REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 25 OF 2007

REPUBLIC…..... RESPONDENT

VERSUS

ALICE WANGARI KARIMI…..... APPELLANT

(Appeal from original Judgment in the Chief Magistrate's Court at Nyeri

in Causing Death No. 9 of 2004 by R.N. NYAKUNDI – CM)

J U D G M E N T

This is one of those rare appeals in which the state is the appellant. The respondent was charged before the Chief Magistrate's Court, Nyeri with three counts under the Traffic Act to wit, causing death by dangerous driving contrary to *Section 46* of the Traffic Act, driving a motor vehicle on the road without a driving licence contrary to *Section 30 (1)* of the Traffic Act and in the alternative failing to carry a driving licence contrary to *Section 36(1)* of the Traffic Act and finally driving a motor vehicle on the road without a driver's PSV Licence contrary to *Section 98 (1)* of the Traffic Act. After a full trial, she was acquitted of all the charges.

The republic however, has appealed against the acquittal of the respondent and has set out 4 grounds of appeal in the petition of appeal dated 20th February, 2006 and filed in court on the same date through **Charles, O. Orinda**, Senior Principal State Counsel. Those grounds are:

1. That the learned trial Magistrate erred in law in allowing hearsay evidence of PW5 to influence his reasoning and thereby arrived at an erroneous decision of acquitting the respondent.

2. That the learned trial Magistrate erred in law in failing to record the entire proceedings thereby failing to properly reconcile the evidence of scene of the collusion and that of PW5 as tendered in court.

3. That the learned trial Magistrate erred in law in failing to evaluate the implication of the evidence of yellow line marking at the scene of accident and thereby arrived at an unsupportable decision of acquitting the respondent.

4. That the learned trial Magistrate failed to take into account the fact that the respondents defence amounted to an admission that she was overtaking in an area where overtaking is strictly prohibited.

Briefly the prosecution case was as follows. **PW1 Francis Kiriro** was on 28th May, 2003 at Gatitu Bus stage on the left side of the road facing Nyeri when he saw two Nissan matatus travelling from Karatina direction headed for Nyeri and also a saloon car in the same lane. The saloon car then indicated its intention to join a murram road on the right side. The second Nissan matatu behind the other collided with the saloon car whilst overtaking the Nissan matatu ahead of it. The collision resulted in the saloon car being pushed forward for about 50 metres. He rushed to the scene and assisted in rescuing the injured victims who were later rushed to the hospital.

On being cross examined by **Mr. Muchira,** the then learned advocate acting for the respondent, he told the court that the saloon car and respondent's Nissan matatu were travelling in the same direction. He further told the court that where the collision occurred the road was wide and had yellow markings. That the driver of the saloon car had indicated her intention to turn right but as she did so a collision occurred as the respondent was in the process of overtaking it, having already overtaken the Nissan matatu ahead of her.

PW2 Samuel Gachau on his part told court that on the material day he boarded the Nissan Matatu registration No.KAK 327P that was being driven by the respondent herein at Karatina headed for Nyeri town. He sat in the front cabin next to the driver, the respondent. On reaching Gatitu area, the matatu he was in hit a saloon car. Before the accident he had noticed that the Nissan matatu ahead of them at Gatitu was slowing down but the Nissan matatu he was in did not slow down. Instead it attempted to overtake the said Nissan matatu ahead. It was in the course of overtaking the aforesaid Nissan matatu that she collided with the salon car as it made a turn to the right.

On being cross examined, the witness stated that he did not know where the small car had come from. He also told the court that from his position he could see clearly ahead as there was no obstruction. He blamed the respondent for the accident. It was further his testimony on cross examination that where the accident occurred the road was wide with yellow markings. Their vehicle left its lane and was being driven in the middle of the road. It was then that it hit the saloon car.

PW3 **David Gichuki Maina** testified that on 28th May, 2003 he boarded the subject matatu at Karatina enroute to Nyeri Town. However on reaching Gatitu area an accident occurred involving the said vehicle and a saloon car. The subject vehicle was being driven by the respondent at a high speed prior to the accident and the passengers had kept cautioning the respondent about speed and her mode of driving.

On being cross examined, he told the court that he did not know nor notice the direction that the saloon car had whence come from before the accident. He also told the court that he did not see the small car enter the main road before the accident.

PW4 **Stanley Gathithi** was also a passenger in the subject motor vehicle. He told the court that on the material day while travelling in subject motor vehicle and seated in the front cabin in the centre seat an accident occurred at Gatitu. Before then a Nissan matatu ahead of them had signalled that it intended to stop. The witness stated that he did not see where the saloon car emerged from before the collision. It was his testimony that the saloon car was making a turn to the right side.

On being cross examined, the witness stated that prior to the collision he saw the small car emerge from a junction but did not stop to give way for vehicles from Karatina side to pass.

PW5 **PC Anne Wanjiru** told the court that a report of the accident at Gatitu was made to Nyeri Traffic Base. She visited the scene on 28th May, 2003 where she confirmed that indeed a collision between motor vehicle KAK 327P and KAH 517M Toyota Saloon had occurred. It was her testimony that she marked the scene and drew the sketch plan upon recording statements from witnesses and evaluating them. Having observed the scene she caused the respondent to be charged with the offence of causing death by dangerous driving as she was satisfied that the respondent was to blame for the accident. In her testimony she created the impression that the two vehicles were coming from Karatina direction and were driving in the same lane. It was further her testimony that the saloon car had stopped and signalled to turn to the right side when the respondent's vehicle which was overtaking collided with it on the right side.

PW5 later made arrangements with motor vehicle inspection unit to have the two vehicles inspected by PW6 **Joel Mbaya** a Gazetted motor vehicles inspector. This was done and reports made to that effect later were tendered in evidence.

PW7, **Cyrus Munyiri** testified that on the material day he boarded Nissan matatu at Karatina intending to go to Nyeri. At Gatitu area, the matatu collided with a saloon car. Before the collision the respondent had driven the vehicle at a high speed and at the time the saloon car had indicted and signalled its intention to turn to the right when it was hit and pushed ahead. The witness told the court that the saloon car was on the same lane as the Nissan matatu.

PW8 **Joseph Gitonga** told the court that on 29th May, 2003 he was at Nyeri General Hospital Mortuary where he identified the body of the deceased **Ann Nyambura** who died as a result of fatal injuries sustained in an accident on the previous day. This was the driver of the saloon car. The post mortem was undertaken by **Dr. Chege** of Nyeri General Hospital but the post mortem findings and report was tendered in evidence by PW9 **Dr. Caroline Mwololo**. The cause of death was found to be cardio Respiratory arrest due o chest injuries.

The respondent was then placed on her defence. She elected to give a sworn testimony and called two witnesses. It was her defence that on 28th May, 2003 she was driving motor vehicle KAK 327P at about 1.30pm along Karatina – Nyeri road. On reaching Kagumo junction, a vehicle suddenly emerged and on trying to swerve, it was too late and a collision occurred. The respondent further told the court that since she was on the high way the driver of the saloon car should have stopped and given way for vehicles on the highway to pass. She therefore blamed the deceased who was the driver at the time of the saloon car for failing to stop and give way to vehicles on the highway. She denied that at the time of the accident she was overtaking another vehicle.

Her first witness was DW2 **Pastor Richard Thairu**. He told the court that on the material day he had boarded the Nissan matatu being driven at the time by the respondent. On approaching Gatitu area there were two Nissan matatus ahead of them. One of the Nissans ahead signalled to stop and in a little while a small car emerged from Mukurweini – Kagumo junction. The respondent tried to swerve and brake to avoid the collision but in vain. It was his testimony that the small car emerged suddenly and was to blame for the accident.

DW3 **Simon Gichuhi** testified that on 28th May, 2003 he was waiting for a vehicle at Gatitu stage when he witnessed an accident involving a Nissan matatu and a saloon car. According to his testimony the Nissan matatu was travelling from Karatina to Nyeri whilst the saloon car was from Kagumo college junction. It was his testimony that the saloon car did not stop at the junction but joined the main road hence a collision took place.

The learned Magistrate having carefully appraised and evaluated the evidence tendered by the prosecution as well as the defence, found favour with the defence case and accordingly dismissed all the charges brought against the respondent thereby acquitting her. As already stated, the republic was unhappy with the aforesaid outcome and accordingly lodged the instant appeal. When the appeal came up for hearing, the respondent though served with the hearing notice, did not bother to turn up to oppose the appeal. Being satisfied that the respondent had been properly served with the hearing notice for the hearing of the appeal going by the affidavit of service on record, I directed **Mr. Orinda**, to prosecute his appeal, the absence of the respondent notwithstanding.

