



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 33 OF 2018

FRANCIS KARANJA MWANGI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Traffic Case no. 171 of 2014 delivered on the 21st day of June, 2012 by Hon. J.L. Tamar, PM]

JUDGMENT

1. The appellant was charged with 11 counts of causing death by dangerous driving contrary to section 46 of the Traffic Act Cap 403 in a Charge Sheet dated 30/4/2014. After full hearing the appellant was convicted on each count and sentenced to imprisonment for six years “without option of a fine”. The appellant was also convicted of a 12th count of reckless driving contrary to section 47 (1) of the Traffic Act and sentenced to imprisonment for 6 months. In addition, the Court directed that the appellant’s driving licence be suspended for a period of 3 years “effective after the accused completes the six years sentence” sic.

2. In his Amended Petition of Appeal, dated 2/7/2018 and amended on 1/3/2019, the applicant raised the following grounds of appeal:

1. **THAT** the trial Magistrate erred in law and fact by convicting the Appellant on insufficient evidence.
2. **THAT** the learned trial Magistrate erred in law and fact by convicting the Appellant despite there having been no direct evidence on the occurrence of the subject accident.
3. **THAT** the learned trial Magistrate erred in law and fact by convicting the Appellant despite the fact that the evidence presented by the prosecution was contradictory.
4. **THAT** the learned trial Magistrate erred in law and fact by disregarding the defence and not appreciating the evidence by the Appellant.
5. **THAT** the learned trial Magistrate erred by passing a sentence that was inordinately excessive in the circumstances.

3. By written submissions before the Court, the appellant challenged the conviction by the trial Court on the principal ground that the cause of accident was not established by the evidence, as follows:

“A number of witnesses for the prosecution testified with regard to what may have caused the subject accident. Mr. Joseph Sigu Otieno (PW3) was passenger in the ill-fated matatu. Pw3 indicated that he was in a ‘Nissan North Rift Matatu’ whose registration number he could not recall. Pw3 was with his sister. Pw3 testified that the vehicle that he boarded was not full and went on picking passengers as the journey to Nairobi progressed. Pw3 stated that, I do not recall that happened at Kamara as I was asleep.’ Pw3 apparently fell asleep and was woken up by people screaming and lost consciousness and he could not recall what happened.

What is clear from the evidence of Pw3 is that he does not know which vehicle was travelling in and therefore no assumption can be made that it was KBB 163T (Toyota Matatu). Pw3 did not know the registration number of the motor vehicle that was involved in an accident with the vehicle he was travelling in. what comes out of the testimony by Pw3 is that he was involved in a road traffic accident in which he sustained serious injuries and nothing more.

William Chelimo (PW7) testified that he was gazetted in the year 2014 vide a Gazette Notice dated 17th September, 2014 and he had

about 27 years in service (presumably in motor vehicle examination). Upon examining motor vehicle registration number KAY 498R (Mercedes Benz Prime Mover), ZB 5147 (Bachu Trailer) and KBB 163T (Toyota Hiace Matatu), Pw7 came to the conclusion that all the vehicles he examined had not pre-accident defects. On cross-examination, Pw7 admitted that motor vehicle registration number KBB 163T was totally wrecked. Pw7 could not tell the condition of the brakes of the said vehicle before the subject accident. Your Lordship, if we were to adopt the position that all the vehicles were in good condition before the subject accident then the cause of the said accident would have to be human error. The question would then be, whose error? In this instance, Pw7 was not certain that the subject accident may not have resulted from mechanical faults on the part of motor vehicle registration number KBB 163T. We submit that Pw7's evidence does not help demystifying the cause of the accident.

Corporal John Wambua (Pw14) was the scenes of crime officer. Pw14 stated that he visited the scenes of the subject accident on 17th April, 2014 at around 8:00. The subject accident had taken place at about 6:45 a.m. according to the Charge Sheet. Pw14 informed the trial Court that motor vehicle registration number KBB 163T was travelling in the general direction of Eldoret towards Nakuru. Motor vehicle registration number KAY 498R/ZB 5147 was travelling from Nakuru towards Eldoret. Pw14 indicated that motor vehicle KBB 163T was extensively damaged. Pw14 took 12 photographs of the scene of the accident.

On cross-examination, Pw14 indicated that the point of impact for Toyota Matatu KBB 163T was on the right side at the front. As regards P.Exh 17 (d) PW 14 stated that the cabin of the lorry was behind the matatu as a result of the impact of the accident. While the photographs produced by Pw14 showed the situation after the subject accident they still cannot explain how the accident happened.

Corporal Charles Owaka (Pw16) was the Investigating Officer at the trial Court. Pw16 stated he received a call from an unidentified matatu driver informing him of an accident at Kwa Harun area, near Kamara Trading Centre along Eldoret-Nakuru road. Pw16 stated that the place that the accident took place was a sharp and blind corner and the corner was marked with continuous yellow line. Pw16 indicated that the place that the accident took place was a sharp and blind corner and the corner was marked with a continuous yellow line. Pw16 indicated that motor vehicle registration number KAY 498R/ZB 5147 was ferrying a very huge tonnage of metal bars. Pw16 stated that the driver of KAY 498L (sic) pulled out from his traffic lane and joined the opposite oncoming lane and collided with motor vehicle registration number KBB 163T. Pw16 stated that 'probably' the driver of KAY (lorry was speeding) at the corner and more so he came '**after a slow or stationery vehicle**'.

On cross-examination, Pw16 could not confirm whether the matatu had its headlights on at the time of the accident or the speed at which it was travelling. At the scene of the accident, the road was slopping in the general direction of Eldoret (where the Appellant was travelling towards). Pw16 admitted that there could have been another motor vehicle which was either slow or no life saver had been placed near such a vehicle. Pw16 stated that there was space to the left as one faces Eldoret that the lorry could have swerved to but he did not explain how a vehicle carrying such a heavy load could be expected to swerve. Further Pw16 admitted to not having indicated measurements on his rough sketch plan.

Your Lordship, the only basis for conviction against the Appellant would have been the testimony of Pw14 and Pw16. However, the two witnesses were not at the scene of the accident and can only speculate as to what happened. The mere fact that the Appellant may have left his rightful lane does not mean that there were no other actors at play. These would include a stalled vehicle and the speed at which the ill-fated matatu was travelling at. Pw16 stated that:

'As both vehicles were about to bypass one another, the driver of motor vehicle registration number KAY 498L (the lorry) pulled out from his traffic lane, joined the opposite oncoming lane from opposite direction and collided head on with motor vehicle KBB 163T...'

It is not clear where Pw16 got this information from and it should be treated as mere fabrication.

It is clear that not a single eye witness testified as to how the subject accident occurred. The testimony by both Pw14 and Pw16 was not consistent and appeared to be mostly speculation.

4. As regards the sentence, the appellant urged a reduction of the sentence to a penalty of a fine as follows:

"In the current, we submit that a sum of Ksh **100,000/-** would be sufficient as fine bearing in mind the time already spent in prison. The Court should also put into consideration the fact that the victims' families were compensated through the various civil suits that were filed against the Appellant's employer."

5. The DPP did not oppose the appeal stating that its witnesses only gave "*a speculative account*" of what may have happened as there was no eye witness, as follows:

"This appeal is NOT opposed.

The appellant herein was convicted of 11 counts of causing death by dangerous driving contrary to section 46 of the Traffic Act Cap 403 Laws of Kenya and sentenced to six years imprisonment without the option of fine for each count. Sentences were to run concurrently. The appellant's driving licence was also suspended for a period of three years effective after completion of sentence. The accident occurred between a Nissan matatu Reg. No. KBB 163T and a lorry Reg. No. KAY 498R/ZB 5147 Mercedes Benz Actros. The appellant herein was the driver of the lorry. The driver of the Nissan Matatu died on the spot alongside 10 other passengers in the matatu. The lorry driver and his passenger survived the crash.

The appellant in the amended Petition of appeal has raised five grounds of appeal. In a nutshell the appellant alleges that the

evidence was insufficient, contradictory, that his defence was disregarded and that the sentence was excessive in the circumstances.

The prosecution called a total of 17 witnesses. PW1, PW2, PW4, PW8, PW9, PW10, PW11, PW12, PW13, PW15 and PW17 were relatives of the deceased in the 11 counts and only assisted in identification of the bodies before postmortem was done. Pw5, was the doctor who examined Pw3, the only survivor in the ill-fated matatu. Pw6 conducted postmortem on the 11 bodies and produced the reports in Court. Pw7, was the motor vehicle inspector who inspected both vehicles, Pw14 was the scenes of crime officer who visited the scene and took photographs of the vehicles at the scene while Pw16 was the Investigating Officer.

