IN THE COURT OF APPEAL AT NAIROBI

(Coram: Law, Miller & Potter JJ A)

CRIMINAL APPEAL NO 39 OF 1979

BETWEEN

TIMOTHY ORWENYO MISSIANI .....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted in the traffic Court, at Nairobi, on a count of causing death by dangerous driving, contrary to section 46 of the Traffic Act. The facts of the case were, briefly, that on 15th February 1978 a car driven by the appellant left the roadway and struck a little girl on the murram side-walk on the near side of the road, causing her serious injuries from which she died shortly afterwards. The appellants' case was that the girl ran across the road in front of his car; that he swerved to his left and braked but was unable to avoid striking her. The trial magistrate preferred the evidence of two eye-witnesses that the girl had safely crossed the tarmac and was standing some 3 feet from the edge of the road on the verge when the car, for no apparent reason, left the tarmac surface of the road and knocked the girl down. One eye-witness said that the car was travelling "very fast" and the other that it was "at speed". The appellant was fined Shs 2500.

The appellant appealed to the High Court against conviction but not against sentence. The judges (Trevelyan and Sachdeva JJ), after carefully evaluating the evidence themselves, came to the same conclusion as the trial magistrate on the facts. Faced with these concurrent findings, based as they are on some evidence, it is not open to this Court to depart from these findings; nor can this Court, in the light of these findings, differ from the finding that in driving off the highway onto the murram verge the appellant did something which was in the circumstances dangerous, and that this act of dangerous driving caused the girl's death. In the result, this appeal against conviction fails, although in our view the case for the prosecution was not strong, especially as the very slight damage done to the appellant's car, and the location of that damage, was more consistent with his story than that of the prosecution witnesses.

After dismissing the appeal against conviction the High Court judges, exercising the power conferred by section 354(3) of the Criminal Procedure Code, enhanced the sentence imposed by the magistrate from a fine to a sentence of three and a half years' imprisonment, and ordered that the appellant be disqualified from holding a driving licence for eight years.

The appellant appeals against this enhancement, and his grounds as set out in his memorandum of appeal are that: "8. The judges erred in imposing the enhanced sentence on the appellant. 9. The judges proceeded on the wrong basis in law as regards sentence".

The judges gave no reasons for the substitution of a custodial sentence beyond saying that a fine in the

circumstances of the case was manifestly lenient and inadequate.

It seems to us that two questions arise on this appeal. The first is, did the High Court judges err in principle in enhancing the sentence in this case? The second is, if there was an error in principle, has this Court jurisdiction to interfere with the sentence on a second appeal? Under section 361(1) of the Criminal Procedure Code we may hear an appeal in this case "on a matter of law (not including severity of sentence) but not on a matter of fact". It appears to us that the effect of the words of the statute just quoted is that the matter of sentence is a matter of law, and that the answer to this second question depends on whether an error in principle in enhancing a sentence is a matter of law, irrespective of the severity of the sentence.

As regards the first question, it is relevant to consider the degree of blameworthiness on the part of the driver which has to be proved by the prosecution before he can be convicted of the offence of causing death by dangerous driving. In *R v Gosney* [1971] All ER 220 it was held by the Court of Appeal, Criminal Division, that in order to justify a conviction there must have been a situation which, viewed objectively, was dangerous, and also some fault on the part of the driver. In regard to this element of fault, Megaw L J, reading the judgment of the Court of Appeal, said (at page 224):

> "Fault" certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame ... Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it is a momentary lapse, even though normally no danger would have arisen from it, is sufficient.

This English decision was followed locally in *Atito v The Republic* [1975] EA 278.

The principles of sentencing in relation to this offence were considered by the Court of Appeal, Criminal Division, in *R v Guilfoyle* [1973] 2 All ER 844. Lawton L J, delivering the judgment of the court, said (at page 844):

> The experience of this Court has been that there have been many variations in penalties. Some variations are inevitable because no two-road accidents are alike, but there are limits to permissible variations and it may be helpful if this Court indicates what they are. Cases of this kind fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment, and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or his passengers or with a degree of recklessness. A subdivision of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs.
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> Offenders, too, can be put into categories. A substantial number have good driving records, a fair number have driving records which reveal a propensity to disregard speed restrictions, road signs or to drive carelessly, and a few have records which show that they have no regard whatsoever for either the traffic law or the lives and safety of other road users. In the judgment of this Court an offender who has a good driving record should normally be fined and disqualified from holding or obtaining a driving licence for the minimum statutory period or a period not greatly exceeding it, unless of course there are special reasons for not disqualifying.
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> If his driving record is indifferent the period of disqualification should be longer, say two or four years, and if it is bad, he should be put off the road for a long time. For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, a custodial sentence with a long period of disqualification may well be appropriate, and if this kind of driving is coupled with a bad driving record the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed.

This passage in our view sets out the correct principles of sentencing persons convicted of offences contrary to section 46 of the Traffic Act. To the same effect is the judgment of the High Court of Kenya in *Govid Shamji v The Republic* (unreported) in which Madan and Chesoni JJ said:

> The offence of causing death by dangerous driving is not an ordinary type of crime. While it cannot be given an aura of protection by putting it in a glass case of its own, the people who commit this offence do not have a propensity for it, neither is it a type of crime committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interests of justice as well as the interests of the public. There are of course cases where a custodial sentence is merited, for example, when there is a compelling feature such as an element of intoxication or recklessness.

