



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Ndungu (Traffic Case 1239 of 2019)  
[2025] KEMC 183 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEMC 183 (KLR)

**REPUBLIC OF KENYA  
IN THE MAKINDU LAW COURTS  
TRAFFIC CASE 1239 OF 2019  
YA SHIKANDA, SPM  
JULY 24, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PATRICK NJUNGE NDUNGU ..... ACCUSED**

**JUDGMENT**

**The Charge**

1. Patrick Njunge Ndungu (hereinafter referred to as the accused person) is charged with the offence of causing death by dangerous driving contrary to section 46 of the *Traffic Act*. The particulars of the offence are that on 18/8/2019 at Kibwezi area within Makeni County along Nairobi-Mombasa road, the accused person being the driver of motor vehicle registration number KCB 901M Nissan UD bus drove the said motor vehicle at a speed or manner which was dangerous to the public and caused the death of Mutuku Kanyote Ndolo. The accused person pleaded not guilty to the charge where after the matter was set down for hearing.

**The Evidence**

**The Prosecution case**

2. The prosecution case was heard by another Magistrate who was subsequently transferred. When the matter was placed before me, directions were given that the same proceeds from where it had reached. This was in compliance with section 200(3) of the *Criminal Procedure Code*. The accused person had already been placed on his defence. The prosecution called a total of six (6) witnesses in a bid to prove its case against the accused person. PW 1 Stanley Musili testified that on 18/8/2019 he was driving motor vehicle registration number KCD 899S Matatu from Mombasa to Nairobi. When he approached Kibwezi area, he saw an old man crossing the road while escorting livestock.



3. There was a lorry and a bus being driven from the opposite direction. That the lorry was ahead of the bus. PW 1 stated that the lorry driver slowed down to give way to the livestock but the bus overtook the lorry. In the process, the bus knocked down the old man and some livestock. PW 1 stopped his motor vehicle and alighted. He went to where the old man was lying and carried him to where his motor vehicle was but discovered that the old man had died. PW 2 Francis Mutinda Musyoka testified that on 18/8/2019 he was at his place of work when he was called on phone and informed that his employee had been knocked down by a motor vehicle. The witness proceeded to the scene and confirmed that his employee had died. He mentioned the deceased herein as his employee. The witness identified the accused person as the driver of the bus that knocked down the deceased.
4. PW 3 Dennis Ngei testified that he was with the deceased herein on the material day. That as the livestock were crossing the road, a bus overtook a lorry that had stopped to give way to the livestock. The bus knocked down the deceased and some livestock. PW 4 Police Corporal Wesley Karani testified that he was the investigating officer in respect of the accident. The witness stated that upon receiving information on the accident, he visited the scene. He interrogated the accused person and recorded statements from witnesses. Upon completion of the investigations, PW 4 formed the opinion that the accused person had caused and was to blame for the accident.
5. PW 5 Doctor Elijah Matiri testified that he was a veterinary doctor. That he visited the scene of the accident and found seven carcasses of cows. He examined them and found that they had multiple fractures which caused their death. PW 6 Doctor Mbugua (other name not clear) testified that he conducted a post-mortem examination on the body of the deceased. His opinion was that the deceased had died from severe head injury. He produced the post-mortem report in evidence. The record indicates that the prosecution called a 7<sup>th</sup> witness and having perused the record, I note that it was the same witness who testified as PW 5. The witness testified twice.

### **The Defence Case**

6. When the accused person was placed on his defence, he opted to give a sworn testimony without calling any other other witness. The accused person admitted that he was the driver of motor vehicle registration number KCD 901M on the material day. His evidence was that when he reached Wayani area, there was a lorry ahead of him. He signalled the lorry driver to let him overtake. The lorry driver turned on his left indicator as a signal for the accused person to overtake. It was the evidence of the accused person that as he was overtaking the lorry, he saw cows crossing the road. The accused person stated that he could neither apply emergency brakes nor swerve as the bus would have overturned. The accused person stopped the bus then alighted. According to the accused person, the lorry he was overtaking had also knocked down some cows and there was an old man lying behind the lorry. The police visited the scene. The accused person drove back to Makindu police station and was later allowed to continue with his journey.

### **Undisputed Facts**

7. From both the prosecution and defence evidence, the following facts are not in dispute:
  - a. That the accused person was the driver of motor vehicle registration number KCD 901M on 18/8/2019;
  - b. That an accident occurred at Wayani area along Mombasa-Nairobi highway on the material day;
  - c. That motor vehicle registration number KCD 901M was involved in the accident;



- d. That the deceased herein was involved in the accident;
- e. That the accident occurred while the accused person was overtaking a lorry.

### **Main Issues For Determination**

8. In my opinion, given that most of the facts are not in dispute, the main issues for determination are:
  - i. Whether the accused person drove motor vehicle registration number KCD 901M dangerously, thereby causing the accident;
  - ii. Whether the accused person knocked down the deceased;
  - iii. Whether the deceased herein died as a result of injuries sustained in the accident;
  - iv. Whether the prosecution has established its case against the accused person beyond reasonable doubt.

### **Analysis And Determination**

9. I have carefully considered the charge against the accused person alongside the evidence on record. I have further considered the applicable law. As already indicated, the occurrence of the accident and involvement of the accused person's motor vehicle is not in dispute. The facts leading to the accident as given by the eye witnesses and the accused person are substantially similar. The only point of departure is that whereas the prosecution witnesses stated that it was the accused person's motor vehicle that knocked down the deceased, the accused person denied having done so. He only admitted that he knocked down two cows.
10. Section 46 of the *Traffic Act* provides as follows:

“ Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence whether or not the requirements of section 50 have been satisfied as regards that offence and be liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by Part VIII of cancelling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of three years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later.”
11. Section 2 thereof defines road as:

“ .....any public road within the meaning of the *Public Roads and Roads of Access Act* (Cap. 399), and includes any other road or way, wharf, car park, footpath or bridle-path on which vehicles are capable of travelling and to which the public has access.”
12. In my view, the key ingredients of the offence of causing death by dangerous driving are as follows:
  1. Driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public; or



2. Leaving a motor vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public having regard to all the circumstances of the case; and
  3. Causing the death of another person.
13. I note that the particulars of the charge indicate that the accused person caused the death of the deceased herein as well as seven cows. The prosecution even called a veterinary doctor to prove that the cows died as a result of the accident. With all due respect to the prosecution, the offence of causing death by dangerous driving relates to the death of a human being and does not extend to animals or other living creatures. In the case of *Atito v R* [1975] EA 278, it was held that to justify a conviction of the offence of causing death by dangerous driving, there must not only be a situation which, viewed objectively was dangerous, but there must also be some fault on the part of the driver causing that situation. In other words, it must be proven that the accident complained of was as a result of some fault on the part of the accused driver.
  14. In the case of *R v Gosney* [1971] 3 ALL ER 220, it was held that an accident by itself is not conclusive evidence of careless or dangerous driving. There must be evidence to the effect that the driver charged was at fault. Similarly, in the case of *R v Wallace* [1958] EA 582, it was held that a conviction for driving without due care and attention cannot be founded on the mere fact of a collision, but be based on a finding of fact that the driver charged with the offence was guilty of some act or omission which was negligent and which was a departure from the standard of driving expected of a reasonably prudent driver.
  15. In *Gosney's case (supra)* the court defined the term fault as follows:
 

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 normally no danger would have arisen from it is sufficient".
  16. The onus is on the Prosecution to prove its case against the accused person beyond reasonable doubt. The accused person is under no duty to prove his innocence. It is for this reason that the accused person has a right to remain silent in his defence. It is not for the accused person to convince the court that he is innocent. Rather, it is for the Prosecution to tender evidence sufficient to prove no other narrative than that of the guilt of the accused person. This standard of proof "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see *Clarence Victor, Petitioner 92-8894 v. Nebraska*, 511 U.S. 1 (1994); *Rex v. Summers*, (1952) 36 Cr App R 14; *Rex v. Kritz*, (1949) 33 Cr App R 169, [1950] 1 KB 82 and *R. v. Hepworth, R. v. Feamley*, [1955] 2 All E.R. 918).
  17. Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when



after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

18. For the court to return a verdict of “guilty” on the part of the accused person, the Prosecution evidence must establish fault on the part of the accused person in driving the motor vehicle. The prosecution had a duty to prove a version that would establish guilt on the part of the accused person beyond reasonable doubt. PW 1 and PW 3 testified that it was the accused person’s motor vehicle that knocked down the deceased. Their testimonies were consistent and corroborative on how the accused person’s motor vehicle knocked down the deceased. From the evidence of both parties, it is clear that the point of impact was on the right lane towards Mombasa general direction. It is agreed that the accident occurred while the accused person was overtaking a lorry. The certificate of examination for the accused person’s motor vehicle indicates that the same had no pre-accident defects but as a result of the accident, the front face grill was damaged and the front windscreen was shattered.
19. It is clear to me that the accident was caused by the accused person’s act of overtaking the lorry. In his own testimony, the accused person stated that he saw the cows crossing the road two metres ahead of him while he was overtaking. The accused person did not state that the cows suddenly crossed the road. Even assuming that the cows suddenly entered the road, a prudent driver would not overtake in an area where there is livestock on or near the road. Clearly, the accused person overtook when it was not safe for him to do so. If the accused person’s defence is anything to go by, it would appear that he depended on the lorry driver and did not attempt on his own to establish whether the course was clear before making the decision to overtake. That, in my view, amounts to dangerous driving.
20. The accused person denied having knocked down the deceased but at the same time, he could not tell who knocked down the deceased. If at all the accused person was driving with due care and attention, he ought to have seen how and by whom the deceased was knocked down. The eye witnesses stated that it was the accused person’s motor vehicle that knocked down the deceased. In my view, for the accused person to rebut the narrative by the prosecution, he ought to have given a counter-narrative showing how and by whom the deceased was knocked down. The medical evidence on record proves that the deceased died as a result of injuries sustained in the accident. I am thus convinced that it was the accused person who knocked down the deceased. I see no reason to disregard the evidence from the prosecution eye witnesses.
21. I have considered the accused person’s defence. In my view, the explanation by the accused person is not capable of dislodging the overwhelming evidence given by the prosecution. Upon consideration of the entire evidence on record, I can state with conviction that the accused person drove the motor vehicle dangerously and thus caused the accident, leading to the death of the deceased herein.

### **Disposition**

22. In view of the foregoing, it is my finding that the prosecution has proven its case against the accused person beyond reasonable doubt. Consequently, I find the accused person guilty of the offence of Causing death by dangerous driving and proceed to convict him accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 24<sup>TH</sup> DAY OF JULY, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**

