REPUBLIC OF KENYA

INTHE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 9 OF 1980

CHARLES MWANIKI KABABI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against sentence by acting Resident Magistrate's Court, Nairobi in Traffic Case No 3190 of 1979)

JUDGMENT

The appellant was charged with and convicted of causing death by dangerous driving, contrary to section 46 of the Traffic Act, and upon conviction was sentenced to serve two and a half years' imprisonment, his licence to drive being taken away from him and he being disqualified for holding or obtaining another one for five years. The magistrate was presented with two versions of what was said to have happened (as is not unusual in this type of case) and in a detailed, analytical and carefully composed judgment (with which I am in general agreement) she came to the conclusion that the prosecution case was true, so she accepted it, and that the defence case was not true, and so she rejected it. I have myself read and considered the recorded word and I entertain no doubt as to the appellant's guilt. There was undoubtedly a situation which, viewed objectively, was dangerous and there was fault on the part of the appellant causing that situation; *Khalif v The Republic* [1973] EA 364. Having regard to the content and detail of the judgment appealed from, I see no purpose in setting out all the evidence and all that the magistrate has said again, and I will go straight to the grounds of appeal dealing with them *seriatim.*

The first ground is that the magistrate failed to call upon the appellant to plead to an amended charge and to inform him of his rights consequent upon such amendment, the mandatory provisions of section 214 of the Criminal Procedure Code being ignored. It has to be said that the magistrate was in error here; but, before I describe why that is so, it needs also to be said that complaint could also validly have been made by the appellant about the charge itself, which I now explain. The three people named in the amended charge were not all mentioned in the original charge; only two of them were. The first question is, however, whether there should have been just the one charge, or whether there should have been two counts in the original charge and three in the amended one? The answer is that one charge was not enough; see *Atito v The Republic* [1975] EA 278.

The Court of Appeal held in that case that for every death there should be a separate count. However, the point was taken neither in the court below nor before me; and the fact that there was just the one charge can have occasioned no possible failure of justice. Nor did the magistrate's failure to comply with the provisions of section 214 do so. She should have called upon the appellant to plead to the amended charge and she should have inquired whether the defence wanted witnesses recalled; but all that happened was that, by the time concerned, the third man had died. The appellant was represented in the court below by counsel who said that she had no objection to the amendment being made and nothing about needing to

recall witnesses for the purposes of his case. It was obviously in everybody's mind that the amendment was insubstantial. I am unable to hold, as counsel for the appellant invited me to do, that the mere failure to comply with the section is fatal. I think that whether it is fatal or not must depend on the circumstances of the particular case concerned. In the present one there could not have been, and there was not, any possibility of a miscarriage of justice; and in any event counsel should have raised the matter at the time; see the Criminal Procedure Code, section 382. It seems to me that the appellant remained charged on the unamended charge, and I proceed accordingly.

The second ground is that the magistrate was wrong to find that the appellant's driving was dangerous, having regard to all the circumstances of the case. Counsel for the appellant began by challenging the magistrate's acceptance of the prosecution evidence, saying that she should not have rejected that of the defence; but, with *Uganda v Khimchand Kalidas Shah* [1966] EA 30 in mind, counsel argued that even on the accepted prosecution case the appellant's guilt was not established. He took the view that, at most, what the prosecution proved was careless driving; which, of course, does not avail him. But the magistrate thought that the appellant's driving was dangerous and, as she put it, gave rise to the death of three men. She said that the single manoeuvre of the appellant meeting and joining a T-junction in the circumstances of the case "is what any reasonable man would call a piece of dangerous driving"; and, in my view, she was right. The appellant was undoubtedly at fault. With plenty of time, space and vision he joined the road on which his Tipper collided with an on-coming vehicle without taking any precautions, and without reducing his speed at all although the vehicle was, and with a proper look-out must have been seen to be, so near that without some avoiding action an accident was inevitable. It is perfectly true that the car hit the Tipper; but the reason for this is that the driver of the car took avoiding action, but had very little time available to him and he could not stop the near side of his car from catching the off side of the Tipper in the agony of the moment. I do not see what else he could have done, or that he could have done any more. As I see it, no reasonable and prudent driver would have driven in the manner in which the appellant drove on this occasion; and in my view his driving was patently bad and highly dangerous and he was the prime cause, indeed the only cause, of the accident and the deaths which ensued.

