



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUSIA**

**Criminal Appeal 50 of 2003**

**JULIUS KAREMI THIGA.....APPELLANT**

**~VRS~**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**The Appellant Julius Karemi Thiga was charged and convicted of six (6) counts of causing death by dangerous driving contrary to section 46 (1) of the Traffic Act. It was alleged in the charges that on the 12<sup>th</sup> day of September 2000 at Otimong Area along Busia - Nambale Road, being the driver of motor vehicle reg. no. KAM 343 C, Toyota Hiace Matatu, drove the said vehicle on a public road recklessly or at a speed or in a manner which was dangerous to the public without having regard to all the circumstances of the case including the nature of the road, condition and use of the road and the amount of traffic which was actually at the time or which reasonably expected to be on the road thereby caused the death of the deceased persons namely:**

**COUNT 1: CAROLINE M. MKENI**

**COUNT II: JANEROSE WASIKE**

**COUNT III: EVERLYNE NIGHT NGIRA**

**COUNT IV: SAMUEL OTIANG'ALA**

**COUNT V: JOHN FESTUS MUSUMBA**

**COUNT VI: DAMARIS MBAGO**

**The accused pleaded not guilty to the offences when the plea was taken on 2<sup>nd</sup> October, 2000. The case was fully heard and a total of eleven (11) witnesses testified. All the prosecution witnesses were heard by Mr. S. O. Omwega Senior Resident Magistrate who put the accused on his defence. Ms B. Maloba, Senior Resident Magistrate took over the case and recorded the defence of the accused after complying with section 200 (3) of the Criminal Procedure Code. The accused was convicted of all the six (6) counts and sentenced to serve four (4) years imprisonment on 15<sup>th</sup> May 2003. It was not stated whether the sentences were to run concurrently or consecutively.**

**The Appellant relied on two grounds of appeal:**

1. *That the learned trial magistrate erred in fact by relying on evidence by PW1, who soundly testified before the court that he was a passenger in the said motor vehicle and on the seat behind the driver (the Appellant herein). It was far from the truth on how it was possible to the witness allegation that he was able to see the speedometer from his seat at 130 kph. The evidence by PW1 could not hold water light evidence and it lacked merit since the witness who happened to be a policeman, tried to make the court to believe his fabrication that he did know exact eventuality for the vehicle could even burst the rear tyre and cause the accident. Your lordship, it is far from the truth that the speed of 130 kph causes the tyre burst.*

2. *Your lordship the trial magistrate erred in law and facts by failing to warn himself that I the appellant herein was inside the vehicle and would not willingly cause the accident, that would not guarantee my own life or security. She also ignored the evidence by the officer who investigated the accident, that the cause of the accident had been due to tyre burst. She did not also consider my accident free experience since 1971 to the fateful day.*

Ms Njalale for the Appellant took the court through the grounds of appeal. It was her submission that the evidence before the lower court in support of dangerous driving was not so overwhelming as to lead to conviction. It was only PW1 who said that the Appellant was driving at a high speed which he gave as 130 k.p.h. It was doubtful that from where the witness was seated, he could see the speedometer.

PW1 also said that when the vehicle lost control, the Appellant jumped out of the vehicle and left it moving on its own. There was no other witness who gave that kind of evidence. PW1 said he was not issued with a bus fare receipt while PW10 said he was issued with one. Although other witnesses said the vehicle was moving at a high speed, none of them indicated the actual speed. The Appellant in his defence said the accident was caused by a tyreburst which cause cannot be faulted on the Appellant. A tyreburst cannot be anticipated according to the Appellant. The sentence was excessive in the circumstances.

The Learned Senior Principal State Counsel disagreed with the defence that the evidence was not overwhelming. He submitted that PW1's evidence on high speed was corroborated by that of PW2 and PW9. The driver had been warned along the way by passengers not to overspeed. The issue of jumping out of the vehicle on cross-examination of witnesses and defence of the Appellant. The state argued that the issue came as an after thought on appeal. On sentence, the state asked the court to correct the anomaly of the lower court which failed to specify whether the four (4) year sentence in the six (6) counts was to run concurrently or consecutively.

On perusal of the record, It is evident that PW1 was the key witness herein. He testified that he was an administration police officer attached to Mungachi A. P. Post in Nambale Division. On the material day, he was traveling from Busia to Mungachi in the Nissan Matatu driven by the accused herein which was full to capacity. He sat on the seat behind the driver, that is on the second row. The accused overtook a matatu christened "Papparazi" at Kovinda junction and from there drove at a very high speed of about 130 K.p.h. PW1 said he could see the vehicle's speedometer from where he sat. A woman passenger who alighted on the way quarreled the conductor on the over speeding by the driver. The vehicle was again driven at a high speed. The driver overtook another Nissan matatu at a shopping centre. It is after this overtaking that PW1 heard a loud burst on the right side of the vehicle. PW1 asked the driver to slow down but he refused to do so. The vehicle lost control and driver jumped out of the vehicle leaving it moving on its own. It rolled several times landing on the left side of the road after hitting a tree.

PW2 testified that he was a retired employee with Registration of Persons Department stationed at Busia. On the material day, he was traveling in Toyota Hiace Matatu registration number KAM 343 C from Busia to Nambale having boarded the vehicle at 3.00 p.m. He sat on the second row of the seats. He said that the vehicle was being driven at a very high speed and it sustained a tyre burst on the right rear wheel. The accused was unable to control the vehicle and it overturned rolling several times. It landed on the left side of the road.

