Republic v Kirimi (Traffic Case E001 of 2022)
[2023] KEMC 295 (KLR) (7 November 2023) (Judgment)

Neutral citation: [2023] KEMC 295 (KLR)

REPUBLIC OF KENYA

IN THE GITHONGO LAW COURTS

TRAFFIC CASE E001 OF 2022

AT SITATI, SPM

NOVEMBER 7, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

REUBEN KIRIMI ..... ACCUSED

JUDGMENT

1. The Accused person was charged with the offence of careless driving contrary to section 49(1) of the *Traffic Act*. The particulars were that on 22nd January, 2022 at 2pm at Gataugwa area along Meru-Nkubu highway, being the driver of motor vehicle reg. no. KBM 892H Mitsubishi FH lorry, drive the said lorry without due care and attention to other road users, swerved to the right side of the road, leaving his lane and rammed into an oncoming vehicle reg. no. KAA 787H Toyota salon which was being driven by Cyrus Mugiria Munyua who was driving the salon car from the Meru direction thereby causing injuries to Cyrus Mugiria Munyua.

2. The Accused person denied the charges and was admitted to bond. He represented himself at the trial which was conducted by Prosecution Counsel Dixon Kibiti.

The Dpp's Case

3. PW1 CYRUS MUNGIRIA told the court that on 22ND January, 2022 he was driving his Toyota saloon car from Meru general direction towards Nkubu general direction. He added that when he got to Gataugwa area, while in his correct lane, he saw the FH lorry driven by the accused person suddenly join his lane and rammed head into his saloon car. The collision made his car to roll over. He was rescued by members of the public and taken to hospital.

PARA 4.

In cross-examination, it was confirmed that the accused person's sudden swerve into PW1's lane caused the collision. It also emerged that the accused person was driving at a very high speed.

5. PW2 MOTOR VEHICLE INSPECTOR RICHARD NJOROGE told the court that he inspected both the lorry and the saloon car and found that the saloon car was rammed into head-on by the lorry. The two vehicles, however, had no pre-accident defects. He prodcuced the 2 inspection reports as P.Ex.1-2.

6. PW3 CLINICAL OFFICER TIMOTHY MBERIA produced the P3 Form for the complainant as P.Ex.3 showing that the complainant suffered bruises and tenderness to the face and nose, deformation of the right leg due to swelling with fractures of the right mid-shaft femur bone.

7. PW4 Sno. 81589 PC LINDA GWADA testified as the Investigating Officer who was then based at the Kariene Police Station. She told the court that on 22nd Janaury, 2022 at 2am she was alerted by Inspector Kilonzo of a traffic incident at Gataugwa area along Nkubu – Meru highway. She proceeded to the scene and found the Mitsubishi lorry KBM 892H on the Right-Hand lane as one faces Meru from Nkubu direction with its driver at the scene. The salon car KAA 787H was in a ditch and its driver had been rushed to the hospital.

8. PW4 took measurements and drew the Sketch Plans together with the legends and told the court that the lorry driver swerved into the salon car's lane and collded head with the car. In support of the case, she produced the following exhibits:

    1. PEx.4- sketch plans

    2. – measurements and legends.

    This testimony was unshaken in cross-examination.

9. At the end of his evidence, the DPP closed his case whereupon the court ruled that the accused person had a case to answer. He was put to his defence.

The Defence Case

10. Reuben Kirimi gave sworn defence. He told the court that the brakes failed hence the collision. He then closed his defence. No witness was called for the accused person.

11. The duty of this Honourable Court is to determine if the DPP has proved all the ingredients of the charges beyond any reasonable doubt against the accused person. Before making that determination, the court found that some facts and issues were proved and were undisputed:

Undisputed Issues

1. PW1 was the driver of the salon car while the lorry driver was the accused person.

2. Both the saloon car and lorry had no pre-accident defects as per the inspection reports produced in court.

3. The incident took place on 22nd January, 2022 at 2am at Gataugwa area along Meru-Nkubu road.

Disputed Issue

12. Before delving into the substance of the case, the court noted that the legality of the charges are worthy of consideration.

13. The accused person has been charged under Section 49(1) of the *Traffic Act* which provides as follows:

> 49. Driving without due care and attention
>
> (1) Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable— (a) for a first offence, to a term of imprisonment not exceeding one year or a fine not exceeding one hundred thousand shillings;
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> (b) for a second or subsequent offence, to a term of imprisonment not exceeding two years or to a fine not exceeding two hundred thousand shillings, and the court may exercise the power conferred by Part VIII of suspending any driving licence or provisional driving licence held, by the offender disqualified from holding or obtaining a driving licence for a period of twelve months starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later."

14. In the authority of Nicholas Munge Kasuku v Republic [2020] eKLR (G.W.Ngenye-Macharia J.) the learned Judge stated the correct law applicable as follows:

> 15. The Appellant was charged under Section 49(1) of the *Traffic Act* with the offence of careless driving. The statement of offence read:
>
> " careless driving contrary to section 49(1) of the *Traffic Act* CAP 403 Laws of Kenya"
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> 16. Section 49(1) of the *Traffic Act* however is worded as follows:
>
> " 49. Driving without due care and attention
>
> (1) Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable—..."
>
> 17. It is evident that the statement of offence and particulars are at variance. What this implies is that the Appellant was charged with a non- existent offence under the *Traffic Act*. Further, the prosecution adduced evidence in proof of an offence that did not exist as the Act has no provision for the offence of careless driving. The learned State Counsel having admitted that Section 49(1) of the *Traffic Act* had been amended as at the time the charge was framed, automatically implored upon the prosecution to amend the charge sheet so as to reflect the correct offence. This cardinal procedure was omitted, again implied that the Appellant was tried and convicted for a non-existent offence.
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> 18. This court was faced with a similar situation on appeal in the case of Bernard Opiyo Ouma v Republic [2018] eKLR and had the following to say:
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> " While the substantial elements of the offence in question were not amended, I opine that the amendment to the statement spelling out the offence was occasioned by the fact that careless driving cannot be equated to driving without due care and attention as the element of careless driving involves a level of negligence that surpasses a failure to take due care and attention. This is informed by definition accorded to word "careless" in the Black's Law Dictionary, 9th Ed. as an action or behavior engaged in without reasonable care comparable to being reckless. It also defines reckless conduct as much more than mere negligence and a gross deviation

from what a reasonable person would do. In my view, the amendment was necessary because an offence with elements similar to the offence of careless driving is set out under Section 47 of the Act, namely reckless driving."

19. I cannot say more save to hold the entire trial was therefore a nullity."

15. The effect of charging an accused person with non-existent offence was discussed in the authority of SEMPOLO OLE NAENI vs REPUBLIC [1984] eKLR (J. Aluoch J.)

> " When the hearing of this appeal started before me, Mr. Nyairo, State Counsel, conceded on the ground that the section under which appellant was charged, did not exist, as Rule 29(1) of Cap 364, was the rule dealing with "Notification of infected areas," not a penalty section for "Moving animals without a permit." Mr. Nyairo relied on the case of UGANDA v Keneri Opidi reported in 1965 E.A.L.R. page 614. I have gone through the case and I would say, it provides a useful guide. I find that the appellant suffered a miscarriage of justice in having been convicted under Rule 29 of Cap 364, Laws of Kenya.

16. The miscarriage of justice suffered, cannot be cured under section 382 *Criminal Procedure Code*, because it goes to the root of the matter, in that, the offence created under these Rules is, "Movement of Animals with restricted areas without a permit. The intention of the legislature was to restrict movements of animals in restricted areas, not just movement of animals generally. This is why this defect cannot be cured by section 382 Criminal Produce Code.

17. I also find that the provision to section 382, criminal produce code cannot apply in this case either, because the appellant and the others who were unrepresented in the lower court, could not have been expected to know that they were charged under a non-existent section. Because of the foregoing, I am left with no alternative, but to allow the appeal, quash conviction and set aside the sentence imposed on the appellant."

18. The second authority bearing a similar situation was that of Ankush Manoj Shah v Republic [2016] eKLR (G.W. Ngenye Macharia J.) where the learned Judge had this to say:

> " I have already candidly found that the law under which the Applicant was charged does not exist. When the objection was raised before the trial court, the plea should not have been taken on account that the Applicant had been charged under a law that did not exist. The magistrate ought to have made a determination on that objection."

18. The objection raised by the Applicant created a weighty legal question that it was an error to rule that it could only have been determined by adduction of evidence. The defence had argued that the Applicant having been charged under Section 70(5)(B)(1)(A) no offence had been disclosed because under Sub-section (5((B), an offence was disclosed only if the accused was driving in excess of the prescribed speed by more than 20 k.p.h. In my view, the learned trial magistrate misdirected herself that the question could only be determined at the hearing. This is so because under Section 89(5) of the *Criminal Procedure Code*,

> " Where a magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order."
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> She ought to have addressed herself on the question of whether the charge disclosed an offence, or was brought under the wrong provision of the law and therefore elect to admit

or reject it. The direction she took represented an irregularity which this court under its supervisory jurisdiction over the courts subordinate to it must correct."

19. When the foregoing principles are applied to the present case, it leads to the finding that the accused person was charged with a non-existent offence. He should have been charged with the of driving without due care and attention as held by the High Court.

Apart from being charged with the non-existent offence, the court found that the investigating officer did not issue the accused person with the mandatory notice of intended prosecution under section 50 of the *Traffic Act* which states:

50. Warning to be given before prosecution

Where a person is prosecuted for an offence under any of the sections of this Act, other than section 46, relating respectively to the maximum speed at which motor vehicles may be driven, 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 fourteen days a notice of the intended prosecution, specifying the nature of the alleged offence and the time and place where 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: Provided that—

i. failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that—

(a) neither the name and address of the accused nor the name and address of the registered owner of the vehicle could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or

(b) the accused by his own conduct contributed to the failure; and (ii) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved

20. He is thus acquitted on the 2 main grounds of the non-existent offence under section 215 of the *Criminal Procedure Code*. The DPP may, in order to avoid a miscarriage of justice, however, charge him with a correct offence as guided by the High Court authorities. Right of appeal is 14 days.

DATED, READ AND SIGNED AT GITHONGO THIS 7TH DAY OF NOVEMBER, 2023

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HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS