REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO 210 OF 1991

FANUEL SO ABWAVO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Traffic Case No 4508 of 1990 of the Principal Magistrate's Court Kisumu. CO Ong'udi, Esq)

JUDGMENT

The appellant Fanuel SO Abwavo has appealed against his conviction and sentence in Traffic Case No 4508 of 1990 in the Principal Magistrate's Court Kisumu.

In that Court, the appellant faced five separate counts each alleging causing death by dangerous driving contrary to section 46 of the Traffic Act, cap 403 Laws of Kenya.

He was convicted of four of these counts and acquitted on one count.

Briefly, the appellant was driving a passenger bus from Kisumu direction to Ahero direction at night when he suddenly noticed a woman pedestrian crossing the road from the left to the right. In an effort to try to avoid the woman, the appellant swerved his bus to the right until it reached the murram edge of the tarmac road on the right. While on that side, the bus collided with a *matatu* carrying passengers and the prosecution's case is that four of the passengers in the *matatu* subsequently died. The defence position is that there was no evidence of these deaths.

Before the bus collided with the *matatu*, the bus had already run over the pedestrian woman and killed her.

Nobody from the bus died and it would appear that there were even no injuries on passengers in the bus.

In this appeal, Mr Menezes who defended the appellant in the lower court, appeared for the appellant while Mrs Muinde, a state counsel, appeared for the State. Each one put up a spirited argument against the other.

The first point of argument was on a point of law that each one of the counts which faced the appellant was duplex. Mr Menezes said that this was so while Mrs Muinde did not agree.

In considering that point I have looked at the cases cited during the hearing of this appeal. Each one of

these counts charged the appellant with driving recklessly or at a speed or in a manner dangerous to the public. According to Mr Menezes, the appellant was in each count charged with three separate offences and that was bad for duplicity. Mrs Muinde does not however see anything wrong in that.

Mr Menezes raised the same question before the learned trial magistrate, but he was overruled.

I find the case of *Uganda v Amisi* [1970] EA 291 to be very useful. This was a Uganda case, but the learned Judge looked at various authorities, including those in England and East Africa before he came to his conclusion. The cases he looked at included *Maithaka s/o Gichinga v R* [1963] EA 627, a Kenya case, where it was held that where separate offences are charged in the alternative, that is disjunctively using the word "or" then separate offences are charged in one count and that is bad for duplicity.

It was said that it is permissible to charge them conjunctively using the word "and" if the matter relates to one single act.

The learned Judge in *Uganda v Amisi* followed *Maithaka's* case and went on to hold that where a charge is bad for duplicity, the question of whether or not there was prejudice to the accused is not relevant since it is a matter of law that the accused must know with precision the offence with which he is charged.

The charge in *Uganda v Amisi* case was worded in the same manner as each one of the five counts which faced the appellant in this case. I am persuaded that that decision was sound and I follow it in this case.

It means therefore that I uphold Mr Menezes argument that each one of the five counts which faced the appellant in this case was bad in law for duplicity.

Having come to that conclusion, this appeal should be disposed of in its entirety at this stage as there should have been no convictions in the case.

But should I be wrong so to hold, what evidence was there to sustain the convictions?

It would appear that this case was not keenly handled by the prosecution. Mr Menezes is therefore able to point out that no police officer visited the scene of the accident during the night when the accident occurred. The police officer who visited the scene did so the following day when he took a sketch plan of the scene.

The Court did not therefore have evidence to show that the dead bodies whose post-mortems were performed later at the New Nyanza General Hospital were bodies of the people who had died as a result of this accident. None of the prosecution witnesses who were at the scene talked of these deceased persons. Did they die on the spot or did they die later in the hospital? There is no evidence. The doctor who performed the post-mortem only found those bodies at the hospital.

It was only the pedestrian woman who was mentioned by some witnesses who said they had seen her cross the road in front of the appellant's bus. Nothing about her death from the witnesses who were eye witnesses.

In relation to the death of the pedestrian woman, the learned Principal Magistrate acquitted the appellant on the ground that he did not find the driving of the appellant to have been dangerous as this woman suddenly crossed the road and in the circumstances the appellant could not have avoided her although the bus had its lights on.

However, the learned magistrate was not prepared to extend that benefit to the appellant in relation to the deaths of the passengers said to have been in the *matatu*. It was the magistrate's view that the appellant's bus should not have been where it was when it collided with the minibus (*matatu*). He divided the sequence into two so that what happened upto the point the woman pedestrian was hit by the appellant's bus when the bus was trying to avoid her was prudent. But what happened after the woman had been hit was not prudent.

The learned trial magistrate had the benefit of hearing and seeing the witnesses, but from the evidence it is difficult to see where the line of division is put. This was a main road. A busy Kisumu to Nairobi Road. The woman pedestrian whom the appellant was trying to avoid was on the tarmac on the side of the road where the appellant driving. The appellant wanted to avoid her by passing in front of her on his right. But that happened to be on the side of the road along which the driver of the minibus (*matatu*) was driving as he was going towards Kisumu while the appellant was going towards Nairobi. The appellant still knocked down the pedestrian and it is difficult to imagine what was running into the mind of the appellant.

It appears from the sketch plan that in an effort to avoid further accidents, especially from oncoming motor vehicles like the *matatu* on whose lane the appellant had reached as a result of his having swerved to the right, the appellant went right off the tarmac road and reached the murram on his right side of the road. It was while the appellant's bus was on the murram that it collided with the *matatu* which apparently had also gone off the tarmac in an effort to avoid the appellant's bus.

The situation as I can see it here is that each driver was trying to avoid the other's motor vehicle when unfortunately those vehicles collided. It is difficult to accept the appellant's claim that his bus had already got stuck into a ditch and was stationery when the *matatu* hit it.

But in my view whether the bus was in a ditch or it was still moving when the accident occurred, I do not attribute negligence to the appellant in the circumstances of this case. Like the driver of the *matatu*, the appellant had passengers in his Akamba bus and must have been concerned about their lives just as the driver of the *matatu* may have been concerned about the lives of the passengers in his vehicle. That none of the passengers in the appellant's vehicle appears to have died or even received serious injury must be to the credit of the appellant.

Considering all these, I hold the view that when the learned trial magistrate acquitted the appellant on count one which related to the pedestrian woman, he should have also exonerated the appellant on all the remaining counts.

Having come to that conclusion and bearing in mind that I had found that the charge in each count against the appellant was duplex, I allow the appellant's appeal in its entirely.

The conviction of the appellant on each count is quashed and the sentence thereof set aside plus orders.

I understand the appellant is out on bail.

Dated and delivered at Kisumu March 13, 1992.

J.M KHAMONI

JUDGE