PW7 was also a passenger in the vehicle traveling from Busia to Mumias. He said the vehicle was full to capacity and had some excess passengers. He said the accused who was the driver drove at an excessively high speed. The rear tyres burst and the driver lost control of the vehicle causing it to roll.

PW9 was the fourth eye witness. In his testimony, he said he was a teacher at Musokoto D. E. B. Primary School. He was a passenger in vehicle reg. no. KAM 343 C driven by the accused from Busia. He was on his way home. The accused was driving very fast and the vehicle got a tyre burst before losing control and rolling.

PW10 the Investigating Officer produced the sketch plan and legend of measurements showing that the vehicle rolled about 63 meters before it hit a tree.

PW3, 4, 5, 8 and 11 were identifying witnesses at the time the doctor performed the post mortem. The accused person defendant himself that it was the tyre burst that led to the accident.

In her judgment, the learned trial magistrate did not believe the defence of the accused. She found that the prosecution had established that the accused person drove his vehicle at a very high speed to an extent that he could not control it when it sustained a tyre burst. The trial court further noted that the accused jumped out of the vehicle and left it moving on its own hitting trees thus causing the death of six (6) people who were passengers.

The first ground of appeal is that the magistrate erred in law and in fact in finding the Appellant guilty of dangerous driving when there was overwhelming evidence that the motor vehicle overturned as a result of the tyre burst. The defence contends that the tyre burst could not be predicted and negligence cannot be attributed on the Appellant.

The second ground is that the magistrate erred in law and fact in finding that the Appellant drove at an excessive speed when there was no evidence to that effect.

From the two grounds, the court will evaluate the evidence, before the lower court and determine whether the conviction on the six (6) counts of causing death by dangerous driving were proved beyond reasonable doubt in the lower court. The issue of what caused the accident is very crucial as highlighted by the defence.

It was the evidence of PW1 an administration police officer stationed at Nambale A. P. Post that the vehicle was traveling at 130 k.p.h. He sat on the sea behind the driver facing the front in the Nissan Matatu. He said he could see the vehicle's speedometer from his seat. According to him the appellant was racing on the road overtaking other public service vehicles. A passenger who had alighted before the accident was said to have complained. PW1 also warned the appellant to slow down but he could not heed to the warning. PW2 described the speed of the vehicle as "very high" while PW9 said the driver was "very fast". PW7 said the driver was driving at "an excessively high speed". These witnesses were passengers in the vehicle and were all in agreement that the appellant drove the vehicle at a very high speed. Although PW2 and PW9 did not tell the court what the high speed was, any passenger in a vehicle is in a position to describe the manner in which the driver is driving the vehicle with accuracy. The same case applies to issue of speed. Any alert passenger will tell when the speed is high, low or moderate irrespective of whether one is a qualified driver or not. It is not important that the actual speed be given. Some passengers may not see the speedometer from their seats. The evidence of speed by a passenger cannot be discredited on grounds that the witness did not produce a driving licence of the four (4) witnesses is overwhelming in that the accused drove his vehicle at a dangerous speed.

The witnesses all agree that there was a tyre burst. The cause of a tyre burst where there is no impact is normally the poor state of the tyres. The owner of the vehicle has a duty to maintain his vehicle in a serviceable condition. The driver would be blamed for driving a defective motor vehicle where a tyre burst occurs without any impact. This would be subject to confirmation by a

motor vehicle inspector. I do not wish to dwell on this issue at length. What concerns the court in this case is whether the lower court rightly convicted the accused person for causing death by dangerous driving. The evidence on the record is that the accused drove his vehicle at an excessive speed and for this reason, he could not control it when the tyre burst occurred. If the accused had maintained the speed limit of 80 k.p.h allowed for the Nissan Matatu, he would have been able to control the vehicle after the tyre burst. The vehicle overturned and rolled for a distance of 63 metres before it hit a tree which stopped it. The accident therefore cannot be blamed on the tyre burst but on the excessive speed.

It was established before the lower court that the six (6) people who died as a result of the accident were all passengers in the vehicle which accused was driving. PW6, the doctor who produced the post mortem forms found that the injuries which caused the death of the six (6) deceased persons were consistent with a road traffic accident.

I find that the trial court made a correct finding on convicting the accused person on the six (6) counts of causing death by dangerous driving. I therefore uphold the conviction.

The accused was sentenced to serve four (4) years imprisonment on each count and was disqualified from driving for three years. The court did not show whether the sentences were to run concurrently or consecutively. This is an omission which this court will deal with. The defence argued that the sentence was excessive. Section 46 of the Traffic Act provides for a maximum imprisonment sentence of ten (10) years and cancellation or suspension of the driving licence for a period not exceeding three (3) years. The sentence imposed by the magistrate is not excessive given the circumstances of the case.

I therefore uphold the sentences and direct that the sentences of imprisonment in the six counts run concurrently.

F. N. MUCHEMI

JUDGE

*Dated, Delivered and Signed at Busia this 4<sup>th</sup> Day of November, 2009 in the presence of Ms Njalale for appellant and Mr. Akeyo for state Counsel. Appellant also present.*