

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
Criminal Appeal 283 of 2003

(From Original conviction (s) and Sentence (s) in Traffic Case No. 283 of 2003 of the Chief Magistrate's Court at Machakos (G.W. Ngenye) RM on 16/9/2003

KENNETH MWALIMU KIAMBATI APPELLANT
VERSUS
REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with causing death by dangerous driving Contrary to Section 46 (1) of Traffic Act. He was convicted and sentenced to 3 years imprisonment and his driving licence was cancelled for 3 years to commence after completion of the jail sentence. He appealed against both the conviction and the sentence. When the appeal came for a hearing, Mr O'Mirera, for the state rightly, I think, chose to concede on two grounds –

- a) That the prosecution was conducted by a person not qualified to prosecute under Section 85 of the Criminal Procedure Code.
- b) That in any case the charge was incurably defective for being duplex.

I have examined the record. I am satisfied that the trial was a nullity for being conducted by an unqualified person under Section 85 of the Criminal Procedure Code aforesaid. For that reason, the conviction is hereby quashed and sentence of 3 years and disqualification to drive for 3 years set aside.

I also do agree that a retrial is not available for two main reasons –

- a) That the charge was incurably defective for being duplex. The framer of the charge has connected the various offences created under Section 46 (1) by using a comma and it is not clear therefore whether the comma stands for the conjunction “and” or “or”. The doubt should be in favour of the appellant.
- b) That the only witnesses in the case were foreigners who left the country soon after the trial and cannot be availed to testify, thus making a retrial impractical.

For the above reasons, it is in the interest of justice to refuse a retrial, which I hereby do.

The end result is to all this appeal. I quash the conviction and set aside the sentences. The appellant who is in bond is set at liberty forthwith unless otherwise held in prison for any lawful reason. It is so ordered.

Dated and delivered at Machakos this 6th day of December 2005.

D.A. ONYANCHA

JUDGE