



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**

**Criminal Appeal No 23 of 2011**

**SULEIMAN MWAJANJI DZONGOLO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in criminal case no. 149 of 2008 of the Chief Magistrate's Court at Malindi before Hon. L. W. Gitari – CM)*

**JUDGMENT**

The appellant was charged, convicted and sentenced on three counts brought under the Traffic Act, namely, causing death by Dangerous Driving contrary to section 46 and two counts of Reckless Driving contrary to section 47 (1) OF THE Traffic Act.

The learned trial magistrate found the charges proven at the close of the trial and convicted the appellant. She imposed a sentence of five years imprisonment on Count 1 and three years on count 2 and 3 in addition she ordered the appellant's driving license to be called.

The appellant has raised the following grounds of appeal:

- 1. That the proceedings were a nullity having been conducted in contravention of the Provision of Section 200(3) of the Criminal Procedure Code Chapter 75 of the Laws of Kenya.**
- 2. That the proceedings were a nullity having been conducted in contravention of the provision of Section 214 (1) (I) & (ii) of the Criminal Procedure code Chapter 75 of the Laws of Kenya**
- 3. That the trial court erred in law and in fact in finding that the ingredients of the offence of Dangerous Driving as charged in count one (1) under section 46 of the Traffic Act Chapter 403 of the Laws of Kenya had been proved beyond reasonable doubt.**
- 4. That the trial court erred in law and in fact in finding that the ingredients of the offence of Reckless driving as charged in count two (2) & count three (3) under section 47 (1) of the Traffic Act Chapter 403 of the Laws of Kenya had been proved beyond reasonable doubt.**
- 5. That the trial Court erred in law and in fact in finding that the evidence of the prosecution was consistent and had proved the case beyond reasonable doubt on all 3 counts as charged.**
- 6. That the trial court erred in law and in fact in evaluating the evidence of the prosecution in isolation with that of the defence.**

7. ***That the trial Court erred in law and in fact in rejecting the accused's defence and holding it to be a sham.***

8. ***That the trial court erred in law and in fact in imposing a severe sentence on count one (1)."***

The facts of the case are straightforward. The appellant was on 2nd day of May, 2007 driving a matatu registration no. KAX 229M along Mombasa/Malindi road. Several passengers including PW1-3 were on board. The driver stopped along the way to Malindi to pick and drop passengers after Gede or stage "entry" he had just resumed the journey when the vehicle veered off to the right and proceeded outside the road where it collided into the deceased in count 1 and damaged a motor cycle registration no. KAW 693F and a vehicle registration no. KAL 952B.

The State opposed the appeal, relying on evidence on record and dismissed the procedural lapses as inconsequential.

The defence which appears to be supported by the prosecution witnesses PW2 and PW3 is that he inexplicably lost consciousness and hence the control of his vehicle. The evidence of PW3 in particular appears to suggest a seizure such as an epileptic fit. In those circumstances it cannot be said that the appellant was driving in a reckless or dangerous manner. The evidence adduced by the prosecution's evidence appears to negate the particulars of the charge. Hence it did not matter that the appellant did not tender medical proof; the onus of proof lay with the prosecutions and did not shift.

Secondly, there were serious procedural lapses in the course of trial. When a new magistrate took over the case as a part heard from B. T. Jaden, there was no compliance with the mandatory provisions of Section 200 (3) of the Criminal Procedure Code. Similarly, when the prosecution introduced a substituted charge sheet the appellant was not informed of his right to recall witnesses under section 214 of the Criminal Procedure Code.

For these reasons I do allow this appeal and will quash the convictions and sit aside the sentences imposed on all the courts. The appellant is to be set at liberty unless otherwise lawfully held.

Delivered and signed this 12th day of September, 2012 in the presence of the Appellant, Mr. Shujaa for him.

Mr. Naulikha for the State.

Court clerks – Leah,

**C. W. Meoli**

**JUDGE**