



**Mugambi v Republic (Criminal Appeal E121 of 2023)
[2025] KEHC 1366 (KLR) (13 February 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E121 OF 2023
EM MURIITHI, J
FEBRUARY 13, 2025**

BETWEEN

ERICK MUTWIRI MUGAMBI APPELLANT

AND

REPUBLIC RESPONDENT

*((Being an appeal from the original conviction and sentencing by Hon. D. Nyambu
CM at Meru Law Court Traffic Case No. 66 of 2018 delivered on 23/8/2023))*

JUDGMENT

1. The appellant herein was charged with 9 counts of causing death by dangerous driving contrary to Section 46 of the Traffic. The particulars were that on the 12th day of August 2017 at about 1400 hours near Ngonyi area along Meru-Nkubu road in Meru County, being the driver of motor vehicle registration number KCL 205 P Isuzu Lorry, did drive the said motor vehicle in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature, condition and the use of the road and amount of traffic which was actually at the time of the accident and which might be reasonably expected to be on the road and did not keep proper lane hence caused the death of Sarah Gakii Ngoro, Edward Karuti Nchebere, Margaret Ntundu, Juria Kalai Ntoiti, Jerusha Thirindi, Josphat Mwititi, Susan Kananu, Salome Mukamaua and Ann Mugomuga.
2. The appellant herein was charged with 9 counts of causing death by dangerous driving contrary to Section 46 of the Traffic. The particulars were that on the 12th day of August 2017 at about 1400 hours near Ngonyi area along Meru-Nkubu road in Meru County, being the driver of motor vehicle registration number KCL 205 P Isuzu Lorry, did drive the said motor vehicle in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature, condition and the use of the road and amount of traffic which was actually at the time of the accident and which might be reasonably expected to be on the road and did not keep proper lane hence caused



the death of Sarah Gakii Ngoro, Edward Karuti Nchebere, Margaret Ntundu, Juria Kalai Ntoiti, Jerusha Thirindi, Josphat Mwititi, Susan Kananu, Salome Mukamaua and Ann Mugomuga.

3. He faced a tenth count of careless driving contrary to section 49 (1) of the *Traffic Act*. The particulars were that on the same day and place, being the driver of motor vehicle registration number KCL 205 P Isuzu Lorry, did drive the said motor vehicle without due care and attention and without consideration to other road users, did not keep proper lane hence caused the accident where Agnes Kawira, a female aged 35 years, Vincent Mwirigi, a male aged 23 years, Charity Mukamaua, a female aged 55 years, Eliud Mwenda, a male aged 33 years and Dominic Mwenda, a male aged 28 years sustained injuries.
4. He denied the charges but upon full trial, he was sentenced to pay a fine of Kshs. 100,000 or in default to serve 3 years for each of the 9 counts of causing death by dangerous driving. He was fined Ksh. 50,000 or in default to serve 1 year imprisonment for count 10.

The Appeal

5. On appeal, the appellant raised 3 grounds of appeal as follows: -
 1. The learned trial magistrate erred in law and fact by failing to note that there was enough evidence to show that the driver of the Matatu was the one who caused the accident according to the evidence adduced before court.
 2. The learned trial magistrate erred in law and fact by failing to pronounce that the sentences to run concurrent bearing in mind that the counts were suggested from the same scope of events.
 3. The learned trial magistrate erred in law and fact by failing to consider the defense of the appellant and his mitigating factors in this case.

Duty of Appellant Court

6. The duty of this court as the first appellate court is to re-evaluate the evidence on record and draw its own independent conclusions, bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. (See *Okeno v R* (1972) EA 32).