The third ground is that the magistrate did not consider or properly direct herself on the question whether the appellant's driving was the substantial cause of the deaths. It is not so. I have already said a word or two about this in relation to the previous ground and I now quote two comments from the magistrate's judgment the one that:

> I have reached the conclusion that on that afternoon the [appellant] drove his vehicle dangerously and gave rise to the death of the three men.

and the other, phrased, "That single manoeuvre by the [appellant], in those circumstances, is what any reasonable man would call a piece of dangerous driving". In any event, it quite clearly follows from her judgment that the magistrate was convinced of the dangerous manner of the appellant's driving.

The fourth ground of appeal is that the magistrate was wrong to find that the appellant drove out of a road on to the one on which the other car was driving; and that she wrongly arrived at her decision because she did not evaluate the defence evidence, as was required. Her findings were made on evidence which she was entitled to believe and accept, and I, in appeal, would not consider myself justified in challenging those findings, she having had the advantage of seeing and hearing the witnesses which I did not (see the *Khimchand Kalidas Shah* case, referred to with approval in The *Republic v Zakaria Shilisia Agweyu* (1980) page 62, *ante*); for there is nothing in the record to enable me to say that she misdirected herself either on the facts or on the law in regard thereto. But having said so much, I would add this, that I independently arrive at the same conclusions as she did.

Part of the fifth ground of appeal was abandoned and rightly so. The magistrate did not fail to consider the worth of the defence. On the contrary. She considered all the evidence largely dealing separately with what the witnesses told her; she pointed to differences between the evidence of the witnesses for the defence; and her findings followed a comment that she had considered the various "reasons of the defence" as she put it. The sixth ground that the appellant was not given the benefit of the doubt is answered by saying that the magistrate saw no doubt, as I see none.

The seventh ground is that the sentence awarded is harsh and excessive. The court prosecutor told the magistrate that he wished her to note that the offence was very prevalent and that three people had died in the accident, a fourth person being crippled for life as a result of it. There was no evidence that anyone was crippled and, more accurately in so far as the charge is concerned, the magistrate was directly concerned that two people had been killed as a result of what happened. The prevalence of the particular class of crime in the locality was not necessarily of itself a ground for imposing a more severe sentence than that which would normally be imposed; see *R v Eneriko Sempala s/o Yowana Batista* (1936) 3 EACA 23 although, as I think, the magistrate was entitled (if not required) to have the matter in mind. For her part, counsel for the appellant said that the appellant was 24 years old and married with two very small children and that he had been driving for four years without any incident, that he supported his wife and children and was still employed by the county council; and she asked for leniency. In her note on sentence the magistrate commented that, apart from the fact that offences of this nature were prevalent, it must be stressed that the consequences of this accident were very sad. She recognised that the appellant was a first offender and pointed out that on the afternoon concerned he drove his vehicle with what she thought was the "utmost negligence". She concluded by saying that it was the Government's call to stamp out offences of this nature and it was required of the Court to carry out that duty. Counsel urged upon us that not only was reference to the extra death and the crippled person improperly taken into account but the magistrate indicated that she did not feel herself free to award a sentence which she would otherwise possibly have awarded, (perhaps a non-custodial sentence), because she felt it her duty to obey Government directives. With respect, the magistrate's comment was not too well worded; but I do not believe that what she said about it being her duty to follow the Government's call can be interpreted in the way contended for. I do, however, have sympathy with what counsel said about the deaths. A Court must always be on its guard against being influenced by death as a result of some criminal act on the part of the accused when considering the matter of sentence.

However having said so much I do not consider that we are concerned with a case where there was inadvertence or momentary inattention on the part of the appellant.

I think the appellant's driving was wanton. In a Tipper vehicle of some size and weight no doubt, he resolved, without taking any precautions whatever, to join the road in complete disregard of the traffic which was there or thereabouts. Death must be kept off the roads and it will not be kept off the roads with awards of inadequate sentences. Having considered what was awarded I am not disposed to interfere with it. In any case, sentencing is essentially a matter for the trial court and I am not disposed to think that for all that I cannot endorse all that the magistrate has said her award has occasioned a miscarriage of justice; see *Harries v R* (1921) 8 KLR 186. I dismiss the appeal.

Appeal dismissed.

Dated and delivered at Nairobi this 27th day of March 1980.

E. TREVELYAN

JUDGE