice that a well-maintained motor vehicle, such as that which the appellant was driving, moving at the very moderate speed of 40Kph, could not have so forcefully veered out of the road and broken fence-posts and killed a by-stander a good distance from the road unless it was being ill-managed. I saw no evidence that there was a KBS bus forcing upon the appellant as a driver such an erratic and fatal course; but even had there been such, the appellant going at 40Kph would have been able to control his vehicle, on a clear and dry day when there were no other obstacles on the road.

A trial leading to those findings, such as the learned Magistrate conducted, is not in my view a trial that prejudices the appellant.

In effect then, what remains of the appellant's gravamen is that the charge brought against him was duplex. The mode of rendering of the evidence, however, shows the charge to have been clear-enough; and I would therefore hold that if the charge, as framed, contained any duplicity, the same is subsumed under the general principle of law, *de minimis non curat lex* (i.e., trifles are not the preoccupation of the law). The case was proved in substance, and the appellant was properly found guilty.

I hereby dismiss the appeal; uphold the conviction; confirm the sentence as imposed by the trial Magistrate.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 17th day of September, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Ndung'u

For the Appellant: Mr. Isindu

For the Respondent: Ms. Gakobo