Among all the witness, the only witness at the scene at the time of the accident is Pw3. He testified that on 17th of April 2014, he was travelling with his sister in a North Rift Nissan Matatu from Eldoret to Nairobi. That he was seated with his sister and another passenger at the back seat of the matatu. That he was asleep at the time of the accident and was awoken by screams before becoming unconscious. He regained his consciousness three days later on 20th April 2014 with injuries and learned that all the people he was travelling with in the matatu including his sister had died in the accident. He did not know the registration number of the matatu he was travelling in nor what happened on the date of the accident. The prosecution did not have any eye witness who saw the accident happen. Pw16, who was the Investigating Officer and visited the scene, only gave a speculative account of what he thought may have happened.”

6. DPP, in addition considered “*the sentence of 6 years imprisonment without the option of fine and a further suspension of the appellant’s driving licence for three years was excessive in the circumstances*”, as follows:

“It is my submission that the appellant in this case in his defence which was uncontroverted explained that he avoided hitting a center which was stationary on the road thus moving to the other lane. He did not intend to cause the death of the deceased persons.

It is because of the above reason that we humbly request the honorable Court to find that the sentence in this case was excessive and review the same and provide for an option of fine as per the Courts discretion.”

Issue for determination

The issues for determination in the appeal are whether the appellant was proved to have driven this motor vehicle dangerously and thereby causing the deaths subject of charge, and whether the sentence, if appellant was properly convicted, was excessive in the circumstances of the case. A technical issue arose as to the legal propriety of the multiple charges to coincide with the number of deaths in a charge of causing death by dangerous driving under section 46 of the Traffic Act.

Determination

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.

On the Evidence

8. The three prosecution witnesses who testified as to the cause of the accident gave evidence as follows:

PW3: JOSEPH SIGU OTIENO

I come from Eldoret – Pioneer Estate. I am a former student in April, 2014 I was a student and on attachment at Langas Police Station and I was a student of Criminology Eldoret University.

On 17th April, 2014 at 4:00 a.m, I was in a vehicle with my sister Leala to Nairobi and she is Winny Sigo and was in a Nissan North Rift Matatu and I cannot recall registration number and I boarded it at its stage at Caltex in Eldoret. I sat with my sister at the back seat at the middle and were three passengers at the back seat. When we left the stage not all seats were occupied and the two seats at the driver cabin were not occupied. My sister was sat on right side. We were going to Nairobi through Eldoret-Nakuru highway. We did not arrive safely to Nairobi. **I do not recall what happened at Kamara as I was asleep. Before I fell asleep, and on arrival at Annex School of Law two passengers boarded and vehicle was being driven well.**

I fell asleep and I heard people screaming and lost consciousness and I did not see what transpired. After I gained consciousness on 20th April, 2014 and found myself at MTRH-Eldoret and my right leg was broken in the mid-lower section. I had a cut a deep cut on right head with scar and internally at the cheek. I had a bruise and my teeth were shaking on the left cheek side and my left ankle had a cut (scar seen). These were the only injuries I was treated at the hospital and I was discharged on 20th April, 2014 and since I was not fully recovered I was not involved in obtaining discharge summary. I then went home with my father where I was informed by my mother that everyone who was in that vehicle died after which we buried my sister Winny who died in that accident (**deceased in count 11**). I did not see her body before burial. I did not see her body before burial. I came to report at Timboroa Police Station though I do not recall exact date and police took statements and I was issued with a P3 form which I took to MTRH and it

was dully filled by a doctor and I returned it to Timboroa Police Station and I can identify the P3 form (shown) and it has my names and it is the one duly filled – P3 form of Pw3 – MF1-1. I have never seen the vehicle to date and the driver died. I have never gone to the scene of accident. I have never seen the other vehicle involved in the accident.

R. YATOR

SENIOR RESIDENT MAGISTRATE

Cross-examination

When we left Eldoret the vehicle was being driven well and orderly as required and on low speed. I am not a driver and I cannot tell the speed it was being driven out from where I was sat I could not see the dashboard and I could see ahead and I could see ahead for some time before I fell asleep at around 20-30 minutes after starting at Annex-School of Law. I was woken up by screams as I was asleep.

PW14: NO. 637900 CPL. JOHN WAMBUA

Attached CID Lamu County Crime Section – scenes of Crime Section and my gazetment number is 4562/2003. I have worked in Section for 13 years. I visited the scene on 17th April, 2014 at around 8:00 a.m., and I was at Kwa Haruni area near Kamara Trading Centre along Eldoret-Nakuru highway and I had gone to visit scene of traffic road accident involving motor vehicle registration number KAY 498R trailer No. ZB 5147 make Mercedes Benz Actros lorry which was coming from Nakuru towards Eldoret direction and motor vehicle registration number KBB 163T Toyota matatu moving from Eldoret towards Nakuru direction. **Both vehicles were on left side of the road as you face Nakuru direction. There were several bodies on the ground with injuries. The Toyota matatu was extensively damaged on the front while cabin of the lorry was behind the Toyota matatu. On request of Inspector Mwakundiki I took 12 photographs as follows:**

1. General view of Kwa Arun area to Eldoret direction towards Nakuru with both vehicles on left side of road **MF1-16**.
2. Photograph 2 **(i), (ii), (iii)** and **(iv)** is a closer view showing both vehicle KAY 498R trailer ZB 5147 and KBB 163T both on left side of road facing Nakuru direction **MF1-17 a, b, c** and **d**.
3. Photograph 3 – closer view showing damages on front of Toyota matatu MF1-18.
4. Photograph 4 – general view facing Eldoret to Nakuru direction showing breakage of matatu on right side of road facing Eldoret direction MF1-19.
5. Photograph 5 **(i), (ii)** and **(iii)** closer view showing vehicle KAY 498Y trailer on right side of road facing Eldoret direction from Nakuru direction MF1-20 a, b and c.
6. Photograph 6 **(i), (ii)** and **(iii)** closer view showing bodies on motor vehicle KBB 163T Toyota matatu (outside the vehicle) **MFI-21 a, b, c** in total 13 bodies.

I printed photographs at CID headquarters Nairobi and later prepared these photographs booklet and I prepared my certificate and signed it dated 19th August, 2014 and I wish to produce the certificate **MF1-22 – P. exhibit 22** as well as all the photographs identified as **P. exhibit 13,14,15,16,17, 18, 19, 20** and 21. I never used to know the accused.

R. YATOR

SENIOR RESIDENT MAGISTRATE

Cross-examined by Musembi:

- **MF1-18 P. exhibit 18** – wreckage of a motor vehicle Toyota matatu KBB 163T and **the impact is on the front of the vehicle i.e. right side of the front.**
- **P. exhibit 17d** shows both vehicles and cabin of lorry is behind the matatu and due to impact cabin of lorry was moved to back of matatu. From P. exhibit **17d** I cannot tell impact on the lorry.

R. YATOR

SENIOR RESIDENT MAGISTRATE

PW16: NO. 62879 CPL. CHARLES OWAKA

I am currently stationed at Timboroa Police Station where in 17th April, I was stationed at Timboroa Police Station and I am the Investigating Officer herein. On material date at 6:45 a.m., when I, Inspector Mwakundia, PC. Stephen Mureithi Njanjo and PC. Wesley Karani were in office when I received a call from a matatu driver informing me that as he was coming from Nakuru heading towards Eldoret he encountered an accident involving a trailer and a matatu and further advised me to carry enough gloves as he

feared all occupants in the matatu were dead. We proceeded to the scene and on reaching on location of accident i.e. Kwa Harun area, near Kamara Trading Centre along Eldoret-Nakuru road. **The accident had occurred at a sharp and blind corner and the corner was marked with a continuous yellow line. The continuous yellow line was a sign barring any motor vehicle from any direction to overtake at that particular corner.**

The accident involved two motor vehicles i.e. motor vehicle registration number KBB 163T Toyota matatu which was being driven from Eldoret towards Nakuru direction and this vehicle had 12 occupants including its driver namely Kairu Ndirangu and 11 fare paying passengers. The other vehicle registration number KAY 498R hauling trailer number ZB. 5147 being driven by unknown quantity of round 32 metal bars believed to be of very huge tonnage on its trailer. As both vehicles were about to bypass one another, the driver of motor vehicle number KAY 498L (the lorry) pulled out from his traffic lane, joined the opposite oncoming lane from opposite direction and collided head on with motor vehicle KBB 163T Toyota matatu and as a result of the accident, 11 occupants in motor vehicle KBB 163t Toyota matatu died on the spot. These included its driver Kairu Ndirangu and 10 fare paying passengers.

