REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 35 OF 2018

JUSTUS MUTUA NZUKI..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGEMENT

1. The Appellant was charged with causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya. The particulars of offence were that on the 23rd day of December, 2017 at about 0900hrs, along Nairobi-Mombasa highway at Kalimbi area in Mukaa Sub-County of Makueni County, being the driver of motor vehicle Registration No. KBW 553K/ZE 1936 Mercedez Benz, did drive the said motor vehicle on the said road recklessly at a speed or in a manner which is dangerous to the public having regard to all the circumstance 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 which might reasonably be expected to be on the road, failed to keep to his proper lane, had head on collision with motor vehicle Registration No. KBB 295B Toyota Hiace and caused the death of **Joseph Obel Obadi**.

2. **Count II**: Causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya. Caused the death of **Charles Wathala Onyango**.

3. **Count III**: Causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya. Caused the death of **Charles Osama.**

4. **Count IV**: Causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya. Caused the death of **Alfred Owino.**

5. **Count V**; Causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya. Caused the death of **Alice Owino Asango.**

6. **Count VI**; Causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya. Caused the death of **Angelina Okello.**

7. **Count VII**; Causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya. Caused the death of **Roselida Wathala.**

8. **Count VIII**; Failing to report an accident contrary to Section 73(1) of the Traffic Act Cap 403 Laws of Kenya.

9. He pleaded not guilty and matter went into trial. At the close of the prosecution case, the Appellant was held to have a case to answer and thus put into his defence.

10. Being aggrieved by the trial court ruling the Appellant lodged instant appeal and set out 2 grounds;

> **(1) The learned Honourable Magistrate erred in law in failing to find that the particulars of the charges in Counts 1 (one) to 1 (seven) were bad for duplicity and therefore fatally defective.**
>
> **(2) The Learned Honourable Magistrate erred in law in placing the Appellant on his defence on Counts 1 (one) to 7 (seven) whose particulars were duplex thereby greatly embarrassing or prejudicing the Appellant for he would not know what he was charged for to be able to defend himself.**

11. The directions were given for appeal to be canvassed via submissions. The Appellant filed same but the Respondent conceded the appeal.

12. The question that this court is called upon to decide is whether or not the particulars in the seven counts are duplex and if so, what is the effect thereof.

Appellant Submission:

13. Appellant submitted that the charges were bad for duplicity and that defect was fatal such that the Appellant should not have been put on his defence but acquitted under Section 210 of the Criminal Procedure Code.

14. The appellant cited **Black's Law Dictionary, 9th Edition** at page 578 defines duplicity as, ***"the charging of the same offence in more than one count of an indictment or, the pleading of two or more distinct grounds of complaint or defence for the same issue."***

15. The appellant contend that, the genesis of the law on duplicity is actually the Constitution being the grund norm. The Constitution of Kenya (now repealed) under Section 77 (2) provided:

> ***"77 (2) Every person who is charged with a criminal offence –***
>
> *i.* ***Shall be informed as soon as reasonably practicable, in a language that he understands and in details, of the nature of the offence charged."***

16. Section 134 of the Criminal Procedure Code provides that;

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences 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."***

17. With regard to these submissions, interest has been drawn to Section 137 which deals with rules for framing of charges and information and at Section 137 (b) it provided thus;

> **i. "Section 137(b) Where the enactment constituting an offence states the offence to be the doing of or the omission to do any one of any different acts in the alternative, or the doing of or the omission to do any act in one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence;**
>
> **ii …………"**

18. The Appellant in this case was charged under Section 46 of the Traffic Act which is in the following terms:

> ***i. "Any person who causes death or 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 of which might reasonably be expected to be on the road shall be guilty of an offence…."***

19. Section 137 (b) of the Criminal Procedure Code appears to suggest that if the Statutory provision is in terms of Section 46 of the Traffic Act, then all matters stated therein in the alternative may be stated in the alternative in the count charging the offence.

20. In order to interpret correctly this Section 137 (b) of the Criminal Procedure Code, the court must go back to the Constitution of Kenya (now repealed). The Constitution of Kenya (now repealed) obligated the state to ***"inform the accused person as soon as reasonably practicable in a language that he understands and in detail, the nature of the offence charged."***

21. Section 134 of the Criminal Procedure Code reinforces this by providing that ***"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."***

22. This Section is geared at giving "the detail" prescribed by the Constitution of Kenya (now repealed). The Constitution of Kenya, 2010 took the issue a notch higher. Article 50 (2) states, *"every accused person has a right to fair trial which includes the right;*

> ***(a)………***
>
> ***(b) to be informed of the charge, with sufficient detail to answer it.***
>
> ***(c) ………***
>
> ***(d)………***

23. It is submitted that the Constitution no longer requires the accused to be informed of the charge in detail as was the case during the Constitution of Kenya (now repealed). The test now is sufficient detail. Sufficient means enough, adequate, ample. So this is the test post the year 2010.

24. It is observed that not all legislation has been appropriately amended to bring it in line with the Constitution of Kenya, 2010. That Criminal Procedure Code is one of them and it is no wonder that Section 137 (b) is still part of our law. It ought to have been amended or repealed altogether.

25. Thus it is contended that in the present scenario, courts should interpret Sections 134 and 137 of the Criminal Procedure Code with Article 50 (2) (b) of the Constitution of Kenya, 2010 in mind. The said sections must be interpreted to give effect to the grund norm- Article 50 (2) (b) and if any of them is inconsistent with Article 52(b) they are null and void to the extent of the inconsistency as per Article 2 (4) of the Constitution of Kenya, 2010.

26. The appellant poses the question whether counts one to seven were duplex. In ***Shah vs Republic [1969]*** **Mosdel J** (as he then was) correctly recognized that this section (S. 46 of Traffic Act) creates four separate offences namely causing the death of another by driving a motor vehicle on a road;

> ***i) recklessly, or***
>
> ***ii) at a speed, or***
>
> ***iii) in a manner, or***
>
> ***iv) by leaving a vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public.***

27. The question by the judge grappled with was whether a charge which alleged in its particulars that Shah had driven his motor vehicle car Reg. No. KBJ 574 on the main Malindi - Mombasa road *"at a speed or in a manner which was dangerous to the public……"* was a duplex charge. The learned judge in the **Shah case** had no doubt that the charge was duplex.

28. In ***Cherere S/O Gukuli vs Reg. (1955) 22 EACA 478*** the Court of Appeal for Eastern Africa held:

> ***i. "Where two or more offences are charged in the alternative in one count, the count is bad for duplicity contravening Section 135 (2) of the Criminal Procedure Code; the defect is not merely formal but substantial. Where an accused person is so charged, and if he is convicted, he does not know exactly of what he has been convicted."***

29. Sir Newnham Worley, the Vice President of the Court had the following to say;

> ***" We think it is impossible to say, and certainly no Court has so far as we are aware ever yet said, that the accused person is not prejudiced when offences are charged in one count in the alternative; he does not know precisely with what is charged, nor of what offence he has been convicted. It is, indeed very difficult to say that a breach of an elementary principle of Criminal Procedure has not occasioned a failure of justice…."***

30. Back to the seven counts that the appellant faced before the lower court. These counts are clearly duplex. This court must by now be wondering what was the nature of the offence with which the appellant before this court was charged. Was it that he had driven his lorry *"recklessly"* or was it that he had driven his lorry *"at a speed"* or was it that "the manner" of his driving was an issue? These clearly were separate offences charged alternatively in one count and were replicated in all the seven counts that the appellant faced.

31. In ***David Ngugi Mwaniki vs Republic (2001) eKLR*** the Court of Appeal sitting in Nairobi said, ***"these, clearly, were separate offences charged in one count and in our view, we would respectively follow the decision of the Court of Appeal for Eastern Africa in Cherere's case which correctly set out the law when the court held that to charge two or more offences in the alternative in one count is not merely a formal but substantial defect and that a situation the accused person must be taken to have been embarrassed or prejudiced as he does not know what he is charged with, and if he is convicted, of what he has been convicted."***

32. The court proceeded to observe, **"we are ourselves satisfied that when framing a charge under Section 46 of the Traffic Act, the prosecution is bound to choose how it proposes to proceed. The prosecution ought to be forced to choose whether they are alleging that:**

> Ø **The driving was reckless, or**
>
> Ø **Was at a speed, or**
>
> Ø **Was in such a manner, or**
>
> **The vehicle was left on the road in such a position or a manner or such a condition as to be dangerous to the public. We suppose that if the driving partook of each and every one of these elements, then the prosecution can bring them in by the use of the conjunctive "and" which……"**

33. The court concluded in no uncertain terms thus "***in short, were two offences are charged in the alternative in one count, the duplicity***

so occasioned is invariably fatal and Section 382 of the Criminal Procedure Code cannot cure such irregularity."

Issues, Analysis And Determination:

34. The trial court held vide its ruling in part; The court in the end determined that there was a clear distinction between charging an accused person with two offences in the alternative in our count and "the situation where the on junctive "and" is used so that though the charge is duplex, an accused person is not necessarily embarrassed or prejudiced.

35. In the latter, the duplicity is not necessarily fatal; in the former, it must be necessarily fatal for the reasons given in **Cherere's case**, and it does not appear to matter that the accused", was represented by an advocate right from the beginning of the trial and that the advocate should have raised objection to the charge.

36. The issue of duplicity of a charge also came up in ***Dickson Muchiro Mahero vs Republic [2002] eKLR***. There, the appellant was charged under the same Section 46 of the Traffic Act.

37. The particulars alleged that the appellant on a particular date at a particular place "***being the driver of motor vehicle Registration No. KAJ 768H, Isuzu Mini Bus drove the said motor vehicle at a speed or in a manner which was dangerous to the public and other road users, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which was actually at the time or which might reasonably be expected to be on the road and caused the death of Herman Onyango".***

38. The court found that, indeed, causing death is a distinct offence from dangerous or careless driving or obstruction and that, particulars of any charge under Section 46 are offences in themselves.

39. With regard to the appellant's argument that the charge as framed alleged two offences in one count namely, first, causing death by driving a motor vehicle at a speed and second, by driving a motor vehicle in a manner which was dangerous, the court held that the particulars were merely intended to give the appellant reasonable information as to the nature of the offence he faced.

40. After considering the record before it, the court was satisfied that the appellant understood the charge he faced and was in no way prejudiced.

41. The Court of Appeal decision upon the foregoing was thus;

> "***As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective"***

42. In this instance, the trial court opined that count one to seven sufficiently demonstrated to the accused person the charges that he was facing before court in that the same illustrate that an accident is said to have occurred whereby life was lost and the accused is said to have caused the said deaths due to his dangerous driving.

43. Hence there was no confusion arising from the said charges and having considered the same with the evidence in support, it was trial court's view that the accused person was fully aware of the case before court and the allegations that had been made against him, hence found the claim that count 1 to 7 were bad for duplicity lacked merit and the accused person was placed on his defence on counts 1 to 7.

44. This court agrees with the trial court findings and upholds the ruling. Thus the court makes the orders;

- ***i) Appeal is found to lack merit and is hereby dismissed.***
- ***ii) The file to be returned to trial court to proceed with defence hearing.***

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE