REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL 343 OF 1976

NDUNGU MWAURA……..…….. APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

The appellant, Ndungu Mwaura, was convicted by the Senior Resident Magistrate at Thika, for causing death by dangerous driving contrary to section 46 of the Traffic Act and sentenced to a term of eighteen months' imprisonment. He was also disqualified from holding or obtaining a driving licence, from the date of judgment (namely 22nd March 1976) for three years. He now appeals against conviction and sentence and represented by Mr Mwihia. The appeal does not directly concern a second count. The circumstances giving rise to the charge were found by the magistrate to be as follows: The incident happened at about 10.00 pm on the evening of 8th July 1975 at Gatura Training Centre, this being a place on the road from Kimikia to Thika. Mr Livingstone Mwangi Maina, usually referred to as "Livingstone", who is a trader in South Kinangop, parked his lorry (registration KLN 187) outside a hotel at the Trading Centre. As one faces Thika, the hotel lies on the right hand side of the road. The road itself is tarmacked; but off the road is a stretch of murram lying between the road and the hotel. It was upon the murram, and off the road completely, that Mr Livingstone parked his lorry. Then he and his turnboy, Samuel Njoroge, went into the hotel for supper. While they were there, they heard a crash and, on coming out, they found that a Ford Cortina station wagon (registration KJD 468) had hit the rear of the lorry, and in some way had gone into the lorry. As a result of this collision, the appellant was found in a helpless condition in the Cortina and his passenger was unconscious with serious injuries. The passenger, Edward Muranga, died in hospital later as a result of these injuries.

The appellant's defence was that the lights of the car had suddenly failed. He applied his brakes and tried to swerve but his hand went into the steering wheel and became injured. His vehicle ran into the rear of the lorry. He was travelling at 50 kph and at some stage he had skidded.

The magistrate found that the appellant's lights had not failed, because a vehicle inspector, William Muguro, found the lights intact and working. The magistrate commented that he thought the appellant had made up the defence. On that basis, the magistrate thought that the appellant must have been coming round the bend too fast in the prevailing conditions of a wet road at night and failed to control his vehicle. This made the appellant run off the road and hit the lorry, which was dangerous. This piece of dangerous driving was the sole cause Edward Muranga's death.

The final part of the judgment deals with the submission that no notice of intended prosecution had been served. The police had served a notice of intended prosecution on 18th July 1975 for reckless driving. That was ten days after the incident. Edward Muranga died on 6th September 1975.

The second notice was served on 11th September 1975 for causing death by dangerous driving. The magistrate said that the second notice had become necessary after the death but that since the death did not occur until 6th September 1975, the second notice was properly served within fourteen days of the date of death. Therefore there had been compliance with section 50 of the Traffic Act.

[His lordship then considered the appeal so far as it related to the facts, and concluded:] on the facts, as found by the magistrate, the only inference could be that the appellant was at fault in driving his car; that he was not hampered by the loss of his lights; and that he had failed to control his car in circumstances which were dangerous to the public, as is stipulated by section 46 of the Traffic Act, and as the appellant was charged.

We turn now to the curious situation in which the law appears to stand with regard to the serving of notice of intended prosecution. Mr Mwihia states that the first notice of intended prosecution served on 18th July 1975 was not a sufficient notice, because it was not concerned with causing death by reckless driving. The second notice concerned with that offence, was not sufficient, he said, because it was only served on 11th September 1975, although the accident occurred on 8th July 1975. He thought that the "commission of the offence" could only be the date of the accident.

The importance of these submissions will be seen from the terms of section 50 of the Traffic Act, which reads as follows: Where a person is prosecuted for an offence under any of the sections of this Act relating to the maximum speed at which motor vehicles may be driven, or to reckless or dangerous driving or to careless driving, he shall not be convicted unless:

(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the sections aforesaid would be considered; or

(b) within fourteen days of the commission of the offence a summons for the offence was served on him; or

(c) within the said fourteen days a notice of intended prosecution, specifying the nature of the alleged offence and the time and place when it is alleged to have been committed, was served on or sent by registered post to him or to the person registered as the owner of the vehicle at the time of the commission of the offence…

We need not set out the provisos which follow. The matter was raised by the defence, and no difficulty occurred in service.

It was under paragraph (c) of section 50 that the police acted twice in this case. If Mr Mwihia is right that if a notice of intended prosecution (in default of other action under paragraphs (a) and (b) related to section 46 of the Traffic Act, is not sent within fourteen days of the date of the accident, that precludes a conviction for causing death by dangerous driving, then we conceive that in many cases that offence can never be prosecuted. Any victim who inconveniently dies after the fourteen-day period prejudices the prosecution unless the police had anticipated the death and served a notice in time. Such clairvoyance would be all the more extraordinary because no offence under section 46 can rise until the occurrence of the death. One wonders whether a notice of an offence, as yet inchoate, is a valid notice, since according to section 50 the offence ought to have been committed. The argument reflects such an unacceptable piece of impracticality that it has caused us to search for the origins of giving notice of intended prosecution in cases under section 46 of the Traffic Act.

It seems that the Court of Appeal for East Africa condoned the practice in *Greene v The Republic* [1970] EA 62, 74, where the conviction of Greene for causing death by dangerous driving was set aside because notice of intended prosecution for that offence had not been served upon him in time.

We have scrutinised the original record of Greene's trial, and we find that the accident occurred on 28th September 1968 at 6.00 p.m. and that Mrs Taylor died on the morning of 29th September 1968. It was possible, therefore, for a notice of intended prosecution concerning section 46 of the Act to have been given within the period of fourteen days. But we have grave doubts whether any notice or any other action under section 50 of the Traffic Act is required at all, in cases concerning death by dangerous driving.

As has always been recognized (see *Greene v The Republic* [1970] E A 62, 65 in the High Court) section 50 of the Traffic Act is a reproduction of section 21 of the Road Traffic Act 1930 in England; and so in *Greene's* case extensive reference was made to English cases on section 21 of the 1930 Act. It is of interest that the 1930 Act dealt in section 10 with maximum speed limits and punishments therefor; in section 11 with reckless or dangerous driving; and in section 12 with careless driving. It is clear that section 21 of the 1930 Act referred to those three sections only. That is so because the offence of causing death by dangerous driving was not created until 1956, when it was enacted in section 8 of the English Road Traffic Act 1956. Section 8(1) of the 1956 Act states the offence in the same words as appear in section 46 of the Kenya Traffic Act, and indeed section 46 was introduced into Kenya in 1956 by the Road Traffic Amendment Act (No 14 of that year). What had happened up to 1956 was that the great number of cases which came before the English Courts dealt with notice relating to section 10, 11 and 12 of the 1930 English Act. Up to 1958 in this country, those cases had been applied to corresponding sections of the Traffic Ordinance.

Thereafter in England, in the Road Traffic Act 1960, causing death by dangerous driving was set out in section 1, but was excluded from section 241 of that Act, which took the place of section 21 of the 1930 Act. This position remains under the Road Traffic Act 1972. One can therefore say that in England none of the provisions stemming from section 21 of the 1930 Act applied to the offence of causing death by dangerous driving, except possibly for the period between 1956 and 1960. We have scrutinized the various authorities of those years, but we can find no report where notice was given in a case of causing death by dangerous driving. That merely means of course that we can trace no record of such notice being given; and we cannot say that no notice of the lesser offences under sections 11 and 12 of the 1930 Act (which continued in force) was given in cases of causing death.

The period between 1956 and 1960 is of interest because Mr Mwihia reads the opening provisions of section 50 of the Kenya Traffic Act as being broad enough to engulf section 46. The latter section had started life in 1958 in Kenya as section 44A. There had, as in the 1930 Act, been specific provisions for maximum speed, reckless and dangerous driving and careless driving, to which section 50 had always referred. Now it is sought to show that the words: an offence under any of the sections of this Act relating to the maximum speed at which motor vehicles may be driven, or to reckless or dangerous driving or to careless driving…are wide enough to cover causing death by dangerous driving under section 46 of the Act, which is said to be essentially an offence concerned with reckless or dangerous driving. It is a difficult question of construction, because the offences to which section 50 relate had always been specifically understood, and the lack of particularity, when causing death by dangerous driving as an offence was introduced in a small amending Act, leaves open the question what was originally intended, when applied with the main Act. Then the consolidating Acts still leave the question open.

This difficulty appears to have been evaded in England, because the 1930 and 1956 Acts lay side by side. So section 8(4) of the 1956 Act provides: If upon the trial of a person for an offence against this section the jury are not satisfied that his driving was the cause of death but are satisfied that he is guilty of driving, as mentioned in subsection (1) of this section, it shall be lawful for them to convict him of an offence under section 11 of the Act of 1930, whether or not the requirements of section 21 of the Act (which relates to notice of prosecution) have been satisfied in respect to that offence.

Subsection (1) of this section refers to reckless and dangerous driving. This provision presupposes that no notice of any sort will have been given. The Courts had held, for instance in *Milner v Allen* [1933] 1 KB 698, that if the notice specified section 11 instead of section 12 of the 1930 Act, it was still a valid notice. It would not have mattered, therefore, whether after 1956 a notice under section 11 had been given; the prosecution, it was said, was not bound to specify the exact section of the Act in the notice. But if no

notice for causing death by dangerous driving had been given, then to reduce the charge to one under section 11 of the 1930 Act would infringe section 21 of that Act. So section 8(4) of the 1956 Act catered for that event. We are confident therefore that it can be said that no notice of intended prosecution was required between 1956 and 1960 in England in cases of causing death by dangerous driving. Since 1960, as we have shown, such notice was specifically excluded by legislation.

Looking at the Kenya legislation from this historical perspective it seems to be at least a solecism to have required notice in cases under section 46 of the Traffic Act. We hesitate, of course, to say that the Court of Appeal was not aware of the English legislation and its effects. As both parties presented to the Court of Appeal arguments on the agreed basis that notice was necessary, the Court probably simply answered their questions, whether or not notice had been served. We have come to the conclusion that, apart from *Greene v The Republic* [1970] EA 62, there is no need for a notice specifying section 46 of the Traffic Act for the following further reasons: To begin with, there is the nature of the offence of causing death by dangerous driving. It originated in England, and the purpose was to avoid the difficulties experienced in what may be called "motor manslaughter". It is not for nothing that section 182 of the Criminal Procedure Code provides:

When a person is charged with manslaughter in connection with the driving of a motor vehicle by him, and the Court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under section 46 of the Traffic Act, he may be convicted of that offence although he was not charged with it.

In cases of manslaughter no notice of reckless driving, etc. needs to be given. If section 50 had applied to section 46 of the Traffic Act, would not there have been some provision, such as appeared in section 8(4) of the 1956 Act in England? Otherwise the reduction would have been rendered useless, unless, of course, it be argued that section 50 was impliedly superceded by the Criminal Procedure Code. It appears that no notice was contemplated.

Such exceptions as were provided in section 8(4) of the 1956 Act in England were introduced into the Traffic Act in Kenya. Section 48 of the Traffic Act provided, originally, that upon the trial of a person who is charged with manslaughter in connection with the driving of a motor vehicle by him, if the Court is satisfied that such person is guilty of an offence under section 47 of the Traffic Act, he may be found guilty of such offence whether or not the requirements of section 50 of the Act have been satisfied as regards that offence. The contrast with section 182 of the Criminal Procedure Code could hardly be more marked.

Then in that section was incorporated (as well as the case of a person charged with manslaughter) the alternative position of a person charged with causing death by dangerous driving. It appears to follow that these two offences were similar in regard to notice; there would not be any. So when reducing either offence to one section 47 the exception was made to cater for section 50 of the Act.

The same position held in the case of persons tried under section 47; they could be found guilty of careless driving under section 49 of the Traffic Act, although no notice was given. The last exception to be found in section 49(3) of the Traffic Act is *ex abundanti cautela*, since one would have expected at least notice for reckless or dangerous driving to have been given in the first place.

Since 1971 the exceptions in both section 49(3) ("whether or not the requirements of section 50 have been satisfied as regards that offence"), have been deleted. It is not clear why. However, as that is not the position, it must, it seems, be necessary for some notice to be given. One might hazard the opinion that the concept of notice requires revision, determining its essentials. However that may be, and whatever may have been the purpose of the 1971 amendments, it does not affect the position in manslaughter or cases of causing death by dangerous driving in regard to section 182 of the Criminal Procedure Code, or, for that matter, section 48 of the Traffic Act either.

In our view, therefore, from the nature of the offence and the legislation involved there is no reason why notice of intended prosecution in cases of causing death by dangerous driving should be given. In the absence of authority, we should have interpreted the opening remarks of section 50 as covering provisions

relating to speed, and sections 47 and 49 as they were originally intended. We find a wider interpretation embracing section 46 difficult to operate sensibly. It depends on the chance of the date of death. However, we are bound by the implications to be drawn from *Greene's* case; and we own the views of this court in that case on first appeal, which seem to have been that notice was necessary. We feel that until the Court of Appeal has considered the point, we must hold that some notice is necessary in case of causing death by dangerous driving. Perhaps that is also the effect of the present section 48 of the Traffic Act after the 1971 amendments.

If that be so, then we observe that notice of intended prosecution was served for reckless driving in time. If Mr Mwihia is right, that reckless driving is so much the essence of causing death by dangerous driving that section 50 applies, then surely such a notice would suffice for either offence. We would indeed apply the views of the English Courts, that a modicum of common sense must prevail, and that as reckless driving contrary to section 47 of the Traffic Act was all that the prosecution could have dealt with at the time, therefore the object of section 50 had been fulfilled. In *Milner v Allen* [1933] 1 KB 698, 702, Lord Hewett CJ explained the purpose of a notice; "The object of the notice is to take back the recollection of the motorist to the facts upon which reliance is placed". Avory J dealt with the technical aspects. He considered (at page 702) that the argument before the Court could not be right, namely, that: the words… 'a notice of the intended prosecution specifying the nature of the alleged offence', necessarily mean that the notice must be a notice of the particular section of the Act under which the prosecution is contemplated. Nor do I assent to the argument that at the time when that notice is given it is necessary that the police officer or other authority should have definitely made up his mind which particular charge is to be made.

Milner's case has been approved of since, and we would, with respect, follow its reasoning. We have seen the notice, and it informed the appellant of the date, hour and location where the accident occurred, and also that he had driven recklessly. The notice did all that Lord Hewart CJ demanded, and informed him that he was at fault. That was a sufficient notice.

The second notice, which the magistrate thought necessary, we consider to have been quite unnecessary. It merely reinforced the first notice. In *Greene v The Republic* [1970] EA 62 one notice was served and it specified that the offence was causing death by dangerous driving. That was possible on the facts of that case. But that case did not decide that such a notice could be given in circumstances where death occurred outside the period of fourteen days. It did not overrule *Milner's* case. It was simply dealing with the meaning of "sent" involved in the service of the notice. Therefore, we are able to hold that in so far as *Greene's* case purports to show that a notice is required in cases under section 46 of the Act, a notice properly stating the facts and fault under section 47 of the Act would be a sufficient notice. We have not considered the effect of notice under section 49 of the Traffic Act.

During argument, we mentioned that the phrase "commission of the offence" in section 50 might include the period until death had occurred, as the magistrate thought. If a notice specifying section 46 is necessarily incumbent upon us as a result of *Greene's* case, such a view of that phrase would be the only possible solution to make section 50 workable. One reason why "commission of the offence" has been confined to the date of the traffic accident is that, in point of fact, that date could be the only consideration in all cases where notice is required, except causing death by dangerous driving. All the cases under section 21 of the 1930 Act refer to the accident for instance. So it used to be under section 50. The offence of causing death under section 46 is inchoate until death has occurred; it will relate back, like in murder or manslaughter cases, to the date of the incident. But the phrase has not been judicially considered in relation to section 46 of the traffic Act, and the point was certainly not argued in *Greene's* case. If it had been, the notice in that case might have been held good. Bearing in mind section 57 of the Interpretation and General Provisions Act, the fourteen-day period would commence on the day after Mrs Taylor's death, viz 30th September 1968. It would end on Sunday 13th September 1968 (which would be excluded). Service would be good on 14th September when it was in fact served. However, as the court's decision involves a calculation whereby the last day was 12th September 1968, *Greene's* case excludes the wider definition of "commission of offence", and we do not rest our decision upon such definition.

For the reasons given, we find that the appellant was properly convicted of the offence charged. There

remains the appeal against sentence. Nothing we heard disposes us to interfere in that quarter. Therefore the appeals are dismissed in their entirety.

Appeals dismissed.

Dated at Nairobi this 28th day of September 1976.

A.A.KNELLER

……..……

JUDGE

H.G.PLATT

……

JUDGE