Evidence

7. PW1 Agnes Kawira testified that, “I reside at Maua. I recall on 12th August, 2017 at about 11.00 a.m, I left Maua going to Chuka. I was travelling in a matatu. We were 14 members of one family. The vehicle was KCC 835 Q. I was sited between the driver and another person. We did not get to Chuka. We came to Ngonyi. I saw a motorcycle ahead. Our driver overtook it. There was an oncoming lorry. It came to our side and hit our vehicle. I lost consciousness. When I came to I found myself admitted at Meru hospital. Then I was taken to Kirua Mission Hospital. I had been injured in head and chest. I later learnt our driver died. Six other passengers died as well as the driver. I learnt the accused was driving that lorry I saw him at the police station. The lorry was – I can’t remember the registration number of the vehicle. It was KCL 205 P Isuzu lorry. Our vehicle was being driven slowly. The lorry was speeding. It was 1.30 p.m. It was a clear day. P3 form MF1 (1).”
8. On cross examination, she stated that, “The accident took place at 1.30 p.m. there was a corner at the scene. The vehicle I was in was trying to overtake a motorcycle. It is possible there are speed bumps from Nkubu direction. Our vehicle was not speeding. Our driver had already overtaken the motorcycle. No, our vehicle did not collide with the motorcycle.”
9. PW2 Vincent Mwirigi testified that, “I come from Maua. I recall 12th August 2017; I left Maua going to Chuka for dowry festivities. We boarded motor vehicle KCC 835 Q Toyota Matatu. I was in company



- of 14 other persons. We came to Ngonyi. I was sited at rear seat. I saw a lorry approaching at speed. There was also a motorcycle ahead of us. The driver overtook the motorcycle. I saw a lorry ahead. They heard a bang. I saw I was bloody. I was taken to Meru General Hospital. I was taken to Kirua hospital. I was injured on right thumb and chest. Later I learnt the accused had been driving that vehicle. Accused pointed at. I was subsequently issued with P3 form MF1 (2). The driver had been speeding very much.”
10. On cross examination, he stated that, “I was sited in the back seat. I saw a lorry approaching. A motorcycle was ahead of us. I was sited in back left. Our vehicle overtook the motorcycle. I did not see speed bumps ahead of us. The lorry hit our vehicle and in turn our vehicle hit the motorcycle. Don’t know how our driver was driving. It was 1.30 p.m. No we were not late. Our vehicle was hit and overturned on the road.”
 11. PW3 Eunice Maheti testified that, “I am from Maua. I recall 12th August 2017 at about 11.00 a.m, I left Maua going to Chuka. I was travelling in motor vehicle KCC 835 Q. We were 14 of us. We were going for a ceremony. I was sleeping. I don’t know what happened. I found myself admitted at Meru General hospital and later Kiirua. I learnt we were hit by a motor vehicle. I learnt eight people died. I had sat on 2nd seat behind the driver. I was treated and later issued with P3 form MF1 (3) for identification only.”
 12. On cross examination, she stated that, “Accident took place at Ngonyi. I had been sleeping. Don’t know how accident happened.”
 13. PW4 Zipporah Mwirigi testified that, “I am from Maua. I recall 12.8.2017 at about 11.00 a.m, I left Maua and headed Chuka. We were using matatu KCC 825 Q. In the vehicle we were many. We were many. We did not get to Chuka. We came to Ngonyi. I heard a bang. I lost consciousness. I did not know what hit us. I was behind driver at conductor’s place. We passed a motorcycle. That I saw. I was injured on head and chest. I was issued with P3 form MFI (4).”
 14. On cross examination, she stated that, “Accident took place about 2.00 p.m. There was a corner. The driver of our vehicle overtook a motorcycle. I saw yellow line. I didn’t see if it was broken or continuous. Don’t know if our vehicle was hit on right side. I put my head up and saw blood.”
 15. PW5 Purity Mukomaua testified that, “I am from Maua. I recall 12th August, 2017, I left Maua going to Chuka. We left Maua at 11.00 a.m. We got to Ngonyi. We were travelling in a Nissan matatu registration number I don’t recall. I was in company of others. I sat at a seat next to rear one on the left. I did not see anything. I just heard a bhang and found myself lying on the ground. I was injured on hand – right hand. I was treated at Meru level 5 then Kiirua. I was issued with P3 form. MFI (5).”
 16. On cross examination, she stated that, “I was asleep. Accident took place near Ngonyi. Don’t know if there were bumps. I blame the lorry. I saw it next to our vehicle. It was in middle of the road.”
 17. PW6 Ibrahim Mutura testified that, “I reside at Tigania East. I recall 14th august 2018, I received telephone call to the effect that an accident had occurred at Ngonyi and one Josphat Mwiti the driver had died. On 14th August, 2018 at 1.00 p.m, I went to Meru level 5 hospital and identified the body of Josphat Mwiti to the doctor for purposes of postmortem. Josphat Mwiti was the son of my brother.”
 18. On cross examination, he stated that, “Josphat was a son of my brother.”
 19. PW7 Sergeant Mwikali attached at Maua police station, testified that, “In the year 2017 I was stationed Meru police station. On 12th august, 2017 I was on duty along Nkubu Meru road. I was in company of P.C Lesang and P.C Joshua. Members of the public from Nkubu direction told us that an accident had occurred at Ngonyi area along Meru-Nkubu Road. We proceeded to the place and found motor vehicle KCC 835 Q Toyota matatu. Toyota matatu registration No. KCL 205 P Isuzu lorry and motorcycle KMCC 918S. At the scene we learnt the lorry was coming from Nkubu direction for Meru and the



matatu was from Meru towards Nkubu direction. I learnt that the driver of the lorry failed to negotiate a sharp bend and collided with the matatu from Meru direction. The point of impact was on the left lane facing Nkubu direction an indication that the matatu was on its lane. The lorry which was from Nkubu had left its lane extremely hitting the matatu which was on its lane. After the collision the lorry pushed the matatu backwards where it hit a motorcycle which had been behind it. As a result of impact eight passengers died on the spot and were lying on the left lane facing Nkubu direction. After the collision the driver of the lorry drove on the left side and settled on his lane. We took the bodies and victims who were injured to Meru level 5 hospital. This was after taking measurements of scene. I am the investigating officer of the case. We blamed the driver of the lorry for leaving his lane. We could tell the driver moved after collision because there were skid marks. I drew rough sketch plan. Rough sketch MFI 6 (A) Exh 6A. Fair sketch plan MFI 6 B. Legend exh 6c. Subsequently the driver of the lorry came to the station. He recorded statement and we charged him as before court.”

20. On cross examination, she stated that, “I am the investigating officer of the case. I recorded my statement on 25th September 2017. A month after the accident had occurred. Some victims were still undergoing treatment and it was necessary to capture what happened to them. That’s the reason for delay. There were speed bumps at a distance. The lorry had by-passed the bumps. The matatu had not by-passed the bump. If you are speeding bumps may not reduce speed. The lorry pushed the Nissan to lie on the motorcycle. It was pushed. After collision the driver drove to his correct side. Scene was very clear. Matatu was on its lane. It was almost leaning on the ground rail but did not hit it. The matatu was not overtaking the motorcycle. The matatu was hit on from right where the driver sits Ref. MFI 6 A. From the sketch plan motorcycle is behind the matatu. It was beneath/behind. There were bodies lying on the left lane facing Nkubu next to the matatu. They were on the right side of the matatu.”
21. PW8 Samuel Orenko Onkware produced VTA 871832, VTA 871833 and VTA 871834 on behalf of his colleague Zacchaeus Nuguna as exhibits 9, 10 and 11. He testified that, “I have VTA 871832 for motor cycle registration number KMCE 981 S Sunrice Motorcycle examined on 18.8.2019 at Meru police station. The following parts had been damaged:- Speed block had been damaged, steering arms had been ripped off, rear side front shock absorber was bent, front mudguard had been damaged, head lamp had been damaged, brakes were in good condition, no pre-accident defects noted on the motorcycle. The defects were as a result of the accident. Report signed and dated. 2nd certificate of examination and test of motor vehicle VTA 871833 prepared in respect to a vehicle involved in an accident. Motor vehicle registration No. KCL 205 P make Isuzu lorry. Examined on 12.8.2017 at Meru police station. When the vehicle was examined it had an auto grade speed governor Serial number 95600. The damages were as follows:- right hand side cabin door and right hand side front wheel panel rear cabin were all damaged, the damage was on the rear front of the vehicle, offside front corner body panel was dented, the truck had dents, brakes were in good condition, speed governor in good condition, signed by Zacchaeus Njuguna on 12.8.2017. The 3rd document is also a certificate of examination of whether serial number VTA 871834 for motor vehicle KCC No. 835 Q Toyota matatu which was examined on 12.8.2017 at Meru Police Station. It confirmed that the matatu had a central PS Speed Governor Serial Number C015-1123112336C. Damages noted:- radiator damaged, steering arm and steering column all damaged, right hand side front arms and right hand side shock absorbers were all bent, right hand side of the body panels, roof, right hand side corner panel all were extensively damaged, chasis/frame on front right was also damaged, right hand side of dashboard smashed, right hand side headlamp had also been smashed, wheel-right hand side front wheel damaged, front left when was deflated, speed governor serviceable at the time of accident, no prior defects noted on the vehicle. Vehicle in good serviceable condition.”



22. On cross examination, he stated that, “The P exh 10 was in good working condition. Witness referred to P exh 11, the speed governor of motor vehicle 835 Q was serviceable. What was smashed was the right hand side front head lamp. Right hand of dashboard also smashed.”
23. PW10 Dr. Nuria Mwangi of Meru Teaching and Referral Hospital produced the postmortem reports of Sarah Gakii, Edward Kinoti, Margaret Mutungi, Salome Mukamaua, Susan Kanana and Julia Kalai on behalf of his colleague Dr. Brian Bett as exhibits 12, 13, 14, 15, 16 and 17 respectively.
24. On cross examination, he stated that, “Witness referred to P exh 12. The date is 14.8.2017. Sarah Gakii died on 12.8.2017. Post-mortem done two days after. The report is dated but the copy is not clear. I had a problem ascertaining the date. It is either 14.02 or 14.08. It is not clear. I cannot confirm the date. Possible for post-mortem to be done in 2018 and yet the person died in 2017. Possible that report done in February yet death was in August. That is about 6 months after.”
25. PW10 Isaac Kimai testified that, “I am from Maua. I am a farmer. I know Edward Karoti and Sarah Gakii. They are my relatives. Edward is my brother and Sarah is his wife. I identified the bodies and moved them from Meru mortuary to Maua mortuary.”
26. On cross examination, he stated that, “I don’t recall the date I identified the bodies.”
27. PW11 Geoffrey Mwirigi M’Ituarichua testified that, “I am a farmer. I know Salome, she was my wife. Salome went to tour and then I was called and informed that she was involved in an accident while in a vehicle. We came to Meru hospital and identified her at the mortuary. Later the body was released to us for burial.”
28. On cross examination, he stated that, “I don’t recall the date the post-mortem was done.”
29. PW12 Josphat Muthuri Kinyua testified that, “I am from Maua. I am a businessman and a farmer. I know Susan Kanana, she was the mother to my children. Regarding this case, when the accident happened I came to Meru to identify the body. Later the body was released to us for burial.”
30. On cross examination, he stated that, “I went to Meru hospital on 12.8.2017. I went back after 2 days or so for the post-mortem.”
31. DW1 Eric Mugambi and the appellant herein testified that, “I live at Igoji and I am a driver. Its regards this case regarding accident on 12.8.2017, I was from Nkubu heading towards Meru. I was driving KCL 205 P Isuzu along Chuka-Maua road. When I reached Ngonyi market at a speed bumps, a matatu began to overtake a motorbike, it hit me on the driver’s side, then it damaged the side mirror and when on driver’s side. And keys posts. I saw the matatu approach on high speed it was moving at over 80 kilometers per hour. I was at 50 kilometers per hour. I tried to swerve to the left but I could not. It hit me then it fell in the middle of the road. I veered off the road. I had driven for 17 years. I have never had/ caused an accident. I did not cause the accident. The driver of the matatu was overtaking at a corner/ a bend corner. I want the case to be finalized.”
32. On cross examination, he stated that, “I was from Meru towards Chuka. Matatu was on the opposite direction. Lorry stopper on left side. After accident the lorry stopped on left side towards Meru. Matatu was in middle of the road. The accident was at a hill towards Meru/Chuka. The lorry did not land on the left side on the matatu’s side. What footage was shown. All vehicles have cameras. No footage was shown.”
33. On re-examination, he stated that, “No evidence presented that my vehicle was on the left side of the road towards Meru.”



Submissions

34. The appellant urges that there was enough evidence to show that the driver of the matatu was to blame for the accident. He faults the trial court for failing to order the sentences to run concurrently bearing in mind that the offences emanated from the same scope of events, and cites the Court of Appeal case of *Peter Mbugua Kabui v Republic* (2016) eKLR. He further faults the trial court for failing to consider his defence and mitigating factors, and urges the court to allow the appeal.
35. The respondent did not file any submissions.

Analysis and determination

36. The twin issues for determination are who was to blame for the accident, and whether the trial court erred in failing to order the sentences to run concurrently.
37. The court finds the testimonies of the 3 eye witnesses, PW1, PW2 and PW4 very crucial in its determination of the first issue. While PW3 and PW5 were travelling in the accident vehicle, their evidence has little probative value because they saw nothing. PW1 was very candid in her testimony that the appellant was solely to blame for the accident. She testified that, "I was sitted between the driver and another person...I saw a motorcycle ahead. Our driver overtook it. There was an oncoming lorry. It came to our side and hit our vehicle...Our vehicle was being driven slowly. The lorry was speeding. It was 1.30 p.m. It was a clear day." She affirmed even on thorough cross examination that their driver, who was not speeding at all, had already overtaken the motorcycle.
38. PW2 maintained on cross examination that, "I saw a lorry approaching. A motorcycle was ahead of us. I was sitted in back left. Our vehicle overtook the motorcycle. I did not see speed bumps ahead of us. The lorry hit our vehicle and in turn our vehicle hit the motorcycle. It was 1.30 p.m."
39. PW4 testified that, "I was behind driver at conductor's place. We passed a motorcycle. That I saw."
40. The eye witnesses' accounts of PW1, PW2 and PW4 were corroborated by the investigating officer herein, PW7 who restated that when she visited the scene on the material day, she learnt that "the driver of the lorry failed to negotiate a sharp bend and collided with the matatu from Meru direction. The point of impact was on the left lane facing Nkubu direction, an indication that the matatu was on its lane. The lorry which was from Nkubu had left its lane extremely hiting the matatu which was on its lane. After the collision the lorry pushed the matatu backwards where it hit a motorcycle which had been behind it. After the collision the driver of the lorry drove on the left side and settled on his lane. We blamed the driver of the lorry for leaving his lane. We could tell the driver moved after collision because there were skid marks. I drew rough sketch plan. Rough sketch MFI 6 (A) Exh 6A. Fair sketch plan MFI 6 B. Legend exh 6c." On cross examination, she stated that, "After collision the driver drove to his correct side. Scene was very clear. Matatu was on its lane. It was almost leaning on the ground rail but did not hit it. The matatu was not overtaking the motorcycle. The matatu was hit on from right where the driver sits Ref. MFI 6 A."
41. In his sworn defence, the appellant wholly blamed the driver of the matatu for overtaking at a corner while on high speed. He testified that, "When I reached Ngonyi market at a speed bumps, a matatu began to overtake a motorbike, it hit me on the driver's side, then it damaged the side mirror and when on driver's side. I saw the matatu approach on high speed it was moving at over 80 kilometers per hour. I was at 50 kilometers per hour. I tried to swerve to the left but I could not. It hit me then it fell in the middle of the road. I veered off the road. The driver of the matatu was overtaking at a corner/a bend corner."



42. As held by the Court of Appeal in *John Njeru v Republic* [1980] eKLR:

“To justify a conviction of causing death by dangerous driving there must be a situation which was dangerous when viewed objectively and also some fault on the part of the driver causing that situation; see *Atito v The Republic* [1975] EA 278.”

43. On the fault necessary to establish dangerous driving *Shah v Republic* (1982) KLR held as follows:

“In a case of this nature it was upon the prosecution to prove that the appellant’s manner of driving was dangerous having regard to all the circumstances of the case at the material time. A sketch plan was produced which showed how the vehicles swerved. It is not normal for a vehicle to swerve to its right without a reason (see *Patel v R* [1968] EA 97 at p 101). The other vehicle swerved because of the sudden danger posed by the appellant’s vehicle which shot onto the main road. That was fault on the part of the appellant and that fault constituted a dangerous situation. In *R v Gosney* [1971] 3 All ER 220 it was held by the court of Appeal Criminal Division, that in order to justify a conviction there must have been a situation which viewed objectively, was dangerous and also some fault on the part of the driver. In regard to this element of fault, Megaw LJ reading the judgment of the Court of Appeal said at p 224:

“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 be a momentary lapse, even though normally no danger would have arisen from it, is sufficient.”

The above English decision was followed in *Atito v R* [1975] EA 278.”

44. The trial court, after due scrutiny of the evidence led during trial finds that the prosecution proved by consistent and water tight evidence that the appellant was entirely to blame for the accident, and thus properly charged and convicted.

45. The court further finds that the appellant’s defence that he was driving at 50 kph when he was hit by the matatu driver, who was trying to overtake a motorcycle, was without any factual basis and the trial court was justified in disregarding it.

Concurrent sentences

46. The principles guiding interference with sentencing by the appellate court were laid down by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR as follows:

47. “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”



48. The penalty for the offence of causing death by dangerous driving under section 46 of the *Traffic Act* is as follows:

“46. Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence whether or not the requirements of section 50 have been satisfied as regards that offence and be liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by Part VIII of cancelling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of three years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later. [*Act No. 14 of 1958*, s. 5, *Act No. 16 of 1977*, Sch., *Act No. 1 of 1986*, s. 12.]

49. Section 49 (1) of the *Traffic Act* provides that;

“Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable— (a) for a first offence, to a term of imprisonment not exceeding one year or a fine not exceeding one hundred thousand shillings; (b) for a second or subsequent offence, to a term of imprisonment not exceeding two years or to a fine not exceeding two hundred thousand shillings.”

50. The appellant was sentenced to pay a fine of Ksh. 100,000 or in default to serve a 3 year prison term for each of the 9 counts of causing death by dangerous driving. The appellant was further fined Ksh. 50,000 or in default to serve 1 year imprisonment for the offence of careless driving, as a result of which 5 people sustained serious injuries.

51. It is common ground that the series of offences herein, strikingly similar in character, were undoubtedly committed on the same day, and it behoved the trial court to order, if considered sentences of imprisonment as appropriate, that the sentences would run concurrently as appropriate in all cases where the offences are committed in the same transaction (See *Odero v R* (1984) KLR 61).

52. The Court of Appeal in *B.M.N. v Republic* [2014] eKLR pronounced itself as follows:

“(15) As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”

53. This court in *Francis Karanja Mwangi v Republic* [2019] eKLR exhaustively held that:

54.



“19. In accordance with the law, the appellant shall be held guilty with regard to count I only, and the other counts of causing death the death of the other victims being mere superfluity are struck out. In convicting and sentencing the appellant for the 11 counts of causing death by dangerous driving according to the number of victims of the fatal accident, the trial Court erred and this first appellate Court is entitled on the principle of *Wanjema v. R* (1971) EA 493, 494 entitled to interfere with the sentence the trial Court having been plainly wrong on principle and also as to the severity of sentence. 20. I respectfully agree with Waki, J. (as he then was) in *Thoya v. R* (2000) eKLR delivered on 9th March 2000 citing *Orweryo Missiani v. R* (1979) KLR 285 and *Chepkwony, J. in Amos Mwengea v. R* [2015] eKLR citing *Govind Shamji v R* Criminal Appeal No. 30 of 1975 and *R. v. Guilfoyle* (1973) 2 ALL ER 844, that not all cases of causing death by dangerous driving must be punished by a custodial sentence, and here as in the *Mwengea* case there was no evidence that the appellant was driving under the influence of alcohol or any other intoxicating substance [or] deliberately taken risk and or controlled the motor vehicle with care abandon, had a bad driving record, or with selfish regard for other road users or passengers”. 21. Having considered the sentences in similar offences in *Orweryo Missiani*, *Thoya*, and *Mwengea* cases, I find that the sentence of imprisonment for six years on each count without an option of a fine coupled with the statutory penalty of cancellation of driving licence for three years is excessive punishment of the appellant in the circumstances of this case, considering always that the appellant did not set out to cause death but death resulted from his dangerous driving of the motor vehicle.”

55. It is clear that the imposition of a fine is one of the sentences that a court may impose on a charge of causing death by dangerous driving in terms of section 26 of the penal Code which provides as follows:

“26.

- (1) A sentence of imprisonment for any offence shall be to imprisonment or to imprisonment with hard labour as may be required or permitted by the law under which the offence is punishable.
- (2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.
- (3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:

Provided that –

- i. where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;
- ii. (Repealed by No. 5 of 2003, s. 4.)”

56. However, there is for causing death by dangerous driving, no provision for alternative imprisonment period in default of a fine under the section 46 of the *Traffic Act*. Consequently, the general provisions on default imprisonment sentences apply as set out in section 28 (2) of the *Penal Code*, as follows:



57. “In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Repealed) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—

Amount	Maximum period
Not exceeding Sh. 500	14 days
Exceeding Sh. 500 but not exceeding Sh. 2,500	1 month
Exceeding Sh. 2,500 but not exceeding Sh. 15,000	3 months
Sh. 15,000 but not exceeding Sh. 50,000	6 months
Sh. 50,000	12 months

58. This court finds that the sentence of a fine of Ksh.100,000 or in default 3 years imprisonment for each of the 9 counts of causing death by dangerous driving, was manifestly excessive in the circumstances and illegal for breach of the provisions of section 28 (2) of the *Penal Code*. Had the trial court sentenced the appellant to terms of imprisonment for the various counts, the appropriate order should have been one for concurrent sentences in accordance with the authorities.
59. In the case of fines and default sentences, section 37 of the *Penal Code* disallows concurrent sentences as follows:

“ 37. Sentences when cumulative

Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof. [*Act No. 5 of 2003*, s. 7.]”

60. However, as observed by this Court in *Francis Karanja Mwangi v Republic*, supra, the law on the offence of causing death by dangerous driving recognizes the offence as the dangerous driving not killing people by dangerous driving, as would make material the number of people killed:

“ A matter of law.



7. I respectfully accept the offence is the causing death by dangerous driving and it consequently does not matter how many deaths occur. See Court of Appeal decision in *Atito v. R* (1975) EA 278 cited in *Charles Muriuki Wahome v. R.* Nairobi HCCRA No. 140 of 2015 (2017) eKLR (G.W. Ngenye Macharia, J.). The laying of 11 charges of causing death by dangerous driving in the case was legally improper, on the principle of law that “no man should be punished twice for the same offence” The charge ought to have been one, only of causing death (of the named persons) by dangerous driving. I would agree that should the appellate Court uphold the conviction only the one charge of causing death by dangerous driving would be upheld and the others dismissed for duplicity.”

61. I would respectfully agree with GW Ngenye J. (as she then was) in decision cited above, *Charles Muriuki Wahome v Republic* [2017] KEHC 9013 (KLR), as regards multiple counts/charges in the offence of causing death by dangerous driving as follows:

“Before I delve into the main issues for determination it is important that I point out that in a charge of causing death by dangerous driving, no matter how many deaths are occasioned, if they occur in the same accident, the accused ought to be charged with one count of causing death by dangerous driving. In the single count the deceased passengers or persons should then be named. The framing of more than one count where the deaths occur in the same accident implies that there existed several accidents in which the deaths were occasioned. In so doing, the ultimate result is that it impacts on the sentence imposed on the accused; which shall depend on the number of counts in which the accused is convicted. This is highly prejudicial to the accused and occasions him injustice especially where the trial court passes consecutive sentences. It follows that the accused is punished twice for the same offence; of dangerous driving. See *Atito v. Republic* [1975] EA 278, in which the then East African Court of Appeal held:

“No man is to be punished twice for the same offence, the offence in this case being dangerous driving and causing death. The number of deaths caused is immaterial.””

62. The correct maximum sentence of imprisonment in default of payment of the fine of Ksh.100,000/- according to the scale in section 28 (2) of the *Penal Code* is imprisonment for 12 months. The Court will quash the convictions and sentence on Counts 2-9 for causing death by dangerous driving c/s 46 of the *Traffic Act*.

63. There is no reason advanced to interfere with the conviction and sentence in Count No. 10 for the offence of careless driving contrary to section 49 (1) of the *Traffic Act*.

Orders

64. Accordingly, for the reasons set out above, the court makes the following orders:

65. The appeal on conviction is without merit and it is dismissed.

66. The appeal on sentence is merited and it is allowed in the following terms:

1. The sentence of a fine of Ksh.100,000 or in default 3 years imprisonment for each of the 9 counts of causing death by dangerous driving is set aside.



2. The Court substitutes fine of Ksh.100,000 for the offence in count No. 1 of causing death by dangerous driving contrary to section 46 of the [Traffic Act](#) and a default sentence imprisonment of one (1) year.
3. The Court does not impose sentence on Counts Nos. 2-9 of the Charge sheet.
4. The sentence passed on the appellant in Count NO. 10 of careless driving contrary to section 49 (1) of the [Traffic Act](#) remains unaffected.
5. In terms of section 37 (2) of the [Penal Code](#), the default sentences on Counts Nos. 1 and 10 will run consecutively.

67. Order accordingly.

DATED AND DELIVERED THIS 13TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Masila for DPP.