In his oral submissions in support of the appeal, **Mr. Orinda** stated that the leaned Magistrate relied on hearsay evidence in acquitting the respondent, that the respondent's defence amounted to an admission, she was reckless in attempting to overtake two vehicles ahead of her whilst driving on an island. Though there were some contradictions in the prosecution case, they were minor and not fatal to its case. It did not matter whether the saloon car came from Kagumo road and joined the highway. That the approach of the respondent's lawyer was to ask leading questions of other witnesses who recorded statements but were not called to testify yet the learned magistrate relied on the said evidence to acquit the respondent. There was no doubt that the respondent overtook recklessly. Accordingly the decision to acquit the

respondent was evidentially in error. He thus urged me to allow the appeal, set aside the order of acquittal and substitute therefore a finding of guilty on the part of the respondent and mete out an appropriate sentence.

This court as a first appellate court has a duty to re-appraise the evidence and come to its independent finding. In doing so I have to appreciate that I did not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that – **Soki V Republic (2004) 2 KLR 21, Kimeu V Republic (2002), KLR 756.** Moreover, I am guided by the principle that the first appellate court should not interfere with the findings of the trial court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that the findings of the trial court are erroneous in law – **Republic V Oyier (1985) 2 KLR 353, Burn V Republic (2005) 2 KLR 533.**

It is common ground that an accident involving motor vehicle registration numbers KAK 327P Nissan matatu driven by the respondent and KAH 517M driven by the deceased, **Ann Nyambura Mwangi** occurred on 28th May, 2003 at Gatitu area, along Nyeri – Karatina road. Following the accident **Ann Nyambura Mwangi** was fatally injured. However who was to blame for the same. According to the republic, the blame lies squarely with the respondent. However the respondent thinks that it is the deceased who was the sole author of her misfortune.

It is very clear from the evidence tendered that the respondent was actually to blame for the accident. There is no doubt at all that the respondent recklessly attempted to overtake the two matatus ahead of her by driving through an island on the road which is prohibited. The island and or yellow marking at the scene was to prohibit any overtaking. Further in pursuing her intent to overtake when the deceased who was ahead of her and had stopped and indicated intention to turn right, the respondent again was reckless and had no respect for the other road users. The respondent's defence in any event as correctly submitted by **Mr. Orinda,** amounted to an admission as to the circumstances under which the accident occurred. Yet the learned Magistrate ignored that admission completely. The prosecution called a total of 9 witnesses most of whom were eye witnesses. PW1 was at a bus stage and saw the accident as it unfolded. PW2, PW3, PW4 and PW7 were all passengers in the subject motor vehicle. Their evidence was consistent and corroborative especially with regard to the manner the respondent was driving. She was overtaking either vehicles ahead of her whilst driving on the island. Some passengers had complained about her speed and manner of driving to no avail. With an obscured view of the road ahead, it was evident that she was reckless to have undertaken to overtake at that juncture.

The prosecution case could not have been rendered any less efficacious by mere mention of the witnesses that they could not tell where the deceased's motor vehicle had emerged from. Whether the vehicle came from Kagumo side and joined the main road would not make the recklessness of the respondent any better for she had embarked on a dangerous exercise of overtaking other vehicles when it was not permissible to do so and when indeed it was dangerous.

It would appear that the approach of the lawyer, as correctly pointed out by **Mr. Orinda**, then defending the respondent, was to ask her leading questions of other witnesses who had recorded statements but had not been called as witnesses. The learned Magistrate in my view, erred in relying on such evidence to come to the conclusion that the prosecution witnesses materially contradicted each other. Yes there may have been slight contradictions. However they were such that they were not fatal to the prosecution case. However it was not in doubt that the respondent overtook other vehicles rather carelessly and recklessly. There is evidence too that the respondent was driving her vehicle very fast and the yellow markings. The decision to acquit the respondent I would agree with **Mr. Orinda,** was therefore evidentially in error.

The upshot of all that I have been saying is that the appeal has merit. It is allowed and the order of acquittal quashed. In its place a conviction is entered with regard to the 1st count of causing death by dangerous driving. No evidence was led in respect of the other counts. Accordingly I confirm her acquittal of the same.

However as regards sentence, I am in a bid of a dilemma since I have not had the benefit of hearing the

respondent in mitigation. Nor do I have her previous record. I have toyed with the idea of remitting the case to the subordinate court for determination, whether by way of re-hearing or otherwise in terms of *Section 354* of the Criminal Procedure Code. The offence was however committed way back on 28th May, 2003, that is over 6 years ago. That period clearly militates against an order for re-hearing of the case. Doing the best I can in the circumstances, I would put off the sentencing to 23rd June, 2009 when I expect **Mr. Orinda** to appraise me of the appellant's previous indiscretions if any. I would also direct that the appellant be served with summons requiring attendance for that day for purposes of mitigation if any.

Dated and delivered at Nyeri this 3rd day of June, 2009.

M.S.A. MAKHANDIA

JUDGE