REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL 59 OF 2007

ABDALLA CHARO MENZA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, **Abdallah Charo Menza**, was charged with the offence of causing death by dangerous driving.

In count 1 he was charged with causing death by dangerous driving contrary to section 46 of the Traffic Act (Cap 403) Laws of Kenya.

The particulars in count 1 are that on the 20th day of July 2005 at about 12.30 pm at Msumarini area along Coast Province being the driver of a motor vehicle Reg No.KAL 339L Nissan Matatu drove the said motor vehicle on the said public road recklessly 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 and the amount of traffic which was actually at the time thereby hitting and knocking down a male adult pedal-cyclist one BILL OBAL ABDULLAH who was ahead of him causing his death.

In count 2 he was charged with causing death by dangerous driving contrary to section 46 of the Traffic Act (Cap 403) Laws of Kenya.

The particulars in count 2 are that on 20th July, 2005 at about 12.30 pm at Msumarini area along Lamu-Malindi Road in Malindi District of the Coast Province, being the driver of motor vehicle Reg No. KAL 339L Nissan Matatu drove the said vehicle on the said public road recklessly 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 thereby loosing control of the vehicle after hitting a pedal cyclist and overturned causing the death of one SIDI CHARO ZIRO who was a passenger therein.

Plea was taken on 26th April 2007 before Joshua Kiarie, SPM;

The record of proceedings are as follows:

26.4.07

Before: Joshua Kiarie, SPM

Court prosecutor – CIP B. Shari

Accused – present

Court: charge read over and explained to the accused in

Kiswahili.

Count one:

Accused: True, I drove dangerously and caused the death

of the pedal cyclist.

Count two:

Accused: True, I drove carelessly and caused the death of

the passenger Said.

Court: Plea of guilty entered on each count.

Prosecutor:

The facts are that on the 20th of July 2005 at about 12.30pm, at Msumarini area along the Malindi – Lamu Road in Malindi District, accused was driving motor vehicle Reg No.KAL 339L, a Nissan Matatu, from Kanagoni area towards Malindi. He was driving so fast that at that point, he would not control the motor vehicle, yet there were other people using the road. He lost control, got off the road and the motor vehicle hit a pedal cyclist one Bill Obal Abdullah who died. The motor vehicle continued and it overturned and one passenger inside, Sidi Charo Ziro, died due to injuries caused by the accident due to dangerous driving. Cause of death of Bill was given as due to multiple injuries due to road traffic accident. A post mortem was done on Sidi Charo Ziro. Cause of death was due to a head and chest injuries from the road traffic accident. These are the two post-mortem reports from the two respectively. I produce them as exhibits.

Court: Exhibits 1 and 2 respectively.

Investigations by the police showed that the accused caused these deaths by driving dangerously and was charged with the offence herein.

Accused: -facts are true.

Court: Guilty on plea and convicted on each count.

Prosecutor: no previous records yet received. Be treated as

first offender.

Accused in mitigation: I ask the court to forgive me. I have a

family. It depends on me for food and

even school fees.

Court: first offender. Mitigation considered. Sentenced to six

(6) years imprisonment on each count.

Sentences to run concurrently. Right of

Appeal 14 days.

The said conviction thus provoked this appeal. Mr. Muranje for the appellant raised 4 grounds of appeal. At the hearing, he sought leave to argue all the grounds together. There being no objection, I granted him leave to do so.

Mr. Muranje argued that the appellant pleaded guilty to the charge. The issue arising is whether the plea is unequivocal as can be discerned from the record. He contended that the plea was taken in a language the appellant could not understand. That the proceedings do not indicate the language that was used. The court record does not indicate the identity of the court clerk/interpreter. That raises the question whether the Coram was complete and if not who read the charge to the appellant.

Mr. Muranje contended that the accused was not proficient in Kiswahili language and hence section 77(2) paragraph (4) of the Constitution was thus breached.

Mr. Muranje further contended that it is not clear from page 1, line 18 what plea was entered: was it a plea of guilty or not guilty.

Counsel also contended that proof of death both in count 1 and 2 was by way of secondary evidence – photocopies of death certificate. That this was in breach of the provisions of section 67 of the Evidence Act. The exceptions are under section 68 of the Evidence Act. The production of copies fell outside the ambit of the exceptions.

On sentence counsel contended that the same must be based on a conviction. The court has to consider both the facts and the evidence.

The charge as drawn is a charge lifted out of section 46 of the Traffic Act. It is not sufficient merely to indicate what is set out under the section 46 of the Traffic Act. It needs much more. The facts as presented by the prosecutor did not show the manner, condition of the road, the speed, nature, and the amount of traffic which was actually on the road at the time to constitute an offence under section 46 of the Traffic Act.

Last but not least, that the sentence of six (6) years is harsh and manifestly excessive. The appellant was treated as a first offender. Two innocent lives were lost in the process but that does not justify a sentence of six (6) years given the disclosed circumstances.

Mr. Ogoti, for the Republic, supported the conviction and sentence. He argued that the charge was not fatally defective. It was proper and represents the standard of drawing traffic charges under section 46 of the Traffic Act (Cap 493) Laws of Kenya.

That the charge was read over and explained to the appellant in Kiswahili.

The fact that the accused mitigated underscores the fact that he understood the charge. That there was communication between him and the court. That takes the appellant's case outside the ambit of section 77(2) of the Constitution which contemplates a situation where the appellant/accused does not understand at all the language of the court.

The Coram indicates that there was a court clerk – court clerk present. The only omission is his identity. That cannot take away the fact that the court clerk was in court.

When an appellant pleads guilty, as was the case herein, there was no need to produce the post-mortem report to found a conviction. The post-mortem report would have been on issue if he pleaded not guilty

in which event every thing would be in issue and hence required full proof as by law enjoined.

That primary documents became an issue at the stage of a trial. Trial commences by the taking of evidence. At the trial documents must be produced by the maker. That is not the position at plea. Hence the issue of production of secondary evidence – photocopies of the post-mortem report- by the prosecution cannot avail the appellant.

I have agonized over these issues raised by the appeal.

In ADAN V REPUBLIC 91975) EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full:-

(i)The charge and all the essential ingredients of the offence should be explained to the accused in the language or in a language he understands;

(ii) The accused own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to the sentence together with the accused reply should be recorded.

In this case it is not certain that the accused was communicating with the court fully as the identity of the court clerk is not borne out by the record. It is not clear to me whether the learned trial magistrate doubled up as an interpreter. It is not clear to me whether the learned trial magistrate was conversant with the language of the appellant. It is not clear to me whether the appellant understood Kiswahili, the language the charge was read in.

In addition thereto the learned trial magistrate recorded only one plea in respect of the two counts. As the Court of Appeal said in ADAN V REPUBLIC (Supra),

> "**It is not a desirable practice for the trial**
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> **court to record only one plea in respect of**
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> **more than one count. It is important that**
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> **the accused should understand each count,**
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> **and that the accused should answer**
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> **separately the charge in each count, and**
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> **that the words of each answer should**
>
> **be separately recorded. Otherwise the court**
>
> **cannot always be sure that the accused has**
>
> **both understood and applied his mind to each**

count”.

Against that background, and having in mind the principle that whether or not a plea can be accepted as unequivocal will depend on the circumstances of each case, I am of the view that in the disclosed circumstances, the plea was not unequivocal. In the result I quash the conviction and set aside the sentence. The appellant shall be set free unless lawfully held for some other lawful reason.

Dated at delivered at Malindi this 4th day of MAY2009.

N.R.O. OMBIJA

JUDGE