



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NUMBER 23 OF 2017
APPELLATE SIDE
(Coram: Odunga, J)

PAUL THIGA NGAMENYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Mavoko Principal Magistrate's Court

Traffic Case No. 1162 of 2012, **T A Odera, PM** on 9th May, 2016)

REPUBLIC.....PROSECUTOR

VERSUS

PAUL THIGA NGAMENYA.....ACCUSED

JUDGEMENT

Introduction

1. The appellant, **Paul Thiga Ngamenya**, was charged in the Principal Magistrate's Court at Kangundo in Criminal Case No. 4 of 2015 with two counts the offence of causing death by dangerous driving contrary to section 46 of the **Traffic Act, Cap 403 Laws of Kenya**. The particulars of the first count were that the appellant, on the 5th day of November, 2012 at about 2.30 pm along Mombasa-Nairobi road in Athi River District in Machakos County, being a driver of motor vehicle registration KBN 603K Toyota Hiace Matatu, he drove the said motor vehicle without due care and attention by overlapping and hitting a motor vehicle registration no. KAM 321P Mitsubishi FH which was parked off the road and caused the death of passenger namely **Joseph Mutiso**.

2. The particulars of the second count were that the appellant, on the 5th day of November, 2012 at about 2.30 pm along Mombasa-Nairobi road in Athi River District in Machakos County, being a driver of motor vehicle registration KBN 603K Toyota Hiace Matatu, he drove the said motor vehicle without due care and attention by overlapping and hitting a motor vehicle registration no. KAM 321P Mitsubishi FH which was parked off the road and caused the death of passenger namely **James Kiseli Musmbi**.

3. After hearing the Learned Trial Magistrate found that the prosecution proved their case against the appellant in respect of both counts, proceeded to fine the appellant Kshs 200,000.00 on each count and in default the appellant was sentenced to serve one (1) year imprisonment with the sentences running consecutively. Further the appellant's driving licence was to remain cancelled for a period of one year.
4. Aggrieved by the said decision the appellant has appealed to this Court against the said conviction and sentence.

The Evidence for the prosecution Before the Trial Court

5. At the trial, the prosecution called eight witnesses. The first witness for the prosecution who testified as PW1 was **Ephantus Mwangi Nguka**. According to him, on 5th November, 2012 he was driving a lorry Motor vehicle registration number KAU 321P Mitsubishi FH (the lorry) owned by **Joseph Irungu Kamau** in the company of two turn boys from Kitui towards Nairobi along Mombasa Road while at Prima Rosa Area the said vehicle got a puncture on one wheel amongst the six wheels. He therefore parked the vehicle on the murrum off the road on the left side of the road as one faces Nairobi direction with one wheel being on the pedestrian path and placed life savers in front and behind the vehicle to alert other vehicles.
6. He then left the turn boys there and headed to Nairobi to buy spare parts since he had one tyre burst which caused a puncture on another one. He therefore went for two tyres. Upon his return at 2.00pm in a taxi he found it raining at the place and found a traffic jam near the place. He then alighted and walked to where he had parked and on reaching the vehicle he found that it had been hit from behind and two people had died and police officers and good Samaritans were removing the bodies. At the scene was a Nissan which was facing Nairobi direction and there were other passengers who were injured.
7. The said bodies were then taken to Machakos Hospital Mortuary. He then fixed the tyres on his vehicle and drove to Athi River Police Station. According to him his vehicle was damaged at the back while the Nissan's front was extensively damaged. After inspection his vehicle was released to him. According to him he saw the driver of the Nissan, who he identified as the appellant, at the scene who had covered himself with a red *shuka*. The said driver had attempted to run but the police chased and arrested him. He however stated that he had not met the appellant before and did not talk to him. His turn boys however informed him that out of fear they had run into the bush.
8. PW1 stated that he moved his vehicle off the road after the tyre burst on the left side. The puncture was also on the same side. He however insisted that the vehicle was off the road on the murrum. According to him, neither him nor his turn boys witnessed the accident but stated that the Nissan hit his vehicle on its left side but damaged the right side of the back door. He however stated that a life saver is usually not put when the vehicle is off the road but is placed near the road to alert other road users.
9. PW2 was **Senior Sergeant Micah Emoi**, who was working at Masimba AP Police Post Kajiado. According to him on 5th November, 2012 at about 4pm he was a passenger in motor vehicle registration number KBN 603K (the *matatu*) travelling from Emali heading towards Nairobi. Upon reaching Daystar University junction, the *matatu* he was in was over-speeding and though he was seated on the second last seat, he could tell from his experience as a driver that driving at over 80 km/h. On reaching the said junction the said *matatu* left its lane went onto the pavement at the same speed and upon seeing a stationary lorry which off the road, the driver tried going back to the road, there was another vehicle behind which did not give him way as a result of which the *matatu* went back off the road and rammed into the stationary lorry.
10. According to PW2, there were many vehicles on the road on both sides of the road and the driver of the *matatu* was trying to overlap on the bicycle path. It was his evidence that there was a life saver sign behind the stationary lorry. After the accident the driver of the *matatu* tried to run away but was arrested by the drivers who were on the same road. As a result he was injured and was taken to Shalom Hospital by a good Samaritan and regained consciousness the following day. It was his evidence that the weather was fair as it had not rained and the road was flat. He identified the appellant as the person who was

driving the *matatu* though he did not know him before.

11. He insisted that the lorry was off the road though it touched the tarmac and all its wheels were on the tarmac but off the white lane. It was his evidence that the driver of the *matatu* did not brake as he tried to go back onto the road. It was therefore his evidence that the accident was caused by the recklessness and carelessness of the driver. He testified that the whole of the front part of the *matatu* rammed onto the back of the lorry.

12. **Josephine Wanza**, PW3 was on 5th November, 2012 at about 3pm travelling from Emali towards Nairobi in a Nissan *matatu* registration number KBN 603K along Mombasa Road. According to her the vehicle which over-speeding though she could not see the speedometer. After passing a flower farm near Daystar, the vehicle which was overtaking a lorry on the left side came upon a stationary lorry off the road and tried to go back to its lane but failed to do so since there was a lorry which did not give it way. As a result the *matatu* driver applied brake and they hit the stationary lorry and stopped due to the impact. As a result she sustained injuries and was taken to Shalom Hospital in Athi River. According to her the weather was sunny on that day.

13. PW4, **Larry Kilonzo**, the Assistant Chief of Isinga sub location, Kangundo on 6th November, 2012 at 10.45 am at Machakos Level 5 Hospital identified the body of his uncle, **Joseph Mutiso Kunga**, who sustained fatal injuries in an accident which occurred on 5th November, 2012. The same body was on the same day identified by the deceased's wife, **Alice Wanza Mutiso**, who testified as PW6. Similarly, PW5, **Joseph Kittonyi Kilolo** on the same day at Machakos Level 5 Hospital identified the body of his nephew, **Gerald Kisali**, who sustained fatal injuries in an accident which occurred on 5th November, 2012.

14. **Christopher Peter Muthoka** (PW7), a motor vehicle inspector testified that identified the signature of Isaac Kimani who prepared the inspection report for the vehicles involved in the accident. According to the report, motor vehicle KBN 603K had extensive damage at the front though there were no pre-accident defects noted. With respect to motor vehicle KAK 321P there were also damages though similarly no pre-accident defects were noted. It was however his evidence that if tyres were deflated or had burst then it would have meant that there were defects. He however stated that the report indicated that the lorry had a problem with the tyres as tyre was scratched which was a defect due to the impact.

15. PW8, **Dr Fredrick Okinyi**, the pathologist confirmed that on 6th November, 2012 he conducted a post mortem on **Joseph Mutiso Ngunga** whose body was identified by **Alice Mutiso** and **Nelly Kilonzo**. He concluded that the cause of death was multiple injuries to the chest, head and femur which was consistent with blunt trauma caused by road traffic accident. He also conducted a post mortem on the body of **Gerald Kisali** which was identified by **Josephat Kitonyi** and **Samson Vati Musembi**. According to him the cause of death was haemorrhagic shock from multiple injuries.

16. PW9 Police Inspector **Charles Omondi Opondo**, visited the scene of the accident along Mombasa-Nairobi road near Prima Rosa where he found motor vehicles registration no. KAU 321P, a lorry Mitsubishi FH and *matatu* registration no. KBN 603K, Toyota Hiace. He also found bodies of two passengers who died on the spot and several other people who were injured whom he arranged to be taken to Shalom Hospital.

17. According to him, the weather was clear and the *matatu* was moving from Machakos Direction towards Nairobi while the lorry was parked off the road and left 2 metres from the road. It was his evidence that the *matatu* which was overlapping overran a life saver triangle which was there and rammed behind the lorry. He disclosed that the driver of the *matatu* attempted to run away but they managed to arrest him and took him to hospital where he was treated and discharged after which he was taken to the police station from where he was charged with the instant charges. He identified the driver of the *matatu* as the appellant and produced the rough sketch plan, the fair sketch and the legends.

18. It was his evidence that though he did not witness the accident, he visited the scene less than 20 minutes after the accident by which time the driver of the *matatu* was at the scene and was in uniform.

According to his evidence the *matatu* rammed onto the lorry from behind and the dead passengers were seated in front next to the drive and the point of impact was 2 metres from the edge of the road on the left side.

Evidence for the Defence

19. At the close of the prosecution case the appellant was put on his defence. In his unsworn statement, the appellant stated that on 5th November, 2012 at 2.00pm he was from Emali heading to Nairobi along Mombasa-Nairobi road while driving motor vehicle KBN 603K *matatu* which was carrying passengers. Upon reaching Prima Rosa area there was a traffic snarl up and vehicles were moving slowly on both lanes. His vehicle however had a front tyre burst at which time he was travelling between 40-45 km/h and was going uphill on his lane towards Nairobi.

20. According to the appellant he tried to control the vehicle but met a stationary lorry with no wheels and hit it. He tried to veer off to the left lane and park the vehicle. As a result two people died in his vehicle. It was his evidence that he did not apply brakes as that would have resulted into the vehicle overturning. It was therefore his evidence that the accident was caused by the tyre burst.

The Judgement

21. In his judgement, the Learned Trial Magistrate found that there was no dispute that the accident occurred as a result of which **Joseph Mutiso Kanga** and **James Kiseli Musembi** sustained fatal injuries. Based on **R vs. Evans [1962] 3 All ER 1086** and **Okech vs. Republic [1990] 1 KLR 705**, the Learned Trial Magistrate found on the basis of the evidence adduced that the appellant must have been over-speeding at the material time and overlapped off the left side of the road to avoid traffic snarl up and rammed onto the back of the lorry

22. It was therefore his finding that the appellant was reckless and drove in a dangerous manner hence the finding that the prosecution had proved its case against the appellant.

Appellant's Submissions

23. It was submitted by the appellant that the photographs which were taken were not produced in evidence and the fact that PW1 placed life saver signs could only be indicative of the fact that the lorry was parked on the road, a factor which was not taken into account by the trial magistrate. According to the appellant, the said photographs were not produced because they would have rendered the evidence of PW1 and PW8 redundant. It was further contended that the turn boys who were left at the scene ought to have been called to testify in the matter.

24. It was submitted that the Learned Trial Magistrate relied on the contradictory evidence of PW1 and PW8 (who ought to have been PW9) with respect to the evidence of over-speeding yet the two never witnessed the accident.

25. It was submitted that the Learned Trial Magistrate by finding that the defence was a sham treated the defence case with disdain hence shifted the burden of proof onto the appellant. This was due to the fact that the court ignored the appellant's evidence that the lorry was on the road.

26. It was further submitted that the sentence was manifestly excessive since the fines imposed were to run concurrently.

Respondent's Submissions

27. The Respondent, through the submissions of **Mr Cliff Machogu**, in conceding the appeal, submitted that the fact that PW1 placed life saver behind the lorry was evidence that the lorry was on the road to warn other road users of the danger ahead of them.

28. It was further submitted that under section 143 of the *Evidence Act*, the prosecution is not obligated to call a particular number of witnesses to prove any fact. It was however submitted that in this case the prosecution failed to call crucial witnesses that would have helped the trial magistrate in taking the material evidence into consideration as he would have. These witnesses, it was submitted included the turn boys who remained at the scene when the driver of the lorry went to purchase the tyres to replace the ones which had been damaged. Similarly, the scene of crime officers who took the photographs were not called to testify as to the position of the lorry. To the prosecution the appellant's testimony did demonstrate that the lorry was on the road and not off it and greater weight should have been placed on it by the Court.

29. It was further submitted that there were a lot of material contradictions and inconsistencies and discrepancies with respect to the evidence of over-speeding as given by PW1 who was not present at the time of the accident.

30. As regards the sentence, it was submitted that the sentences were manifestly excessive as they were to run consecutively and not concurrently.

Determination

31. Even though the State conceded the appeal, it does not follow that in those circumstances this court must allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565**, the court said:

“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”

32. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

33. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

34. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. We adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd vs. Uganda Railways Corporation [2002] 2 EA 634**, thus:

“The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In **Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**

‘I would accept Mr. Byenkya’s submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).’”

35. It was therefore held in **David Njuguna Wairimu vs. Republic [2010] eKLR** by the Court of Appeal as follows:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

36. In the same vein the Court of Appeal in **Isaac Njogu Gichiri vs. Republic [2010] eKLR** expressed itself as hereunder:

‘With regard to failure by the superior court to give due consideration to the appellant’s defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: “*I find that the defence of the 5th accused is not true.*” We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: “*The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances.*” We agree with this confirmation.’”

37. It was therefore concluded by the Supreme Court Uganda in **Odongo and Another vs. Bonge** Civil Appeal 10 of 1987 (UR), (Odoki, JSC) that:

“While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance.”

38. Section 46 of the *Traffic Act. Cap 403 Laws of Kenya* provides as follows:

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 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.

39. This provision and provisions couched in similar terms has been the subject of judicial pronouncements in this country and in other jurisdictions. A case in point is **Ngure vs. Republic [2003] E.A.** in which the Court of Appeal had the following to say:

“The mere occurrence of an accident alone is not enough to prove a charge of causing death by dangerous driving under section 46 of the Traffic Act. Evidence must disclose a dangerous situation and the driver must be shown to be guilty of a departure from the normal standard of driving which would be expected of a reasonably prudent driver.”

40. In **Atito vs. Republic [1975] EA 278**, the Court of Appeal dealt with a case in which the appellant had been convicted for the offence of dangerous driving resulting in the death of two persons. At page 280 the court said:

“The question in this case is whether the appellant took avoiding action at all, or in good time, and whether by not taking this action, or delaying taking it unduly, he caused a dangerous situation to arise for whose consequences he is criminally liable.”

41. The Court of Appeal went on to re-state the standard of proof and the test, as was laid down in **Kitsao vs. Republic MSA H.C.Cr. A. 75 of 1975 (unreported)** that to justify a conviction of 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 that situation. The question therefore is not just whether or not there was a dangerous situation, but whether the appellant also played a part in causing the situation to be dangerous. The Court of appeal went on to make the following observation:

“In Kitsao’s case the appeal was allowed, as the most the prosecution could show was an error of judgment on the part of the driver.”

42. In **Atito vs. Republic** (above cited), at page 281, the court said:

“The fact that the motor –cyclist may have been at fault in not passing safely in the three or four feet of tarmac available to him is, in our opinion, immaterial. It would not cancel out the appellant’s fault, in not taking avoiding action in time, which fault, whether it should properly be described as careless or dangerous driving, was clearly more, in the circumstances of this case, than a mere error of judgment.”

43. The law as regard the test to be applied when considering whether or not a driver is said to have been driving in a dangerous manner was stated in the case of **R –vs- Evans [1962]3 All ER 1086** at page 1088 where **Fenton Atkinson J. A.** stated that:

“... the objective test, because it has been laid down again and again in the reported cases, among others by Lord Goddard C.J. in Hill –vs- Baxter (1) where he said:

“the first thing to be remembered is that the statute contains an absolute prohibition against driving dangerously or ignoring halt signs. No question of mens rea enters into the offence; it is no answer to a charge under the section to say ‘I did not mean to drive dangerously’ or ‘I did not notice the halt sign’.”

It is quite clear from the reported cases that, if in fact a man adopts a manner of driving which the jury think was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best.”

