REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 170 OF 1998

THOYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Traffic Case No 6833 of 1997 of the Chief Magistrate's Court at Mombasa - G Katasi, Resident Magistrate, Mombasa)

JUDGMENT

On 18.5.97 at about 9.30 am an overloaded matatu Reg No KAG 158T was travelling from Changamwe to Mombasa Island when at Kibarani, Makupa Causeway, it came to grief. The driver lost control and one of its 21 passengers died on the spot. Others were injured. It was licenced to carry 16 passengers only.

The driver was subsequently charged before Mombasa Resident Magistrate with the offence of causing death by dangerous driving contrary to section 46(1) of the Traffic Act and another charge of carrying uninsured passengers contrary to section 4(1) of the Insurance Act (sic). He was convicted on both counts and was sentenced to serve 4 years imprisonment on the first count and was disqualified from driving for a period of 3 years. He was sentenced to a fine of Shs 5, 000 / = on the second count or in default 6 months imprisonment.

The learned trial magistrate found as a fact that the appellant was driving very fast and therefore lost control in the act of overtaking. She also found as a fact that there was some oil which had spilled on the road and made it slippery, hence the need to drive cautiously on that road. Other vehicles she found were passing through the same section and faced no problem and therefore the appellant drove dangerously at high speed and in total disregard of the slippery nature of the road. It was dangerous for him to drive fast and to overtake on a slippery section of the road.

The appellant attacked those findings in a petition of appeal raising six grounds but they were argued as 4 by learned Counsel Mr Mutinda. In essence, he submitted that there was no evidence of speed or any negligence on the part of the appellant. The evidence on both sides of the case was that there was an oil-spill on the road which was totally to blame for the accident. There was no proof beyond reasonable doubt that the appellant drove dangerously and the conclusions reached by the trial magistrate were erroneous in fact and in law. As for sentence he submitted that it was excessive and did not consider the mitigating factors raised.

Senior state counsel Mr Gumo supported the findings of the trial magistrate and the sentence.

I have carefully considered the matter and re-evaluated the evidence as I am bound to do on a first appeal. The starting point is to examine the charges laid against the appellant. It seems to me that the second count is misconceived as it purports to lay a charge of carrying "uninsured passengers" under section 4 (1) of cap 405. That section provides for insurance of motor vehicles against third party risks. There was no complaint or evidence that the motor vehicle was not insured for third party risks. There was no proof that five passengers in the vehicle were uninsured and if so which five. The complaint and evidence was rather that the vehicle was licenced to carry 16 passengers but was carrying 21. That was clearly an offence under section 100(2) of the Traffic Act cap 403. Such offence was not laid against the appellant and conviction cannot ensue for an offence which is not preferred and is not cognate. I set aside the conviction and sentence on the second count.

On the face of it, the first count charged the offence in the alternative in that it states the vehicle was driven "recklessly at a speed or in a manner which is dangerous to the public". That may well be duplex but no complaint has been laid that it caused prejudice to the appellant or occasioned a failure of justice. It is curable under section 382 Criminal Procedure Code.

On persuasive authority in the Tanzanian case of *Pyarali -vs- Republic* [1971] EA 169:

> "the test of whether a piece of driving is dangerous is objective and if the manoeuvre itself is dangerous the degree of negligence or care of the driver is irrelevant".

The judge there followed *Republic v Evans* (1963) 46 Cr App R 62 where it was held

> "If a man infact adopts a manner of driving which the jury think was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best".

Again the prosecution does not have to prove that the dangerous driving was the sole cause of death if it was the substantial cause of it. The Court of Appeal in *Atito -vs- Republic* [1975] EA 281 also laid down the law on the standard of proof:

> "to justify a conviction for the offence of causing death by dangerous driving there must not only be a situation which viewed objectively was dangerous but there must also be some fault on the part of the driver causing that situation".

"Fault" was defined in another Court of Appeal case *Orweryo Missiani - vs- Republic* [1979] KLR 285 at page 289:

> "Fault" certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame ….. Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient."

Those are the principles I have to apply. The evidence available and accepted by the learned trial magistrate was that the appellant was driving the *matatu* at speed. Five witnesses who were in the *matatu* testified so. One of them put the speed at between 90 - 120 Kmph. It was overloaded. It overtook several other vehicles on the same road and was in the process of one such overtaking manouvre when it hit a spot of spilled oil on the road. There is evidence, also accepted by the learned trial court that the oil-spill had been there for sometime. The appellant had passed through the same road three times earlier. There was evidence also that it had rained. Those are the conditions of the road the appellant had to contend with.

The police officer who visited the scene and drew a sketch produced as exhibit 6, showed that the vehicle rolled and came to rest 350 meters away. It had no pre-accident defects as proved by the vehicle examiner

exhibit 7. The deceased's head was split into two upon impact according to the post mortem report exhibit 8. I agree with the learned trial magistrate in view of these circumstances and evidence on record that the appellant drove in a dangerous manner. I would dismiss the appeal on conviction and now do so.

As for the sentence, the principles were considered in the *Missiani Case* (above) following *Repuplic -vs- Guilfoyle* [1973] All ER 844.

> "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 into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgement, and 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 sub-division 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 well be appropriate, and if this kind of driving is coupled with a bad driving record the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed."

And citing *Govid Shamji -vs- Republic* Madan and Chesoni JJ (as they then were)

> "The offence of causing death by dangerous driving is not an ordinary type of crime. While it cannot be given an aura of protection by putting it in a glass case of its own, the people who commit this offence do not have a propensity for it, neither is it a type of crime committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interests of justice as well as the interest of the public. There are of course cases where a custodial sentence is merited, for example, when there is a compelling feature such as an element of intoxication or recklessness".

The maximum sentence under section 46(1) is 10 years or imprisonment. That does not mean that other options available for sentencing cannot be considered depending on the circumstances of the case. They were not considered in this case and no reasons were given for failure to do so.

The appellant appears to have been a first offender since no records of previous conviction were produced by the prosecution or admitted by him. He was a family man with children. Although the appellant was correctly found to have been at fault as legally defined above, it was still relevant to consider during sentencing, that there was an oil-spill on the road whose effect the appellant may well have misjudged. There was no compelling feature such as an element of drugs or alcohol intoxication to aggravate the offence and thus attract severe custodial penalty.

In my view this is a case where the ends of justice would have been served by giving the option of a fine to the appellant. The appellant has served a period of about 2 years out of the term of imprisonment imposed on him. I set aside the sentence and substitute therefore a fine of Shs 10,000/= upon payment of which the appellant may be set at liberty forthwith. In default he will serve a period of imprisonment of 6 months from the date of this judgment.

I further propose to interfere with the order for disqualification from holding a driving licence which I now set aside and substitute therefor a period of 2 years from the date of conviction by the lower court.

To that extent only the appeal succeeds.

Dated and Delivered at Mombasa this 9th day of March 2000.

P.N.WAKI

JUDGE