REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISCELLENOUS CRIMINAL REVISION NO. 57 OF 2017

EDWIN MBURU KANGARA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The Applicant was arraigned in ***Kiambu Chief Magistrate's Court Traffic Case No. 148 of 2015*** facing three counts as follows:

   a. Causing death by dangerous driving contrary to section 46 of the Traffic Act, Chapter 403 of the Laws of Kenya. The particulars were that on the 25th day of February, 2015 along the Cianda Kawaida Road in Kiambu District of Kiambu County, being the driver of motor vehicle registration number KAZ 821U Nissan Matatu, drove the said Motor Vehicle at a speed that was dangerous to other road users and amount of traffic at the time, and knocked pedestrian pupil, Gladys Nanjala killing her on the spot.

   b. Driving un-insured motor vehicle contrary to section 4(1) of the Insurance Act, Chapter 403, Laws of Kenya. The particulars are were that the Accused drove the aforementioned motor vehicle on a public road without a Certificate of Insurance.

   c. Failing to renew driving licence contrary to section 30(4) of the Traffic Act. The particulars are that the Accused Person drove the aforesaid motor vehicle and failed to renew his driving licence.

2. The matter proceeded to trial and the Prosecution called two witnesses and then closed its case. The Learned Trial Magistrate then ruled that the Applicant had a case to answer and placed him on his defence. The Applicant is aggrieved by that decision and thinks that the decision and the proceedings in general are un-procedural and so deficient in legality that they should invite the supervisory jurisdiction of the High Court to revise them.

3. The Applicant has raised three arguments which I will briefly summarize in the next few paragraphs.

4. First, the Applicant argues that the charge of causing death by dangerous driving should not have culminated in him being put on his defence for two reasons. One reason, argues the Applicant, is that he had already reconciled with the family of the victim and he had paid Kshs. 220,000/- pursuant to that reconciliation. The Applicant says that he and the Victim's family even reduced their agreement into writing – and that the Prosecutor was aware of this. He refers to a number of times when the Prosecutor applied for an adjournment to give a chance for the parties to reconcile. The Applicant complains that the Learned Trial Magistrate refused to accept the reconciliation efforts and forced the mother of the Deceased to testify. The Applicant says that this flew in the face of Article 159(2) of the Constitution which requires Courts to encourage alternative forms of dispute resolution. He finds it unfair that he gave out what he calls his lifetime savings to the family of the Victim only for the Learned Magistrate to turn around and refuse to accept the reconciliation. The Applicant relied on: ***R v Musili Ivia & Another [2017] eKLR*** and ***R v Mohamed Abdow Mohamed [2013] eKLR***.

5. Second, the Applicant says there was no sufficient evidence to put him on his defence on this charge anyway. In this regard, the Applicant says that it is noteworthy that only two witnesses testified and none of them was an eye witnesses. What is more, the Learned Trial Magistrate accepted documents from people who were not the makers – in particular, the post-mortem Report.

6. Third, regarding the second count – that of driving un-insured motor vehicle contrary to section 4(1) of the Insurance Act – the Applicant says that the offence is incurably defective since no such offence is disclosed in the named section. The Applicant relied on ***David Njogu Gachanja v R 2015 eKLR***.

7. I will quickly dispose of this ground. The Applicant is surely right: section 4(1) of the Insurance Act, Chapter 487 of the Laws of Kenya does not create any offence. Neither does section 4 (there is not 4(1)) of the Traffic Act. The charge sheet references "Insurance Act" but also references "Cap 403, Laws of Kenya". The Insurance Act is Chapter 487 of the Laws of Kenya; while Chapter 403 of the Laws of Kenya is the "Traffic Act". It is not clear at all under what statute or provision of the law the charge is based.

8. Section 134 of the Criminal Procedure Code provides 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.*

9. In interpreting this section, ***Sigilani v R (2004) KLR 480*** held that:

> *The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.*

10. In the present case, it is not merely technical that it is impossible to tell what section of the law the Applicant is accused of violating. It is substantive and would cause embarrassment to the Applicant in his defence. It is simply not fair to have an Accused Person engage in a guessing game as to which provision of the law he is accused of violating. For this reason, that charge is defective and the Applicant should not have been called to answer to it.

11. Turning now to the first count – that of causing death by dangerous driving – after perusal of the Court file from the lower Court, I have come to the conclusion that it is best that the Applicant completes the trial and, if aggrieved by the outcome, to pursue an appeal. I say so because I have found it to be imprudent to subject the Learned Trial Magistrates ruling on a no case to answer on this specific charge to revision at this stage. This decision is based on the jurisprudential policy preference to decline invitations to review criminal cases at the interlocutory stage absent exceptional circumstances.

12. In ***Mark Lloyd Steveson v R [2017] eKLR***, I had this to say about this issue:

> *For clarification, it is important to state the trite position that the High Court will usually exercise its power to review or even exercise an appeal over an interlocutory matter before a magistrate's court only in exceptional circumstances. While difficult to determine with mathematical precision when the court will use this power, it is only be sparingly used where, in the words of South African authors, Gardiner and Lansdown, grave injustice might otherwise result or where justice might not by other means be attained. As the authors correctly write, the Court will generally "hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below. Hence, the propriety of exercising revision power for interlocutory matters is decided on the facts of each case and with due regard to the salutary general rule that appeals are not entertained piecemeal.* (Internal quotations omitted)

13. In my view, this case represents a case where it would be a lot more fruitful for the Applicant to let the trial conclude and then prefer an appeal if aggrieved by the final decision. He would have the benefit of placing before the High Court, the Trial Magistrate's thinking on the points he raises – whether this was an appropriate case to allow settlement by way of reconciliation and whether the Prosecution marshaled sufficient admissible evidence to prove the charge beyond reasonable doubt – to enable the High Court adequately deal with those two issues.

14. Finally, although the State's Counsel argued at length about Count 3 (failing to renew driver's licence), the Applicant had not complained at all about that count. I assume that the Applicant is not aggrieved that the Learned Trial Magistrate put him on his defence respecting that particular count.

15. The upshot is that the case is remitted back to the Trial Court for conclusion of the trial on Counts 1 and 3. As the Court has found Count 2 to be fatally defective, the trial against the Applicant on that count shall be terminated immediately.

16. Orders accordingly.

Dated and delivered at Kiambu this 7th day of June, 2018.

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JOEL NGUGI

JUDGE