IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: LAKHA, BOSIRE & KEIWUA JJ A)

CRIMINAL APPEAL NO 53 of 2002

BETWEEN

DICKSON MUCHINO MAHERO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court at Nairobi, Oguk J, dated April 8, 2000

in

H.C.CR.A. No 315 of 1999)

****

JUDGMENT OF THE COURT

Section 46 of the Traffic Act, Cap 403 of the Laws of Kenya, provides that:

> "46. 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..."

The appellant is before us on a second appeal challenging his conviction, *inter alia*, for the offence under the aforesaid section, whose particulars alleged that:

> "On the 8th October, 1997 at about 8.30 a.m at Caltex Petrol Station along Second Avenue Eastleigh within Nairobi Area being the driver of motor vehicle Reg. No.KAJ 768H, Isuzu Mini bus drove the said motor vehicle at a speed or in a manner which was dangerous to the public and other road users, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which was actually at the time or which might reasonably be expected to be on the road and caused the death of Herman Onyango."

The facts as found by the trial and first appellate court are that the appellant, a "*matatu*" tout was on the material date at a petrol station where, he and the driver of the aforesaid vehicle had gone to refuel. The

driver left for a while leaving the motor vehicle at the said station being refuelled. He left the ignition keys in the ignition switch. While he was away, the appellant entered the vehicle, started it and drove it back and forth. As he reversed the vehicle he knocked down Herman Onyango, a pump attendant (the deceased) who was refuelling another motor vehicle. The deceased was rushed to hospital, but unfortunately he died on the way to hospital. The appellant on realizing that he had hit the deceased escaped. He was not arrested until 9 months later. He had not reported the accident to any person in authority.

A Traffic Policeman, PC Thomas Rono, testified that he knew the appellant before as a *matatu* tout, a fact which was confirmed by the driver of the accident vehicle. The driver testified that the appellant was not a qualified driver.

Although the appellant cross-examined prosecution witnesses on their testimony, he opted not to say anything in his defence. The trial magistrate and first appellate court had no difficulty in holding that the appellant was guilty of, firstly, causing death by dangerous driving contrary to section 46, of the Traffic Act; secondly, of failing to report an accident contrary to section 73(3) of the Traffic Act and thirdly, of driving a motor vehicle without a driving licence contrary to section 30(1) of the same Act. This being a second appeal, only issues of law fall for consideration.

An offence under section 46, aforesaid, is in actual fact a charge of manslaughter in connection with the driving of a motor vehicle by an accused. The section does not create more than one offence, but does set out different ways of managing a motor vehicle which may give rise to the offence. The different modes of driving are in themselves offences under different provisions of the Traffic Act. For instance section 47, thereof creates the offence of reckless driving, which includes dangerous driving. Section 49, creates the offence of careless driving and section 53 creates the offence of obstruction. But in a charge under section 46 the particulars of the charge, although in themselves may allege offences those sections create, they are infact in the nature of particulars to support the manslaughter charge. That notwithstanding this Court in the case of *David Ngugi Mwaniki v. R* (Criminal Appeal No.68 of 2001), after considering several previous decisions came to the conclusion that particulars of a charge under section 46, aforesaid, alleging as does the charge against the appellant herein are invariably incurably duplex. The Court rendered itself, in pertinent part, thus:

> "In short, where two offences are charged in the alternative in one count, the duplicity so occasioned is invariably fatal and section 382 of the Criminal Procedure Code cannot cure such irregularity."

Mr. Solanka for the appellant, heavily relied on the aforequoted excerpt of the decision to urge the view that the appellant was convicted on a defective charge as, in his view, the particulars of the charge, which we set out earlier, alleged two offences. The first offence he said was causing death by driving a motor vehicle at a speed, and the second is by driving a motor vehicle in a manner which was dangerous. In his view it did not matter that only one person was killed.

We must confess that upon reading the judgment of the Court in *David Ngugi Mwaniki*, we could not help thinking that the Court expressed itself too broadly, particularly considering the fact that it was dealing with an offence under section 46 of the Traffic Act. That section like sections 296(2) and 297(2) of the Penal Code, respectively, provides for different modes of committing an offence under it. It is not uncommon to find particulars of a charge under sections 296(2) and 297(2) aforesaid, alleging in general terms that:

> "... jointly with others not before the court, and being armed with dangerous weapons, and at or immediately before, or immediately after the time of the robbery ..."

The Legislature appears to have in a way sanctioned that in cases falling under those sections, particulars could be worded in duplex terms. For instance under the 2nd schedule of the Criminal Procedure Code, Standard Forms of particulars of certain offences have been set out. Form No.5 deals with the offence of "wounding". The particulars as set out there allege as follows:

> "A.B., on the ..... day of ..... 19... in .....District within the .....Province, wounded C.D, with intent to maim, disfigure or disable, or to do some grievous harm, or to resist the lawful arrest of him the said A.B."

And Form No.21, which deals with the offence relating to false accounting, the particulars are worded in the following terms:

> "A.B., on the ..... day of ..... 19 ..... in ..... District, within the ..... Province, being clerk or servant to C.D, with intent to defraud, made or was privy to making a false entry in a cash book belonging to the said C.D., his employer, purporting to show that on the said day Sh.2,000 had been paid to Z.M."

Section 330(b) of the Penal Code which creates the offence for which the above are the particulars, provides, in pertinent part, that:

> "330. Any person who, being a clerk or servant, or being employed or acting in the capacity of a clerk or servant, does any of the acts following with intent to defraud, that is to say:-
> (a) ...
> (b)Makes, or is privy to making, any false entry in any such book, document or account; or"
> (Emphasis supplied).

Thus as in the case of an offence under section 46 of the Traffic Act the section creating the offence states the various modes of committing the offence of fraudulent false accounting namely, making or being privy to the making of a false document.

In the English case of *Ministry of Agriculture Fisheries & Food v. Nunn* [1978] Ltd. [1990] Crimn.L.R. 268, DC it was emphasized that the question of duplicity is one of fact and degree; and that the purpose of the rule is to enable the accused to know the case he has to meet.

Likewise, in *Amos v. DPP* [1988] RTR 198 DC, it was held that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed and to counter a true risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain.

Section 134 of the Criminal Procedure Code, provides that:

> "134. Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences, with which accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

And Section 135(2) CPC enacts that each offence should be charged in a separate count. This is the provision which Mr. Solanka, stated had been breached.

As we stated earlier the particulars of the offence under section 46 of the Traffic Act, with which the appellant was charged alleged that it was due to him driving a certain motor vehicle at a "speed or manner" which caused the death of the deceased. These were particulars which were intended to give him reasonable information as to the nature of the offence he faced. Whether or not those particulars were clear enough to him is a question of fact on which the Court has to make a finding. Sections 382 and 361(5) CPC, in a way clothe appellate courts with the jurisdiction to re-evaluate the facts and the evidence to satisfy themselves that the accused has not been prejudiced or embarrassed in answering the charge against him as framed. That is the approach, we think the court adopted in *Shah v. Republic* [1969] EA 197, when it rendered itself thus:

> "... The real offences were causing the deaths of two people by driving in a manner dangerous to the public by reason of one or the other of two things, viz the speed or manner of driving. How can it be stated, therefore, with any sense of reality that he did not know what case he had to

> answer? It seems to me that an accused is in no worse position where the particulars of the offence are framed disjunctively than when they are framed conjunctively. Is prejudice really occasioned by the use of the word "or" but not the use of the word "and"? Whether "or" or "and" appears in the charge an accused knows that he must be prepared to meet both limbs of the charge".

It is our view that it is by sheer coincidence that the particulars of any charge under section 46 , are offences in themselves. Causing death is a distinct offence from dangerous or careless driving or obstruction. The death arising from the manner of driving is merely an aggravating factor as in the case of violence under Sections 296(2) and 297(2) of the Penal Code as will entitle the court to impose a stiffer penalty.

In the appellant's case we have perused through the record of the trial court, and are satisfied that the appellant understood the charge he faced, he asked relevant questions to the charge and in no way was he prejudiced.

In the result we come to the conclusion that the appellant was properly convicted for the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act.

As we stated earlier the appellant faced two other counts. The first is failing to report an accident contrary to section 73(3) of the Traffic Act. The other, is driving a motor vehicle without a driving licence contrary to section 30(1) of the Traffic Act. Regarding the count alleging that he failed to report an accident, Mr. Solanka, submitted that the section quoted does not create an offence. With due respect to him, the section provides that a driver who has been involved in an accident while driving a motor vehicle on a public road should report the accident, presumably to the police, within twenty four hours of the occurrence thereof. The appellant according to the evidence on record, failed to do so and was thus in breach of that section. It is true as Mr. Solanka submitted that the section does not provide penalties for such breach. That does not mean that no offence is created by the section. Section 75 of the Traffic Act makes provision for penalties for breach of provisions under Part VII of the Traffic Act under which section 73(3) falls. The section, in pertinent part, provides as follows:

> "Any person who contravenes or fails to comply with any of the provisions of this part shall be guilty of an offence..."

Section 75, above, was not stated in the charge against the appellant. It would have been prudent to include it in the statement of the offence, so that the statement of the offence would read "... contrary to section 73(3) as read with section 75 of the Traffic Act"; but failure to do so did not invalidate the charge. The appellant was sufficiently informed of the charge against him.

As for the last count there was ample and acceptable evidence to support the charge. Besides there are concurrent findings of fact on the issue and we find no basis for interfering with the appellant's conviction on that count.

In the result and for the foregoing reasons, the appellant's appeal has no merit. It is accordingly dismissed. Order accordingly.

Dated and delivered at Nairobi this 31st day of July , 2002

A.A. LAKHA

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

M. OLE KEIWUA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR