**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT NAIROBI**
**CRIMINAL DIVISION**
**CRIMINAL APPEAL 474 OF 2004**

**(From original conviction and sentence in Criminal Case no. 947 of 2003 of the Senior Resident Magistrate's Court at Limuru.)**

**DAVID KARIUKI MUTURA ...……...……..……APPEALLANT**

**VERSUS**

**REPUBLIC ……..……..…. RESPONDENT**

**JUDGMENT**

**MR. DAVID KARIUKI MUTURA**, hereinafter referred to as the Appellant was arraigned before the Senior resident Magistrate's Court at Limuru on four counts of causing death by dangerous driving contrary to Section 46 of the Traffic Act. The Appellant also faced a 5th count of failing to report an accident contrary to Section 73 (3) of the Traffic Act. Particulars of each count were set out in detail in the charge sheet. Following a full trial, the Appellant was convicted on the 4 counts of causing death by dangerous driving. However he was acquitted on the 5th count of failing to report an accident

. Following the conviction the Appellant was sentenced to a fine of Kshs.35,000/= in default to 3 years imprisonment for each of the 4 counts. Sentence was ordered to run concurrently whereas the fine was run consecutively. The Appellant's driving licence was also ordered suspended for a period of 2 years. Being aggrieved by the conviction and sentence, the

Appellant lodged this Appeal. The Appellant advanced 18 grounds in which he faulted the Learned trial Magistrates findings that led to his conviction. As the said grounds are on record, I do not wish to reproduce them here.

When the hearing of the Appeal commenced before me, the Appellant was represented by Mr. Muchui Learned Counsel, whereas the state was represented by Mrs. Toigat Learned State Counsel. The Learned State Counsel informed the Court that the State was conceding to the Appeal. Learned State Counsel advanced the following reasons for the state's position.

**1. THAT** the offense was not proved beyond reasonable doubt.

**2. THAT** the prosecution failed to call crucial eye witnesses from whom they had already recorded statements.

**3. THAT** the defence called 3 witnesses whose evidence was not rebutted by the prosecution in cross-examination.

**4. THAT** the defence evidence was sufficient to cause doubts in the prosecution case which doubt should have been resolved in favour of the Appellant.

In response, Mr. Muchui concurred with the position taken by the state in this Appeal. He only added that in the event that the Appeal was allowed then this Court should order that the fine paid by the Appellant should be refunded to him.

I have gone through the evidence on record, re-assessed and re-evaluated the same as expected of me as a first Appellant Court. It is common ground that an accident involving two motor vehicles namely KAK 128P Isuzu Lorry and KAN 576K Mitsubishi Minibus occurred on 6th April, 2003 at about 6 a. m. at Gachiongo Area along Naivasha - Nairobi road. It is also not in dispute that as a result of the accident 4 people who were all passengers in the minibus died. The issue which called for the determination of the trial Magistrate was who among the two drivers of the two vehicles was responsible for the accident. Following the trial, the Learned trial Magistrate was persuaded that the driver of the lorry was responsible.

For a Court of Law to convict an accused person of the offence of causing death by dangerous driving, the prosecution must prove recklessness, speed or manner of driving by an accused person that was dangerous to the Public. The prosecution called 8 witnesses. PW1 to PW4 all inclusive could not assist the Court with their evidence in this respect as they were mere formal witnesses who identified the 4 dead bodies from the minibus. Similarly the evidence of PW5 and 8 was of no assistance to the Court as they all admitted that they were asleep at the time of the accident. They could not therefore tell how reckless or the speed at which the Appellant was driving the lorry. The only relevant evidence on this aspect was offered by PW6 who was however the driver of the minibus. His evidence ought to have been treated with a lot of caution as he had vested interest in the outcome of the case. He could have as well been charged with the offence. In a manner of speaking his evidence could as well have been selfserving. The witness stated that the Appellant drove his lorry slightly to his side of the road past the yellow line. The witness further said that front cabins of both vehicles had no contact with each other but the rear cabins collided. In his defence, the Appellant testified that at Gachiengo Area whilst he was driving his lorry, he met an oncoming but speeding motor vehicle. This was the minibus being driven by PW6. That before they passed one another, the said motor vehicle lost control and came on his side of the road. He attempted to avoid head on collision and the minibus hit the right side of his vehicle. The evidence of the Appellant regarding the speed of the minibus was boosted by the evidence of DW1 who was a passenger in the minibus. He stated that:-

> ***"… Near Kijabe our motor vehicle overtook a small motor vehicle and then went zigzag, then I heard a collision…."***

Similarly Dw5 who was also a passenger in the minibus driven by PW6 testified as follows:-

> ***"…. At Soko Mjinga, we started to speed and I got worried. I wondered whether he was a normal drier. I looked and saw oncoming lorry and the vehicles collided. The Matatu driver was unable to control the motor vehicle at the speed. I think it is the speed. The collision was on the side of the truck"***

Finally DW3 also from the minibus testified as follows:-

> ***"….we started speeding from the flyover. My fellow passenger asked for a lesson to close her eyes. Then after 20 minutes, we had the accident…. The matatu driver."***

From the foregoing, I am unable to fathom the basis upon which the trial magistrate opted to believe the testimony of the driver of the minibus (PW6) as opposed to the testimony of Appellant which was corroborated in material particulars by the aforesaid defence witnesses. These defence witnesses were from the minibus and could easily pass for eye witnesses. The Learned trial Magistrate did not give any reason why he discarded their evidence which in my view was critical in determining who between the two drivers was actually to blame for the accident. It is noteworthy that the Appellant went out of his way to get independent witness to testify. The prosecution did not do such thing. In those circumstances I

would agree with the Appellant that the Learned trial Magistrate grossly erred in disregarding the evidence of the defence witnesses who were eye witnesses, to the accident without giving any reasons. As I have already stated the trial Magistrate ought to have treated the evidence of PW6 rather cautiously as it was bound to be self serving in the circumstances of this case. In view of the evidence tendered by the defence and which was not at all shaken in cross-examination or rebutted by the prosecution, I think and as rightly submitted by the Learned State Counsel, sufficient doubt was created as to who between the two drivers was at fault. That doubt ought to have been resolved in favour of the Appellant.

The Learned trial Magistrate seem to have placed a lot of reliance on the evidence of the investigating officer over the point of impact. However in my view, the evidence of their particular witness was speculative as he did not talk to any of the 2 drivers nor any eye witness so as to determine the point of collision. Yet, this very witnesses had in his possession recorded statements crucial eye witnesses. These witnesses were not called to testify. In the case of **GEORGE NGOSHE JUMA & ANOR VS ATTORNEY GENERAL, MISC. CRIMINAL APPLICATION NO. 345 OF 2001,** The Constitutional Court held that the prosecution has a duty to bring before Court all the evidence gathered to ensure that justice is done. The prosecution cannot be allowed to suppress evidence in their possession even if it is in favour of the accused. Unfortunately this what seems to have happened in the instant case. The investigating officer was selective in the evidence he wanted adduced before Court. There was evidence recorded from witnesses that was in favour of the Appellant. This evidence was suppressed for no apparent reason. I think in this regard the Appellant's complain that the Learned trial Magistrate erred in disregarding the fact that the prosecution had deliberately suppressed the evidence of the eye witnesses to the accident despite having taken statements from them has some justification. I think that in those circumstances, the trial Magistrate ought to have drawn the necessary inference that the evidence that would have been adduced by the said witnesses would have been unfavorable to the prosecution case.

In my view, having carefully considered various aspects of the case including the charge sheet that was laid before the Court plus the evidence adduced in support thereof I am constrained to agree with both Counsels herein that the conviction of the Appellant was not safe. I would in the circumstances allow the Appeal, quash the conviction and set aside the sentence imposed on the Appellant. The fine imposed on the Appellant if paid should be refunded forthwith.

Dated at Nairobi this 17th day of July 2005.

**……**

**M. S. A. MAKHANDIA**

**JUDGE**