In sentencing the appellant to a custodial sentence, the High Court judges cited with approval a *dictum* of Todd J in *Njuguna Kabanya v The Republic* (1979) (unreported) to this effect:

> It cannot be too clearly known that if drivers cause death by dangerous driving they may well be in real and imminent danger of being sent to prison for a substantial period of time ....

That is indeed what the statute provides; the maximum penalty is five years' imprisonment. But that is not to say that every person convicted of that offence should be sentenced to imprisonment. The principles to be applied are clearly stated in the judgments referred to above.

Turning to the facts of this case, the following matters seem to us relevant.

The incident which led to the appellant's conviction was an isolated incident, and not part of a continuous act of reckless driving. Both Courts below found as a fact that the point of impact was off the road on the murram verge. No explanation was suggested by the prosecution for the appellant suddenly driving off the road; the appellant's explanation was that he swerved to the left to avoid the deceased who ran across his path, a plausible explanation which was not believed by the courts below.

An eye-witness (whose evidence found favour with both courts below) said that the left front corner of the car hit the child. In fact the only damage to the car was a slight dent to the off-side wing. This is consistent with the appellant's story, and is inconsistent with high speed, as alleged by the prosecution witnesses. The appellant is a man of good character with five infant children. He has been driving for seven years and has a clean licence. He is not a "hit-and-run" driver, on the contrary he reported at once to the police and came back to the scene with two policemen.

In our view the appellant comes within the category described by Lawton L J in *R v Guilfoyle* [1973] 2 All ER 844 as an offender who has been convicted because of "momentary inattention or misjudgment" and who has a good driving record who should normally be fined and disqualified for not more than a short period. It is a case, in the words of Madan and Chesoni JJ in *Govid Shamji's* case (unreported), without any "compelling feature such as an element of intoxication or recklessness" such as to justify the imposition of a custodial sentence.

With great respect to the first appellate judges, we hold that in enhancing the sentence of a fine imposed by the trial magistrate to a sentence of three and a half years' imprisonment, the judges erred in principle. The same applies in our view to the period of eight years' disqualification ordered by the judges.

The second question now falls to be considered and answered: does an appeal against sentence lie to the Court of Appeal where, in the view of the Court of Appeal, the High Court has enhanced the sentence excessively acting on a wrong principle? A strong bench of this court's predecessor posed this very question, without answering it, in *R v Mohamed Aslam* (1941) 8 EACA 31. In that case, the Court found that there had been no error in principle affecting the enhanced sentence, and Sir Joseph Sheridan CJ delivering the judgment of the court, said (at page 32):

> This is a second appeal on the ground that the sentence is severe and for that reason no appeal lies.

> As to whether an appeal would lie on the ground that the Supreme Court had enhanced a sentence, acting on a wrong principle, which is not this case, we express no opinion, leaving the point to be decided in a case in which a decision is essential to the result of the appeal.

Such a case has now arisen. The instant appeal is not against the sentence as being too severe; it is based on the ground that the judges proceeded on the wrong basis in law as regards sentence and that they erred in law in imposing the enhanced sentence.

On a second appeal to this Court a party may appeal "on a matter of law not including severity of sentence) but not on a matter of fact"; see section 361 (1) of the Criminal Procedure Code. As we have already observed, sentencing is clearly treated in this provision as a matter of law. It appears to us therefore that if any question as to sentence is raised before us which does not merely relate to the severity of the sentence, we have jurisdiction to consider it. Thus in *Gopalbhai Nathubhai Mistry v R* [1957] EA 368, where the Supreme Court of Kenya enhanced a sentence without giving the appellant an opportunity to show cause, the Court of Appeal set aside the sentences and remitted the case to the Supreme Court with a direction to impose sentences after hearing the parties. Also, a second appeal would seemingly lie against a sentence which was unlawful as being in excess of jurisdiction; see *Hassamali Jamal v R* (1949) 16 EACA 143.

We are of the view that an error in principle in assessing an enhanced sentence is a matter of law which can be raised before this Court on a second appeal. The enhanced sentence imposed by the High Court was a lawful sentence in the sense that it was one authorised by law, and as such we cannot interfere with it; disregarding its severity, we think that the sentence was wrong as a matter of law in view of the principles regarding sentencing in cases of this nature so clearly enunciated in the judgments referred to earlier in this judgment.

In these circumstances, we dismiss this appeal so far as the conviction is concerned. We allow the appeal against sentence, not on the ground that it was too severe but on a matter of law, which is that in our view it wasbased on a wrong principle. We set aside the sentence of three and a half years' imprisonment passed on the appellant. Although we do not think that this is a case meriting a custodial sentence, as the appellant has in fact been in custody since 18th July 1979, we substitute such sentence of imprisonment as will ensure his immediate release. We also set aside the order that the appellant be disqualified from holding a driving licence for eight years and substitute an order that he be disqualified for one year from the date of conviction.

Appeal allowed as to sentence.

Dated and delivered at Nairobi this 2nd day of November 1979.

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR