



**Wahome v Republic (Criminal Appeal E019 of 2022)
[2023] KEHC 18455 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18455 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E019 OF 2022
AK NDUNG’U, J
JUNE 14, 2023**

BETWEEN

PAUL MAHINDA WAHOME APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki
CM Criminal Case No 443 of 2017– L. Mutai, CM)*

JUDGMENT

1. The Appellant in this appeal, Paul Mahinda Wahome, was convicted after trial of three counts of causing death by dangerous driving contrary to section 46 of the *Traffic Act* (count I, II & III) and one count of failing to maintain parts and equipment contrary to section 55(1) as read with section 58(1) of the *Traffic Act* (count IV). For count I, II and III, he was fined Kshs.200,000/- and in default to serve two (2) years imprisonment for each count. For count IV, he was fined Kshs.30,000/- and in default to serve six months imprisonment. The Appellant’s license was also suspended for a period of three years. He did not pay the fines and he is therefore serving a cumulative sentence of 6 ½ years imprisonment.
2. The particulars for count I were that on 27/08/2017 at about 6:00pm along Nyeri-Nanyuki road at Mureru area in Nyeri County being the driver of motor vehicle registration no. xxxx Toyota Hiace matatu, drove the said vehicle on a public road 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 the amount of traffic which was actually at the time on the road, drove the said vehicle along the near side on the left and as a result collided with motor machine registration no. xxxx HAMM GRW 18P/ Roller and caused the death of David Kamau Njuguna male adult aged 66 years, who died on the spot.
3. The particulars in count II were that on the same day, time, place and manner caused the death of Mary Wamuyu Mbogo a female adult aged 44 years old who died on the way to hospital and the particulars



- in count III were that on the same day, time, place and manner, he caused the death of Samuel Mbogo Wamuyu a child aged 10 years who died on the spot.
4. The particulars for count IV were that on the same day, time and place, drove motor vehicle registration no. xxxx Toyota Hiace matatu on a public road without maintaining parts namely the speed governor.
 5. The Appellant was aggrieved by the conviction and the sentences hence his appeal to this court. The convictions and sentences are being challenged on the following grounds-
 - i. That he was not over speeding as he was moving at a moderate speed of 70-80km/h a fact that was corroborated by DW2.
 - ii. That the brake system failed resulting for the failure of the vehicle to stop thereby causing the accident.
 - iii. That PW10's evidence that the braking system was not defective prior to the accident was not true since PW2 testified that the vehicle had dropped brake pads on the road.
 - iv. That the speed governor may have been damaged by the impact of the accident causing it to lose the previous information.
 6. He filed written submissions and submitted that the brake system was defective as he tried to stop when he was flagged off by PW6 but could not stop. That this was corroborated by DW2 evidence who stated that he saw the brake pads on the road appearing hot hence, the braking system was defective prior to the accident. He submitted that he was not over speeding as PW6 alleged and that PW6 evidence was contradicted by DW2 evidence who testified that the Appellant was moving at a speed of 70-80km/h. That PW10 evidence that the speed governor was defective prior to the accident was not true as the speed governor was functioning properly but possibly got damaged due to the impact as a result of the accident.
 7. The Respondent's counsel opposed the appeal. Counsel submitted that there was indeed a road traffic accident involving the Appellant's vehicle and three people died as a result of the said accident. That the Appellant's contention that the braking system was faulty was not substantiated with evidence since PW10, the motor vehicle inspector produced a report that stated that the braking system was not defective prior to the accident; the Appellant did not produce any evidence to support his allegation that the braking system was faulty. It is submitted that the prosecution proved that the accident was caused by the Appellant who was careless as he failed to take into account the nature, condition and use of the road which was under construction at the time. Further, the report by PW10 revealed that the speed governor kept no information which meant that the speed governor was faulty prior to the accident hence, it was not maintained to the required condition. Counsel concluded that the trial court rightly considered the Appellant's defence vis-à-vis the evidence by the prosecution.
 8. As for the sentences, it is the prosecution's position that given the fact that the sentences were in default of a fine, they were therefore to run consecutively and not concurrently as the Appellant's alleged. That the sentences were proper as the trial court considered that three people lost their lives as a result of the accident. Counsel concedes, however, that this court can interfere with the sentences since the same failed to comply with section 28(2) of the *Penal Code* that provides that sentence in default of a fine that exceeds Kshs.50,000/- should not exceed 12 months.
 9. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.



10. I have considered the evidence as recorded at the trial court. I have had due regard to the submissions and case law relied upon. I have borne in mind, however, that I neither saw nor heard the witnesses testify and I have given due allowance for that fact.
11. The case before the trial court was as follows. PW1 testified that he learnt that his father was involved in a road traffic accident and he identified his body for the purpose of post mortem. He did not witness the accident. PW2 also did not witness the accident but identified the body of David Kamau Njoroge, one of the persons who died as a result of the accident. PW3 identified the body of his deceased's sister Mary Wamuyu Mbogo and his nephew Samuel Mbogo Wamuyu who died as a result of the accident. He identified the post-mortem report for both. He did not witness the accident.
12. PW4 testified that he was a tractor driver and on the material day, he was working at Mureru area where they were constructing the road. A single lane was functional as the left side as one faces Nanyuki direction was closed and at that time. At the material time only vehicles from Nanyuki direction had been given the greenlight to pass by the workers controlling traffic. He stated that he noticed the Nissan vehicle that was on his extreme right side and realised that its right tyres were touching the road. The Nissan vehicle swerved into the road, lost control hitting his tractor on the left side and the vehicle entire left side was ripped off. After the accident, the Appellant claimed that the vehicle had brake issues. He stated that the Appellant was not patient since somebody was giving instructions.
13. PW5 was the scene of crime officer who processed the scene of crime photographs which he produced as Pexhibit 3a-e and the certificate accompanying the photographs as Pexhibit4b.
14. PW6 testified that on the material day, he was at the construction site controlling vehicles from Naromoru direction towards Nanyuki. A matatu that was driven on high speed from Naromoru direction approached and with the red flag, he warned the driver to stop but due to speed, the driver swerved to the left side where the tractors were. He shouted to the workers who jumped to the bushes to avoid been hit. The vehicle passed in between the two tractors and hit one tractor on its left side and as a result, an elderly man and a young man died on the spot. He testified that there were notice board 200 meters on each side of the road about the ongoing construction. He stated that the Appellant was careless.
15. PW7, identified the body of Mary Wamuyu, his sister and his nephew Samuel Mbogo for purposes of post mortem. He identified the post mortem report. He did not witness the accident.
16. PW8, Dr. Joseph Mine Kagoro produced the post mortem report for Mary Wamuyu Mbogo and Samuel Mbogo Wamuyu as Pexhibit1 and Pexhibit2 respectively. He testified that the cause of death for Mary Wamuyu was soft tissue injuries, multiple fractures and collapsed lungs secondary to road traffic accident. For Samuel Mbogo Wamuyu, the cause of death was severe soft tissue injuries and multiple fractures and blocked airway by the tongue.
17. PW9, Dr. Victoria Githenya produced the post mortem for David Kamau Njuguna as Pexhibit5. She testified that the cause of death was massive bleeding, collapsed lungs, split trachea, ruptured heart and diaphragm and broken ribs secondary to a road traffic accident.
18. PW10, Keffa Macharia was a motor vehicle inspector. He testified that he inspected motor vehicle registration number xxxx Toyota matatu and produced his report as Pexhibit6a. He testified that the shedding door on the left side was damaged, the braking system was not defective prior to the accident, the speed governor kept no information of the speed to mean that the speed governor was defective prior to the accident. He stated that the vehicle was unroadworthy prior to the accident. He also inspected Machine xxxx, a roller machine and produced the report as Pexhibit7. He testified that upon inspection, the left side front corner was dented, the paint was scratched, the rear left side mirror was



damaged, the indication and the head lamp were also damaged, the rear indicators and remaining lamp were damaged prior to the accident and the machine had pre-accident defects. On cross examination by the Appellant, he testified that the braking system for the matatu was good and the speed governor was defective since no data could be retrieved on the speed.

19. PW11 was the investigating officer. He testified that he learnt about the accident from members of the public. He visited the scene and found two bodies lying on the road. Upon investigations, he established that the driver of the matatu was to blame for the accident since the road was under construction and he ought to have slowed down but failed to do so. He produced the sketch plan as Pexhibit8a, the fair plan as Pexhibit8b and measurements and legends as Pexhibit9a-b.
20. The Appellant in his unsworn testimony testified that on his way to Nanyuki, he found a section of the road that was closed. He braked but noticed something had fallen down from the vehicle. He braked again but the vehicle failed to halt. He hooted on the workers who were working on the road and while trying to avoid hitting the tractor that was working, he tried to penetrate by it but hit it thereby causing the accident. He blamed the brakes pad that failed to work.
21. DW2 testified that he was on board the subject matatu which the Appellant was driving and sat behind the Appellant. On nearing Bantu, he heard the Appellant hooting and he drove off the road. As he turned to pass the tractor, the vehicle was hit on the left side. On cross examination, he testified that somebody had flagged the Appellant to stop with a red flag and other vehicles were at a halt.
22. DW3 testified that the Appellant was ahead of him and when they arrived at Bantu, they were warned to stop since that section of the road was under construction. The Appellant did not stop but drove off while hooting and hit the tractor. He testified that he saw the brake pads on the road appearing red hot. On cross examination, he testified that he saw the warning to stop. He stated that he did not get the hot red brakes. He stated that the Appellant was driving the motor vehicle at a speed of 70-80km/h.
23. That was totality of the evidence before the trial court. The only issue for determination is whether the case against the Appellant was proved to the required standard and whether the sentences meted were lawful.
24. In the 1st, 2nd and 3rd count, the Appellant was accused of contravening the provisions of section 46 of the [Traffic Act](#) that provides thus;

“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.”



25. In the case of *Atito v Republic* [1975] EA 281 the Court of Appeal stated that:
- “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 the situation.”
26. The Appellant was stated to have driven the motor vehicle in a manner dangerous to the public having regard to all circumstances of the case, the nature, condition and use of the road and the amount of traffic that was reasonably expected to be on the road.
27. The Appellant did not deny that the accident occurred on 27/08/2017 and that he was the driver of motor vehicle registration No. xxxx. He did not deny the fact that three people died as a result of the said accident. The evidence on record shows that indeed three people who were onboard the matatu died as a result of the accident. The Appellant in his submissions however blamed the braking system of the matatu. He stated that he tried to halt the matatu but the brake failed to function. He submitted that DW3 in fact saw the brake pads on the road since they had fallen.
28. I have considered the evidence before the trial court. The allegation by the Appellant that the braking system failed is not substantiated by any evidence. PW10 was the motor vehicle inspector who inspected the subject matatu. He produced his report as Pexhibit6a. He testified that the braking system had no defects prior to the accident. The same was properly working. Furthermore, the Appellant alleged that the braking pads fell on the road as DW3 testified however, nothing was collected on the road by the Appellant or his witnesses or by the investigating officer. This was just a mere allegation without evidence in support.
29. As to whether the Appellant drove the subject matatu dangerously, the evidence on record revealed that the road was under construction. One side of the road was closed and PW6 was controlling the movement of the vehicles. PW6 testified that there was warning mounted on the road 200 meters before the scene that indicated that the road was under construction. He further testified that the Appellant was on high speed and he tried to flag him off but due to speed, he failed to stop thereby causing the accident.
30. There was obvious fault on the part of the Appellant for reasons that he approached the scene at a high speed notwithstanding that there was a warning sign well before the scene, a speed that was dangerous to the public in the circumstances of the case. An expert, PW10, testified that contrary to the Appellant’s contention, the subject motor vehicles brakes had no pre-accident defects. The evidence of PW10 is credible and worthy of believe. He is an independent witness who had nothing to gain from whatever outcome in the trial. No cogent evidence was adduced by the defence in rebuttal and the Appellant’s contention on brake failure remains unsubstantiated and leaves the prosecution evidence intact.
31. From the foregoing, it can only be said that the Appellant was driving on high speed and that is why he failed to stop even after being warned by PW6. It is therefore my view that count I, II and III were proved to the required standard.
32. As for count IV, the Appellant was charged with the offence of failing to maintain parts and equipment contrary to section 55(1) as read with section 58(1) of the *Traffic Act*. Section 55(1) provides;
- “No vehicle shall be used on a road unless such vehicle and all parts and equipment thereof, including lights and tyres, comply with the requirements of this Act, and such parts and



equipment shall at all times be maintained in such a condition that the driving of the vehicle is not likely to be a danger to other users of the road or to persons travelling on the vehicle.”

Section 58(1) states;

“Any person who drives or uses on a road a vehicle in contravention of the provisions of section 55, 56 or 57 or in accordance with the East African Community Vehicle Load Control Act, 2013, shall be guilty of an offence and liable to a fine not exceeding four hundred thousand or to imprisonment for a term not exceeding two years or to both.”

33. The particulars were that he failed to maintain the speed governor. According to PW10, the speed governor was not functional prior to the accident. He stated that he could not retrieve the speed from the speed governor which meant that it was faulty prior to the accident. The Appellant in his submissions claimed that the speed governor got damaged after the accident. The evidence by PW10 was that the only part that was damaged as a result of the accident was the sliding door and the passenger’s windows. I have also seen the photographs that were produced as Pexhibit3a-e and they clearly show the extent of the damage. The front part of the vehicle was not damaged apart from the sliding passenger’s door. No other damages were discovered by PW10. From the foregoing, the Appellant’s allegation that the speed governor was damaged as a result of the accident was not substantiated by any evidence. It therefore follows that count IV was proved to the required standard.
34. The final issue is in regard to the sentences imposed by the trial court. The Appellant was fined Kshs.200,000/- and in default to two years imprisonment for count I, II, and III each. For count IV, he was fined Kshs.30,000/- and in default, six months imprisonment. The trial court did not however indicate whether the sentences were to run concurrently or consecutively. Learned prosecution counsel submitted that the sentences meted in count I, II, and III were afoul of section 28(2) of the Penal Code. The said section provides;

“In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act 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 Shs 500.....	14 days
Exceeding Shs 500	
but not exceeding Shs 2,500.....	1 month
Exceeding Shs 2,500 but	
not exceeding Shs 15,000.....	3 months
Exceeding Shs 15,000 but not	
exceeding Shs50,000.....	6 months
Exceeding Shs 50,000.....	12 months.”



35. In the absence of express provisions in any written law relating thereto, terms of imprisonment in default of payment of fines are governed by the above section and currently cannot exceed 12 months imprisonment for any fine exceeding Kshs 50,000/00. There are no express provisions in sections 46 of the *Traffic Act* under which the Appellant was sentenced relating to terms of imprisonment in default of payment of fines.
36. In the present case therefore, the maximum term of imprisonment that the trial court ought to have imposed upon the Appellant in default of payment of the fine was 12 months. The term of two (2) years imprisonment imposed was thus unlawful. The sentence in count IV was however lawful.
37. It is also to be noted that sentences in default of payment of fines must be served consecutively, not concurrently as provided under section 37 of the *Penal Code* which states;

“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.”

38. I will in the event partially allow the appeal by setting aside the default sentences in count I, II and III meted out and substituting therefor a default sentence of twelve (12) months imprisonment in each count to run consecutively (a cumulative sentence of three (3) years imprisonment for the three counts). As stated earlier, the sentence in count IV was lawful and I will not interfere with the same save to add that the sentence is to run consecutively with the sentences in counts I, II and III.
39. With the result that the appeal on conviction fails and is dismissed. The appeal on sentence succeeds to the extent that the Appellant is to serve 12 months imprisonment on each of the counts I, II and III and 6 months on count IV all terms to run consecutively from the date of sentence by the trial court.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 14TH DAY OF JUNE 2023

A. K. NDUNG’U

JUDGE