44. Section 46 of our *Traffic Act* is similarly worded like the English Act that the learned judge referred

to and states that “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 ...” The said Section of the **Traffic Act** is absolute in terms of liability. It does not matter that the driver thought that he was driving as best as he could in the circumstances. If the court is of the opinion that he was driving dangerously, then he shall be found guilty of the offence of dangerous driving. The above English decision was quoted with approval by **V. V. Patel, J.** in the case of **Okech –vs- Republic [1990] KLR 705.**

45. In **Thoya vs. Republic [2000] eKLR**, **Waki, J** (as he then was) held that:

“On persuasive authority in the Tanzanian case of *Pyarali -vs- Republic* [1971] EA 169:

“the test of whether a piece of driving is dangerous is objective and if the manoeuvre itself is dangerous the degree of negligence or care of the driver is irrelevant”.

.....

Again the prosecution does not have to prove that the dangerous driving was the sole cause of death if it was the substantial cause of it. The Court of Appeal in *Atito -vs- Republic* [1975] EA 281 also laid down the law on the standard of proof:

“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 that situation”.

“Fault” was defined in another Court of Appeal case *Orweryo Missiani - vs- Republic* [1979] KLR 285 at page 289:

“Fault” certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient.”

Those are the principles I have to apply. The evidence available and accepted by the learned trial magistrate was that the appellant was driving the *matatu* at speed. Five witnesses who were in the *matatu* testified so. One of them put the speed at between 90 - 120 Kmph. It was overloaded. It overtook several other vehicles on the same road and was in the process of one such overtaking manoeuvre when it hit a spot of spilled oil on the road. There is evidence, also accepted by the learned trial court that the oil-spill had been there for sometime. The appellant had passed through the same road three times earlier. There was evidence also that it had rained. Those are the conditions of the road the appellant had to contend with.

The police officer who visited the scene and drew a sketch produced as exhibit 6, showed that the vehicle rolled and came to rest 350 meters away. It had no pre-accident defects as proved by the vehicle examiner exhibit 7. The deceased’s head was split into two upon impact according to the post mortem report exhibit 8. I agree with the learned trial magistrate in view of these circumstances and evidence on record that the appellant drove in a dangerous manner. I would dismiss the appeal on conviction and now do so.”

46. In this case there is evidence from the passengers who were in the *matatu* that the said vehicle was being driven at a high speed. Even though the exact speed was not disclosed, there was the evidence that arising from the impact the *matatu* was extensively damaged. This evidence does not match with the appellant’s contention that the vehicle was moving slowly and that he was going uphill at a speed of between 40-45 km/h. It is not uncommon for vehicles being driven at reasonably slow speed to be able to

be controlled even where there is a tyre burst. In this case even discounting the evidence of PW1 and PW9 (wrongly named PW8), there was evidence from PW2 and PW3 that the appellant was overlapping on the left side off the road when he suddenly came upon the stationary lorry and due to the speed its attempt to abruptly come back to the road was thwarted by a lorry that was behind it forcing it back and to hit the stationary lorry.

47. In my view the act of the appellant in overlapping and going off the road onto the path of the cyclists thus “overtaking” vehicles on the left side was a dangerous manoeuvre itself hence his degree of negligence or care is irrelevant. It was dangerous because he ought to have known that even if there was no obstacle in the form of a stationary vehicle there was a possibility of colliding with a cyclist or a pedestrian.

48. As to whether there was fault on the part of the appellant, it is clear that by driving at a high speed where he was not supposed to drive in the first place amounted to falling below the care or skill of a competent and experienced driver, in circumstances of the case where the other drivers exercised patience and were bidding their time waiting for the traffic flow to open up. It does not matter that the appellant felt that the fault was slight, or that it was a momentary lapse and in the “normal *matatu* mania” no danger would have arisen from it.

49. If, as it is contended the lorry was on the road and the vehicles were moving very slowly as the appellant admitted, the question would arise as to why the other vehicles were able to pass the lorry without a collision. Therefore assuming that the lorry was on the road, the accident would have been substantially caused by the appellant and the prosecution did not have to prove that the dangerous driving was the sole cause of death if it was the substantial cause of it. If the lorry was on the road and the appellant’s vehicle had a tyre burst, and there was no evidence of this, there is no evidence that the appellant attempted to veer off the road to avoid colliding with the lorry.

50. The appellant took issue with the failure to call the turn boys as witnesses. However, section 143 of the *Evidence Act* provides that:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

51. I can do no more than reiterate what the Court of Appeal stated in **Benjamin Mbugua Gitau vs. Republic [2011] eKLR** that:

“It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.”

52. In **Mwangi vs. R, [1984] KLR 595** the Court of Appeal held that:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

53. The prosecution is not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. In **Keter versus Republic [2007] 1EA135** the court was categorical that:-

“The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

54. However where the prosecution in the course of its investigations unearths evidence favourable to the defence, it is under obligation to disclose the same and ought not to suppress the same in order to get a conviction. Article 157(11) of the Constitution provides:

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

55. Apart from that, section 4 of the ***Office of the Director Public Prosecutions Act***, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

56. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Some of these principles are the interests of the administration of justice, impartiality, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya and the need to serve the cause of justice, prevent abuse of the legal process and public interest. The office of the Director of Public Prosecution is also required to promote constitutionalism. Some of the principles of constitutionalism are to be found in Article 10 of the Constitution and these include transparency and accountability. Dealing with suppression of evidence, in **David Kariuki Mutura vs. Republic [2005] eKLR** it was held that:

“These witnesses were not called to testify. In the case of GEORGE NGOSHE JUMA & ANOR VS ATTORNEY GENERAL, MISC. CRIMINAL APPLICATION NO. 345 OF 2001, The Constitutional Court held that the prosecution has a duty to bring before Court all the evidence gathered to ensure that justice is done. The prosecution cannot be allowed to suppress evidence in their possession even if it is in favour of the accused. Unfortunately this is what seems to have happened in the instant case. The investigating officer was selective in the evidence he wanted adduced before Court. There was evidence recorded from witnesses that was in favour of the Appellant. This evidence was suppressed for no apparent reason. I think in this regard the Appellant’s complain that the Learned Trial Magistrate erred in disregarding the fact that the prosecution had deliberately suppressed the evidence of the eye witnesses to the accident despite having taken statements from them has some justification. I think that in those circumstances, the trial Magistrate ought to have drawn the necessary inference that the evidence that would have been adduced by the said witnesses would have

been unfavorable to the prosecution case.”

57. In this case there is no evidence that the statements of the turn boys were taken and that they were favourable to the appellant. As regards the photographs, it has not been contended that the same were in fact favourable to the appellant’s case. The appellant’s case seems to be that that evidence “might” have been favourable to him. In this case the rough sketch plan, the fair sketch and the legends were produced. It is not mandatory in these kinds of matters that photographs be taken and produced if their purpose may well be served by the said plans. In those circumstances I cannot state with certainty that the prosecution suppressed the evidence favourable to the appellant.

58. With respect to the alleged inconsistencies, contradictions and discrepancies what was alleged as amounting to inconsistencies, contradictions and discrepancies were the fact that PW1 and PW9 stated that the appellant was over-speeding while they were not eye witnesses to the accident. Whereas I appreciate that there were minor discrepancies in the evidence of the witnesses it is my respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See *Law of Evidence (10th Ed) Vol. 1 at 46*.

59. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

“Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place and that one or both suffered from a defective memory.”

60. This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR**, where the Court of Appeal held:

“As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code.”

61. In my view the contradictions pointed out were not so material as to vitiate the conviction.

62. It is therefore my view that the conviction of the appellant was grounded on sound evidence and should not be disturbed.

63. As regards sentence, **Waki, J** in **Thoya vs. Republic** (supra) expressed himself as hereunder:

‘As for the sentence, the principles were considered in the *Missiani Case* (above) following *Republic -vs- Guilfoyle* [1973] All ER 844.

‘The experience of this Court has been that there have been many variations in penalties. Some variations are inevitable because no two road accidents are alike, but there are limits to permissible variations and it may be helpful if this Court indicates what they are. Cases of this kind fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgement, and secondly those in which the accused has driven in a manner which has shown a selfish disregard

for the safety of other road users or his passengers or with a degree of recklessness. A sub-division of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs. Offenders, too, can be put into categories. A substantial number have good driving records, a fair number have driving records which reveal a propensity to disregard speed restrictions, road signs or to drive carelessly, and a few have records which show that they have no regard whatsoever for either the traffic law or the lives and safety of other road users. In the judgment of this Court an offender who has a good driving record should normally be fined and disqualified from holding or obtaining a driving licence for the minimum statutory period or a period not greatly exceeding it, unless of course there are special reasons for not disqualifying. If his driving record is indifferent the period of disqualification should be longer, say two or four years, and if it is bad, he should be put off the road for a long time. For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, a custodial sentence with a long period of disqualification may well be appropriate, and if this kind of driving is coupled with a bad driving record the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed.'

And citing *Govind Shamji -vs- Republic Madan and Chesoni JJ* (as they then were):

'The offence of causing death by dangerous driving is not an ordinary type of crime. While it cannot be given an aura of protection by putting it in a glass case of its own, the people who commit this offence do not have a propensity for it, neither is it a type of crime committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interests of justice as well as the interest of the public. There are of course cases where a custodial sentence is merited, for example, when there is a compelling feature such as an element of intoxication or recklessness.'

The maximum sentence under section 46(1) is 10 years for imprisonment. That does not mean that other options available for sentencing cannot be considered depending on the circumstances of the case. They were not considered in this case and no reasons were given for failure to do so.

The appellant appears to have been a first offender since no records of previous conviction were produced by the prosecution or admitted by him. He was a family man with children. Although the appellant was correctly found to have been at fault as legally defined above, it was still relevant to consider during sentencing, that there was an oil-spill on the road whose effect the appellant may well have misjudged. There was no compelling feature such as an element of drugs or alcohol intoxication to aggravate the offence and thus attract severe custodial penalty. In my view this is a case where the ends of justice would have been served by giving the option of a fine to the appellant. The appellant has served a period of about 2 years out of the term of imprisonment imposed on him. I set aside the sentence and substitute therefore a fine of Shs 10,000/= upon payment of which the appellant may be set at liberty forthwith. In default he will serve a period of imprisonment of 6 months from the date of this judgment. I further propose to interfere with the order for disqualification from holding a driving licence which I now set aside and substitute therefor a period of 2 years from the date of conviction by the lower court. To that extent only the appeal succeeds."

64. In this case the sentences meted against the appellant were expressed to run consecutively. The next question is whether the sentences should run concurrently or consecutively. Section 14 of the *Criminal Procedure Code* provides for circumstances in which a court can direct sentences to run concurrently or consecutively. Section 14 provides in part as follows:-

"(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct

offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(3) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences:-

a. of imprisonment which amount in the aggregate to more than fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or

b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.”

65. Section 7 (1) of the *Criminal Procedure Code* stipulates that:-

a. a subordinate court of the first class held by a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.

b. a resident magistrate may pass any sentence authorized..... or under the Sexual Offences Act. See also the High Court decision in *Ali Abdi Shabura –v- Republic- H.C.CR.A No. 90 of 2007.*

66. In the case of *Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97*, the then Court of Appeal for Eastern Africa in a judgment read by **Sir Joseph Sheridan** stated that the practice is, where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

67. The Court of Appeal in *Peter Mbugua Kabui vs. Republic [2016] eKLR* expressed itself on the matter as hereunder:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totalling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful” We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same.”

68. In this case it is clear that the series of offences which the appellant faced were committed at the same time in a single act/transaction. Therefore the Learned Trial Magistrate ought to have imposed a

concurrent sentence. With respect to the cancellation of the appellant's driving licence, it is clear that the accident did not arise through momentary inattention or misjudgement but was a result of a selfish disregard for the safety of other road users or his passengers or with a degree of recklessness. According to the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**:

“[91] In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”

[92] The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**
- 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
- 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.**
- 5. Community protection: To protect the community by incapacitating the offender.**
- 6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”**

69. I have considered the fact there has been a sharp rise in the prevalence of road traffic accidents in this country most of which are caused by recklessness on the part of the drivers. Overlapping has become the order of the day for *matatus* in this country. In my view one way of curbing such reckless loss of lives and limbs by people who are only interested in financial gain is to impose a sentence whose objective is geared towards retribution, deterrence and denunciation.

70. In the premises, whereas I hereby set aside the consecutive sentence imposed upon the appellant and substitute therefor a concurrent sentence in so far as the period to be served is concerned, the fine imposed and the disqualification will however remain undisturbed.

71. Right of appeal 14 days.

72. Judgement accordingly

Judgement read, signed and delivered in open court at Machakos this 3rd day of October, 2018.

G V ODUNGA

JUDGE

In the presence of:

Mr Mbithi for Mr Otieno for the Appellant

Ms Mogoi for the Respondent

CA Geoffrey