Fortunately one passenger namely Joseph Otieno Sigo survived the crush. He was seated on rear back seat but in the middle and as a result impact of head on collision, Joseph Otieno was thrown off to rear wind screen and then rushed to Nakuru Provincial General Hospital by a Good Samaritan while in a coma and same day transferred from Nakuru Provincial General Hospital to MTRH-Eldoret via Timboroa Police Station condition improving but still unconscious.

As both vehicles were involved in the head on collision, the round 32 metal bars being ferried in the trailer ZB wreck off the front door of the said trailer and found way and wrecked off the cabin from engine of KAY 498R and some pierced the passengers in the matatu on different parts of their bodies with help with a skidder belonging to Comply Company we were able to remove some of the 32 metal bars that had pierced the passengers in the matatu.

After the accident, immediately driver of KAY 498R/ZB 5147 left scene of accident to unknown destination. Motor vehicle KBB 163T was extensively damaged beyond repair. I made arrangement for personnel from scenes of crime – Nakuru to come take photos of the scene and also for motor vehicle inspector William Chelimo from Nakuru who came and inspected the two vehicles at the scene.

The result of the lorry, trailer and matatu came out that all vehicles were serviceable worthy to be on the road and it gives a lot to be desired as the driver of KAY 498R/ZB 5147 pulled out from his lane and joined the opposite oncoming lane. I and fellow investigators came up with opinion that most probably that driver of KAY (Lorry was speeding) at that corner and more so he came after a slow or stationery vehicle and before checking cleaves of the road decided to turn right and hence what caused the head on collision or if not, as a result of fatigue most probably he fell asleep. Arrangements were made where I drew sketch plan at scene of accident, bodies were removed to Makutano Police Station for safe custody.

On the same day about 8:00 p.m. I was in the office with inspector Mwakundia when one Assif Suleiman came to our office and introduced himself as one of the managers of the Road Star Transporters Ltd Company which was the owner of KAY 498R/ZB 5147 and pleaded with us if we could release the trailer No. ZB 5147 together with the round 32 metal bars so as to be to the owner in Eldoret and I told him to bring the driver first and I then served him with P.32 form giving a police officer power to compel owner of a motor vehicle to bring the driver who committed any type of offence on any specific date within 7 days failure to which owner is charged with failure to keep record and particulars.

On 24th April, 2014, the said Assif Suleiman brought us some documents belonging to driver who committed the accident on 17th April, 2014 and the documents were:

- Photocopy of driving licence.
- Photocopy of national I/D.
- Photocopy of certificate of good conduct.
- Photocopy of NSSF card etc.

He pleaded we release him the vehicle and all the documents brought to us bore names of one Francis Karanja Mwangi and I advised him to still try get the driver and on 29th April, 2014 at 12:00 p.m., the person by names Francis Karanja Mwangi whose documents were given to us was brought by Assif Suleiman to Timboroa Police Station. His statement was recorded, I prepared a charge sheet and on 30th April, 2014 he was arraigned in Court, charged with the charges herein. Heading towards Nakuru both vehicles were on left side of the road and if facing Eldoret direction both vehicles were on right side of the road. At place of accident was marked with continuous yellow line.

- I have the P32 form dated 17th April, 2014 MFI-23 P. exhibit 23.
- I have P.72 form N.I.P which I serve driver Francis Karanja Mwangi MFI-24 P. exhibit 24.
- Rough sketch plan which I prepared showing both vehicles on left side of the road leading to Nakuru direction **MFI-25 P. exhibit 25.**
- Fair sketch plan **MFI-26. P. exhibit 26.**

- Measurements and legends which I wish to produce as **P. exhibit 27 a, b.**

I never used to know accused herein before accident.

R. YATOR

SENIOR RESIDENT MAGISTRATE

9. When put on his defence, the appellant testified that he had moved from his left lane to the right lane following encounter in misty conditions with a stalled vehicle on his lane, as follows:

DWI: FRANCIS KARANJA MWANGI

I am accused herein and I have heard charges once read and I plead not guilty. I reside in Nairobi and I am a driver and I have 10 years in driving and I have a driving licence which I obtained in the year 2006 and in those years I have never been charged with similar offence. At the moment I am still a driver with Sifa Imports.

In 2014 I had been employed by Roadstar Company Limited. On 17th April, 2014 I was on duty for Athi River going to Eldoret while driving motor vehicle KAY 498R a Prime Mover trailer i.e. truck hauling a trailer make Actros Mercedes Benz which is a 24 tonnes. On material date I was carrying twisted bars (metal) which were around 18 tonnes in weight and which was below its maximum weight. I left Athi River at 7:00 p.m., when I arrived at Mlolongo and had problems at weighbridge and waited for about 2 hours when I left at 9:00 p.m., and first stopped at Kangemi at Nairobi outskirts at 9:30 p.m. as I had passenger one Anthony Kimani I was to carry after which we proceeded on at Mlolongo and I was driving the motor vehicle at around 50 kph and its maximum speed is 80 kph. I then came straight till when at Sachangwan and stopped for half hour so to see my mother whom I saw as I reside next to the road and I stayed for around 25 minutes then proceeded with the journey.

I arrived at Kamara Kwa Harun (scene) at around 5:30 a.m. At the scene of accident, the road has two lanes from Eldoret and Nakuru direction. From Nakuru to Eldoret the scene is descending and I was still doing 50 kph. There was mist which I could see but with difficulty and I found a vehicle which had stopped on the road and it was a Canter which registration number I did not see. It was on left side of the road leading to Eldoret which was my lane. Due to the mist I noticed it was ahead of me at 20 metres and my vehicle had lights on and I could not apply emergency brakes and expect the trailer to stop as being heavy vehicle you can damage break system (disk or pressure) hence I decided to overtake. If at all I applied emergency brakes it will not stop as the luggage behind can also fall onto the cabin and the vehicle can also roll as it was downstream.

I then decided to overtake and while at middle of canter I saw an oncoming vehicle at high speed at around 30 meters away and I could not tell the exact kind of vehicle. I then decided to leave overtaking lane and get totally outside the road to right side towards Eldoret and I went outside the lane. I did not hit the Canter that had stopped on the road and there was no other vehicle so the oncoming one got space to go ahead as I left its lane but he did not use the space I had left but instead hit my vehicle on left side of the cabin and at no time did it hit right side of cabin. It hit the left cabin door and at that time I had already left the road and was outside.

My vehicle was damaged as the cabin today detailed from the trailer and flown to right side of the road i.e. outside the road. I did not hit the matatu as it is the one which knocked my vehicle while I was outside the road on right side to Eldoret that he had used the space I got out from the accident road not have examined and it is him who personally caused the accident.

R. YATOR

SENIOR RESIDENT MAGISTRATE

Cross-examined by Prosecutor

The road has two lanes to Eldoret and from Eldoret. I was heading to Eldoret and I was keeping to the left and the one to Nakuru was to keep to my right side. On nearing scene I was driving at 50 kph. There was mist and could see with difficulty and my full lights where on. **The stationery Canter I noticed at 20 meters away. I did apply breaks but could not apply emergency and I overtook it as usual and as a driver I am expected to overtake of road is clear from opposite side and I did not confirm if it was clear as I suddenly started to overtake and it was the matatu which had a right of way but it hit mine. It is true I caused the accident as I suddenly left my lane into the right side which the matatu had a right of way.**

On right side of road there is no barrier and nothing could prevent us to get totally outside the road. **Point of impact was not on the road but totally outside the right lane. It is not true I was careless and either into the right side but I did not check of it was clear.**

R. YATOR

SENIOR RESIDENT MAGISTRATE

Re-examination:

The other driver had a smaller vehicle and I have driven both small and big vehicles and a small vehicle can easily apply emergency brakes unlike mine it did not stop but hit my vehicle. The accident was not head on.

R YATOR

SENIOR RESIDENT MAGISTRATE

10. DW2 the appellant's friend and passenger supported the case of the defence by testimony as follows:

“DW2: ANTHONY KIMANI

I am a carpenter and I come from Sach-Angwan. The accused is a friend of mine and I know him as a driver and I know of the charges facing. The accused carried me from Nairobi- Kangemi and at 4:00 a.m. He stopped at Sachangwan to visit his parents and we are neighbors and he was carrying metal and pleaded with me to accompany him to offload then we return home for Easter holiday. **We left at around 5:00 a.m. towards Eldoret and at Kamara there was rain and mist and was at a speed of 50-60 kph and he came and a vehicle that had stopped on the road and when he saw a vehicle at around 50 meters and he overtook the stalled vehicle and the oncoming vehicle was on a high speed and to around a head on collision with the oncoming vehicle which was on a high speed and did not speed and the accused went totally to the right side of the road and the Matatu which was coming hit the hit the left side on where I was sat and the cabin of lorry was thrown far while Matatu, engine and metal it was carrying near rear each other at a different place.**

We were down and I told him I will not remain there and I saw members of public attacking us and I decided to return home and I left her behind and it was after sometime that he called me requesting that I left her behind and it was after sometime that he called me requesting that I come testify but I first hesitated as I was not a driver but I complied due to Court summons.

R. YATOR

SENIOR RESIDENT MAGISTRATE

Cross – examined by prosecutor:

Accused picked me from Kangemi and home is Sach-Agwan and was stopping vehicle and accused stopped and coincidentally it was him who I used to know. I was coming home. The accident was at Kamara and you will first come at Sachangwan. After accused went to visit mother at Sachagwan and he returned and requested I accompany him to Eldoret to offload. I was not his conductor since I was unauthorized passenger. We were on left line heading to Eldoret. At Kamara onwards it was heavily misty hence was at low speed between 50-60 kph though I had not checked the speedometer.

We noticed a vehicle stalled a head and we decided to avoid it by going to the right side for opposite oncoming vehicle and accident was a right hand side. It was the lane meant for the oncoming Matatu. It is not true that accused was not observant on oncoming vehicle and he should have seen the matatu with lights on and should have matter. The Matatu did not come to the left side of the road.

R. YATOR

SENIOR RESIDENT MAGISTRATE

Re - examination:

No one anticipates occurrence of an accident. I doubt if you caused the accident.

R. YATOR

SENIOR RESIDENT MAGISTRATE”

Findings of the Court

Cause of accident

11. With respect, the evidence of the Investigation officer as to how the accident may have occurred is not mere speculation as urged by the appellant but a statement of analysis of available facts. To state that the driver of the trailer must have left his lane and gone into the lane of the on-coming vehicle is based on the respective positioning of the vehicles after the collision. It is not a baseless speculation. The established facts of the position, point of impact, position of impact on the vehicles. There will be cases where, as here, there are no eye-witness and it cannot be said that the cause of the accident and the driver or drivers at fault cannot be established in such cases without eye-witnesses accounts as to how the accident happened. The cause and circumstances of the accident may properly be inferred from other facts proved. Such facts in this case are the position of the vehicles after the accident, the point of impact on the road, the point of impact on the vehicles involved in the accident, the evidence as to the weather and visibility, and the evidence on the section of the road at which the accident occurs.

12. The Investigating officer (Pw16) could only state his opinion as to how the accident appeared to have been caused. Pw14 could only testify as to how he found and photographed the scene upon arrival at the accident. Pw3 was asleep and could not tell how the accident happened. The driver of the trailer (appellant) and his witness agree that they had come upon a vehicle which had stopped in the road which he overtook by moving to the right lane whereupon a head on collision occurred, with an oncoming vehicle which was allegedly at high speed, and that the appellant's vehicle had moved to the right side of the road and the oncoming vehicle had hit it on the left side.

DW2 said had the appellant saw the motor vehicle that had stopped on the road at a distance of 50 metres and that he was driving a speed of about 50-60 Kph, both said that it was around 5.00am and "there was rain and mist".

13. On cross-examination by the prosecution, the appellant asserted that he could only see with difficulty because of the mist and he only noticed the stopped vehicle at 20 metres as follows:

Cross-examined by Prosecutor

The road has two lanes to Eldoret and from Eldoret. I was heading to Eldoret and I was keeping to the left and the one to Nakuru was to keep to my right side. **On nearing scene I was driving at 50 kph. There was mist and could see with difficulty and my full lights were on. The stationery Canter I noticed at 20 meters away. I did apply breaks but could not apply emergency and I overtook it as usual and as a driver I am expected to overtake of road is clear from opposite side and I did not confirm if it was clear as I suddenly started to overtake and it was the matatu which had a right of way but it hit mine. It is true I caused the accident as I suddenly left my lane into the right side which the matatu had a right of way.**

On right side of road there is no barrier and nothing could prevent us to get totally outside the road. Point of impact was not on the road but totally outside the right lane. It is not true I was careless and either into the right side but I did not check if it was clear.

R. YATOR

SENIOR RESIDENT MAGISTRATE

14. I find that the appellant did not check to see whether there was oncoming motor vehicle on the right side before overtaking the vehicle that had stop on his left lane. The area had a continuous yellow line prohibiting any overtaking. The weather conditions of rain and mist made it difficult for the appellant to see clearly and in such circumstances it was wholly dangerous to attempt to overtake even when faced with the stalled or stopped vehicle on his left lane, the appellant should have checked to see whether it was clear and safe to overtake. The explanation that it was misty and he could not therefore see the vehicle which had stopped on the road and that he could not stop his heavily laden vehicle begs the question of lack of care while driving in the very conditions of rain and mist so that he almost abruptly at 20 metres come up the stopped vehicle, I do not accept that the evidence of the Investigating Officer is mere speculation as to how the accident happened. In the absence of an eye witness, the Investigating officer was at liberty and indeed a duty to piece up the evidence and come up with the manner the accident could have occurred. I find the prosecution has proved on the basis of the evidence presented to the Court as to the position on the road of the motor vehicles and point of impact on the vehicles, that the appellant had driven his motor vehicle dangerously by attempting to overtake in misty conditions without checking whether there was an oncoming vehicle. I would, accordingly, uphold the conviction by the trial Court for causing death by dangerous driving c/s 46 of the Traffic Act.

Sentence

Provision as to Sentence of imprisonment

15. Section 26 of the Penal Code 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. (ii) (Repealed by No. 5 of 2003, s. 4.)

16. The sentence of imprisonment for ten years is not a minimum sentence and the Court may, therefore, consider imposing a fine as suggested by the appellant bearing in mind the entire circumstances of this case. The appellant has already served with remission a term of 14 months since sentence on 21st June 2019. I consider that an order of payment of ksh.100,000/- as suggested by the appellant in his submissions, does in addition to the period of imprisonment already served and the provision for suspension of driving licence meet the justice of the case in terms of retribution, reformation and deterrence.

17. I have not been served with argument as to constitutionality of the provision and I do not make any observations thereon. It shall only suffice it to say that in addition to being empowered by section 46 of the Traffic Act as read with section 26 (3) of the general provision on imprisonment the offence is a capable of being punished by a fine **addition thereto or in lieu** of imprisonment.

18. Section 46 of the Traffic Act cap 403 is in the following terms:

“46. 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.** [Act No. 14 of 1958, s. 5, Act No. 16 of 1977, Sch., Act No. 1 of 1986, s. 12.]”

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.

22. I consider that a fine of Ksh.100,000/- would serve the interests of justice in this case having regard to the diminished value of money today over the 20 years since *Thoya* where a fine of ksh.10,000/- was imposed and considering that the appellant has served over 14 months period of imprisonment served since sentence by the trial Court. I would impose as the appropriate penalty a fine in the sum of Ksh.100,000/- in addition to the imprisonment term already served.

23. Pursuant to the discretion (see *Orweryo Missiani*) in sentencing as to the period of cancellation of the appellant driving licence, as in *Thoya*, supra, I would set the said period to be 2 years from the date of conviction by the trial Court.

24. I do not find any reason to interfere with the conviction and sentence of six months imprisonment imposed in Count II for reckless driving contrary 47 (1) of the Traffic Act or the order that it be served concurrently with the sentence of imprisonment for the offence of causing death by dangerous driving in the same accident.

Orders

25. Accordingly, for the reasons set out above, the Court while affirming the conviction of the appellant by the trial Court for the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act, finds the sentences of imprisonment for six years on each count to be excessive and illegal and, consequently, sets aside the said sentences and substitutes therefor a sentence for imprisonment for 12 months, and in addition a fine of Ksh.100,000/-.

26. Having already served in full the imprisonment term of 12 months, the appellant shall be released from custody forthwith upon payment of the fine of Ksh.100,000/-.

27. In default of payment of the said fine of Ksh.100,000/-, the appellant shall serve imprisonment for a period of 12 months from the date of this Judgment.

28. In accordance with the penal provision of section 46 of the Traffic Act as to suspension of a driving licence the Court upholds the cancellation of the appellant’s driving licence and direct that the appellant is **disqualified from holding or obtaining a driving licence for a period of 2 years starting from the date of conviction.**

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF SEPTEMBER 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kamwaro for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.