**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.103 OF 2018**

***(An Appeal arising out of the conviction and sentence of Hon. E. Riany – SRM delivered on 21st June 2018 in Nairobi CM. TR. Case No.2126 of 2018)***

**JAMES NDUBI NYERERE.......................................APPELLANT**

***VERSUS***

**REPUBLIC.................................................................RESPONDENT**

**RULING**

The Applicant, James Ndubi Nyerere is facing a charge of **causing death by dangerous driving** contrary to **Section 46** of the **Traffic** Act. The Applicant pleaded not guilty to the charge. The prosecution has called all its witnesses. It has closed its case. The Applicant made submission on no case to answer. After considering the said submission, the trial court held that the Applicant had a case to answer. The Applicant was aggrieved by the decision. He filed an appeal to this court. Pending the hearing of the appeal, the Applicant sought to stay further hearing of the case before the trial court. From his submission, it was clear that the Applicant takes issue with the particulars of the charge which stated as follows:

> "***On the 1st of January 2018 at about 1400 hours, along Ronald Ngala Street in Nairobi within Nairobi County, being the driver of motor vehicle Reg. No.KBS 053X Isuzu matatu did drive the said motor vehicle on the road recklessly or at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the road at the time and hit a male adult pedestrian namely Julius Gikonyo Kinunu by sandwiching him with another motor vehicle registration number KBX 521N which was stationary thereby causing his death."***

The Applicant contends that the particulars are duplex and did not disclose the charge that the Applicant was being called upon to answer to. The Applicant was of the view that the charge was incurably defective and therefore ought to have been dismissed at the stage of no case to answer. The Applicant relied on the case of **David Ngugi Mwaniki -vs- Republic 2001 eKLR** where the Court of Appeal held that **Section 46** of the **Traffic Act** as framed created four distinct and separate offences which must be set out in the particulars of the charge. The Applicant was aggrieved that despite raising this issue of the duplex nature of the charge, the trial court did not find favour with his submission. That is the reason why the Applicant was seeking a second opinion from this court. The Applicant urged the court to reconsider the trial court's decision and rule that the Applicant has an appeal with overwhelming chances of success and therefore stay the proceedings pending before the trial court until the hearing and determination of the appeal.

Ms Kimiri for the State opposed the appeal. She took the opposite view from that of the Applicant. She submitted that the charge brought against the Applicant was not duplex. The Applicant understood the charge. He vigorously defended himself before the trial court. The Applicant's complaint related to the particulars of the offence which essentially gave the particulars on how the offence was committed. Learned prosecutor contended that the application before this court was premature since the Applicant has another opportunity to persuade the trial court when making the final submission after the close of his defence. There was no guarantee that the Applicant would be convicted or acquitted at this stage of the proceedings. She was of the view that the matters that the Applicant is seeking to canvass before this court should be presented to the trial court and in the event the Applicant is aggrieved by the decision of that court, he is at liberty to lodge an appeal before this court. In the circumstances, she urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties to this application. It has also read the proceedings of the trial court annexed to the application. The issue for determination by this court was whether the Applicant made a case for this court to stay proceedings before the trial court pending the hearing and determination of the appeal. In considering such application, this court must be persuaded that the appeal has an overwhelming chance of success that this court will have no option but to stay the proceedings before the trial court pending the hearing of the appeal. The Applicant's main complaint is that his plea to have the case dismissed for being duplex and therefore incurably defective was disallowed without the court taking into consideration his submission.

*What constitutes a duplex charged?* In **Reuben Nyakango Mose & Another –vs- Republic [2013] eKLR**, the Court of Appeal held thus in regard to what constitutes a duplex charge:

> ***"In a persuasive authority of the High Court in the case of Laban Koti –vs- R [1962] EA 39 the Appellant was charged with and convicted of wrongfully attempting to interfere with or influence witnesses in a judicial proceeding, either before or after they had given evidence contrary to Section 121(1)(f) of the Penal Code. On appeal, it was suggested that the charge might be barred for duplicity first because it alleged that the Appellant "wrongfully attempted to interfere with or influence" witnesses, and secondly because he alleged that such attempt occurred "either before or after" the witness had given evidence. It was held that in deciding whether there is duplicity in a charge the test is whether a failure of justice has occurred or the accused has been prejudiced…"***

Later in the judgment the court held thus:

> ***"The court in the Mahero (supra) case considered the English case of Ministry of Agriculture Fisheries & Food v Nunn Comm & Coal (1987) Limited [1990] L.R. 268 where it was emphasized that the question of duplicity is one of fact and degree and that the purpose of the rule is to enable the accused to know the case he has to meet. In the case of Amos v DPP [1988] RTR 198 it was held that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed and to counter a true risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain."***

In the present application, for the Applicant to persuade this court that he meets the threshold of overwhelming chance of success, he must establish that the charge brought against him was duplex. Having evaluated the charge and the particulars thereof, this court is not persuaded that the Applicant has made a case to persuade this court that the charge is duplex. The reasons are as follows: The Applicant understood that he was facing a charge of causing death by dangerous driving. There was a victim involved who died as a result of the Applicant's driving. As to whether the Applicant was driving the motor vehicle in a dangerous manner is for the trial court to determine. The Applicant was aware, from particulars of the offence, the circumstances in which the prosecution alleged the accident took place. It cannot therefore be said that the Applicant was confused or was placed at a disadvantage in understanding the charge that he is facing.

The Applicant is represented by counsel. He has defended himself by cross examining all the witnesses that the prosecution has presented to the court. The Applicant cannot therefore say that in cross examining the prosecution witnesses he did not know the charge that he was facing or the nature of the defence that he was presenting before the trial court. This court agrees with the prosecution that the Applicant has not made a case for this court to stay proceedings before the trial court because the issue he intends to raise on appeal does not constitute a matter which has overwhelming chance of success. In any event, the Applicant has the opportunity to present before the trial court his view regarding the nature of the charge brought against him in his final submission. He therefore prematurely appeared before this court.

It was for the above reasons that this court dismissed the application on the day it was argued before the court. It is so ordered.

**DATED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2018**

**L. KIMARU**

**JUDGE**