Kilonzo v Republic (Criminal Appeal E117 of 2022)
[2023] KEHC 23975 (KLR) (Crim) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23975 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E117 OF 2022

DR KAVEDZA, J

OCTOBER 24, 2023

BETWEEN

LAWRENCE KYUMU KILONZO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against conviction and sentence delivered by Hon. D. Kuto PM on 30th June, 2022 in Traffic Case No. 978 of 2014 at the Kibera Law Courts)

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of causing death by dangerous driving contrary to section 46 of the *Traffic Act* Cap 403 Laws of Kenya. He was sentenced to pay a fine of Kshs. 100,000/= in default to serve 5 years imprisonment.

2. Aggrieved, he filed an appeal challenging his covnction and sentence. In summary, he challenged the charge sheet as being defective for duplicity. He challenged the totality of the prosecution's evidence against which he was convicted. He also challenged the sentence as being hash and excessive.

3. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).

4. The Prosecution in this regard called 9 witnesses to prove their case. PW1, John Wachira, the father the Douglas Kashimiri (deceased), told the court that on 9/6/2012 at around 9.00pm, he was picked by some motor bike riders who informed him that an accident had occurred involving his son a motorcyclist. He arrived at the scene and found a stationary pickup, with his son lying on the ground.

The driver of the said pickup, which had allegedly caused the accident, was also at the scene, and was subsequently arrested by the police. Other victims had been taken to the hospital. PW1 went to Ngong Police Station where he recorded his statement and later took the body of his son to City Mortuary. On 15/6/2012, a post-mortem was conducted. He identified the accused as the driver of the pickup that caused the accident.

5. In cross-examination, he affirmed that his son was not an alcoholic and he never chewed miraa nor smoked cigarettes, and that he was wearing an helmet and a reflector jacket at the material time. He also affirmed having recorded his statement on the same day of the alleged accident.

6. PW2, Rose Mugure Warendi, an aunty to Douglas (deceased) told the court that on 15/6/2012, she received a call from her sister, Florence, who informed her that the body of her nephew had been taken together with PW1. They identified the body for post-mortem.

7. PW3, Daniel Wanjohi Njoroge, the father to Moses Njoroge Wanjohi (deceased) told the court that on the material day at around 11.00pm, a friend of his son informed him that Moses (deceased) had been involved in an accident. He rushed to the scene but did not find his son. He, together with his wife, Jacinta, decided to follow their son to Kenyatta National Hospital. They found their son admitted in the ICU, but he died three days later. A post-mortem was conducted on 19/6/2012. PW3 later recorded his statement. In cross-examination, he indicated that he saw the accused person at the scene and that the accused was smelling alcohol.

8. PW4, Mathias Kamau, the brother to Moses Njoroge Wanjohi (deceased), told the court that on the material day, his friend, Akir, called and informed him about the accident that had occurred at Elsie Park around Veterinary area. He proceeded to the scene and was told that it was a head on collision. He took photographs of the pickup but later lost the phone. He then went to the hospital and found his brother admitted with serious injuries. He was later told that his brother had died.

9. In cross examination, he said that he did not indicate in his statement that he visited the scene, and that he could not recall the colour of the pickup.

10. PW5, Samuel Njunji, told the court that on 9/6/2012, he was at Vet area waiting to board a vehicle when his friend, Douglas(deceased), came and had two passengers who alighted from his motorcycle. Douglas then picked PW5 and his friend. While on their way, PW5 saw a vehicle emerge from the Owang Area with full lights, which dazzled him. He did not see what happened next but only woke up to find himself at Kenyatta National Hospital after two days. He was told that Douglas and Thuita died.

11. In cross-examination, he indicated that he had known Douglas as a friend for about 4 to 5 weeks before the accident. He could not recall whether Douglas had a reflector jacket on; neither was he and Thuita given a helmet.

12. PW6, Dr. M. P. Okwnmwa, attached at Kenyatta National Hospital, told the court that he performed an autopsy on the body of Moses Njoroge Wangia on 19/8/2012. There were multiple bruises and abrasions on the lower limbs, with fractured dislocation on both knee joints. There were also multiple tears on the liver and spleen, which resulted in excessive internal bleeding. He found the deceased to have died as a result of abdomen and lower limb injuries as a result of back trauma due to motor vehicle accident. The post-mortem report was produced as an exhibit.

13. PW7 Dr. Dorothy Njau, attached at City Mortuary, told the court that on 15/6/2012, she conducted the post mortem on the body of Douglas Kashimiri Wachira. On examination of the body, there were multiple fractures to the skull and brain material was oozing from both ears. There were also fractures on both thighbones, as well as fractures on both legs. There was further bleeding within the substance

of the brain and a fracture of the spine at the centre of the neck. The conclusion was that the cause of death was head and spinal injuries due to blunt force trauma due to motor vehicle accident. The post-mortem report was produced as an exhibit.

14. PW8, No. 77327 PC Kiptala, the investigating officer in this case, told the court that on 9/6/2012 at 10.40pm, she received a call from members of public saying that there was a road traffic accident along Ngong Road near Elsie. At the scene, there was a pickup, a motorcycle and a dead body, male, lying on the left side of the road as he faces Nairobi from Ngong direction. Rough sketch pictures of the scene were taken. The pickup was heading towards Ngong direction while the motorcycle was oncoming from Ngong headed to Nairobi. According to the scene, the driver of the pickup failed to use his lane and knocked the motorcycle head-on, as it was coming from Ngong side. The body was taken to City Mortuary. The registration number of the motor vehicle was KAA 127D, while that of the motorcycle was KMCF 127D. PW5 also found the driver of the pick up at the scene. Both the motor vehicle and motorcycle were towed to Ngong Police Station, where they were inspected by Mr. Thiongo, a motor vehicle inspector.

15. PW 9, Dr. Maundu, attached at Nairobi Police Surgery, told the court that on 10/3/2013, he examined Samuel Ngonjo (PW5), who had been involved in a road traffic accident on 9/6/2012. On examination, the victim had healing wounds. Both the right and left knees were swollen and tender. PW5 also sustained a fracture of the left fibula; the injury was about 9cm and was probably caused by a blunt object. He produced the P3 form as exhibit 3. The prosecution closed its case.

16. When put on defence, the defence called 2 witnesses. DW1, Lawrence Kyumu Kilonzo, the appellant, recounted to the court that on the 9/6/2012, he was driving a motor vehicle with registration number KAA 6395. Accompanying him were his brother Anthony Ndungu and cousin Patricia. Upon reaching Embulbul, encountering a hill, the traffic was moving at a speed of approximately 30-50 km/h. There was a vehicle in front navigating in a zigzag pattern, and he decided to overtake. He asserted that he followed all regulations, including signalling and checking his side mirror for any approaching vehicles. Claiming to have seen no lights behind him, he proceeded with the manoeuvre.

17. However, before completing the overtaking, a motorcyclist collided with his vehicle. DW1 clarified that the motorcycle had no lights nor reflectors, and he was unable see it. Following the collision, a confrontation ensued with the motorcyclists around, who allegedly threatened to burn them. Police officers intervened and took them away from the scene. DW1 stated he had a valid driving license and a ten-year accident-free driving record.

18. During cross-examination, DW1 acknowledged obtaining his driving license in 2008 after attending a driving school. He justified the decision to overtake, citing the erratic movement of the vehicle in front. DW1 maintained that he did not see the motorcyclist. Despite having lights on his vehicle, he claimed there was no indication of any vehicle or motorcycle in his immediate vicinity.

19. DW2, Anthony Ndungu Kilonzo, testified that on the night of 9/6/ 2012, he was in a pickup with his brother DW1 and cousin Patricia. DW1 was driving, and after overtaking a zigzagging vehicle, they had an accident past Bulbul. The collision involved a motorcycle on a hill, traveling at 30-50 km/h. DW2 defended DW1, claiming the charges were untrue and that DW1 was driving responsibly. After the accident, a crowd threatened to burn the vehicle, but the police intervened. DW2 denied having taken alcohol on the material day. During cross-examination, he detailed road conditions and that the vehicle was escaping potholes. He noted the absence of a continuous yellow line at the location.

20. In the appeal, the appellant challenged the charge as framed and said that it was bad for duplicity. He said that the duplicity arose from the fact that both the aspects of causing death (twice), and causing harm were reflected in the same count which he contended had the effect of charging two offences in

one count, a situation which he said the law does not permit. He relied on the case of *Hassan Jillo Bwanamaka & another v Republic* (2018)eKLR.

21. It was further submitted that that the charge sheet was fatally defective as the particulars of the offence as brought out in the charge sheet did not support the charge as stated in Section 46 of the *Traffic Act* cap 403 Laws of Kenya. He added that the particulars of the charge sheet actually supported a totally different charge, which is under section 49(1).

22. The appellant further argued that the Prosecution failed to prove their case beyond reasonable doubt as its evidence was inconsistent, contradictory and lacked corroboration from its primary witness. In particular, that the evidence witnesses who arrived at the scene was contradictory as to the exact positioning of the vehicle and the motorcycle after the accident, and further that learned magistrate arrived at conclusions without concrete proof. Finally, it was submitted that the victims of the accident failed to abide by the traffic rules and regulations. Particularly, that as per the evidence of PW3 and PW5, it was clear that the rider and pillion passengers did not have helmets or reflector jackets on.

Analysis and Determination

23. After considering the grounds of appeal, submissions thereon and evidence adduced in the trial Court, I find that the main issues raised by the Appellant in his appeal are firstly, whether the charge sheet was defective for duplicity; and secondly, whether he was rightly convicted for the offence of causing death by dangerous driving.

24. Regarding the first issue, the rule against duplicity prohibits the prosecution from charging the commission of multiple offenses in a single charge sheet. Such a charge is referred to as 'duplex' or 'duplicitous.' This rule is grounded in two key principles. Firstly, as a matter of fairness, an individual accused of a criminal offense has the right to be informed of the specific crime they are alleged to have committed; this enables them to adequately prepare and present a suitable defence. Secondly, the court handling the charge must also be aware of the allegations to determine relevant evidence, assess potential defences, and decide on an appropriate punishment in case of a conviction. (See *Hassan Jillo Bwanamaka & another v Republic* [2018] eKLR)

25. Section 46 of the *Traffic Act* cap 403 Laws of Kenya provides as follows;

> Causing death by driving or obstruction
>
> 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.

26. The above section creates one offence mainly 'causing death by dangerous driving'. There is thus a defect that is already apparent in the charge sheet in the sense that the particulars of the charge indicated that the Appellant caused the death of two, namely Douglas Kashimiri and Moses Njjoroge Wanjohi,

and caused harm to one namely Samuel Njoho. The later particular of causing harm to Samuel Njoho is not an offence under section 46 of the *Traffic Act*, as causing harm is distinct from causing death under the said section. I am minded in this respect that the law on the framing of charges requires clarity in the charge sheet as stated in section 134 of the *Criminal Procedure Code* as follows:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

27. It is important that I demonstrate by case law what constitutes a duplex charge. In the case of *Ephraim Botto Wahome v Municipal Council of Nakuru* Constitution Petition No. 1 of 2006 the particulars of the offence referred therein were that:

> " On diverse dates, between 28th February 2002 and 25th July 2003, being proprietor of Soto Solar Limited on plot No. Block 1/752 along Kanu Street within Nakuru Municipality caused noise pollution from Kanu Street workshop thereby causing annoyance, interference with concentration, communication, relocation and sleep to the neighbours."

28. In that case, it was obvious that the particulars of the offence represented two different offences, that is; noise pollution and causing annoyance, interference with concentration, communication, relocation and sleep to the neighbours. The Court of Appeal also referred to the case of *Mahero v R* [2000] 2 KLR 496, which considered the English case of *Ministry of Agriculture Fisheries and Food v Nunn Comm & Coal (1987) Limited* [1990] LR 268, where it was emphasized that the question of duplicity is one of the fact and degree and that the purpose of the rule is to enable the accused to know the case he had to meet.

29. In my view, the rationale for the principle of duplicity is that when a charge is duplex, and an accused person goes through a trial, the fairness of the process is fundamentally compromised.

30. Can a duplex charge be cured under section 382 of the CPC? To answer this, the court in the case of *Hassan Jillo Bwanamaka & another v Republic* [2018] eKLR held as follows;

> " The converse position therefore is that if the charge sheet reveals two independent offences where one cannot be subsumed in the other in the sense of all the ingredients of one of the offences being included in the other offence, and the evidence adduced pursuant to such a charge does not disclose any of the offences, then this is a defect that is not curable under section 382 of the *Criminal Procedure Code*."

31. I am therefore of the view that the defect in the present appeal is not one that is curable under section 382 of the Criminal Procedure Code, as there are three offences disclosed by the particulars of the charge, namely, two counts of causing death by dangerous driving contrary to section 46 of the *Traffic Act* Cap. 403 Laws of Kenya, and Careless driving contrary to Section 49(1) of the *Traffic Act* Cap. 403 Laws of Kenya, which offences require specific and separate ingredients to be proved, and which attract different penalties under the law. In addition, as shown above, the said offences were not supported by the separate particulars. Lastly, it is my opinion that there was prejudice caused to the Appellant in this regard, as it would not have been clear what offence or sentence was applicable to him.

32. In my thoughtful judgment, I believe that this particular ground of appeal is adequate to resolve the appeal. In light of the fact that I have determined the proceedings were founded on a flawed charge, it

is not advisable in these circumstances to delve into the remaining issues, which would scrutinize the merits of the trial court's findings.

33. The only issue that remains to be considered is whether the appeal should be allowed in its entirety or a retrial ordered. The principles governing whether or not a retrial should be ordered were enunciated in *Fatehali Manji v Republic* [1966] EA 343 by the East Africa Court of Appeal as follows:

> " In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."

34. In *Mwangi v Republic* [1983] KLR 522, the Court of Appeal also held thus:

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

35. I am convinced that this is not a proper case for retrial. I have in this regard particularly noted that there were gaps in the prosecution evidence. Particularly, the prosecution was unable to produce the motor vehicle inspection report and the sketch of the scene of the accident. Additionally, this is a 2014 matter, and nine years have passed since the accident occurred. In the circumstances, it would obviously be a tussle tracing some of the witnesses. Besides, the recollection of the said witnesses on the series of events may be vague.

36. As it is, the appellant was convicted on a duplex charge and as the matter now stands, no one can state for sure, which of the offences he committed. In my view, such conviction should not be allowed to stand. The appeal is accordingly allowed, the conviction quashed and sentence set aside. The fine paid is to be refunded to the payer.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2023.

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D. KAVEDZA

JUDGE

In the presence of:

Mr/Ms. ..... for the State.

Applicant present (VTC)