IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Shah & O'Kubasu JJ A)

CRIMINAL APPEAL NO 68 OF 2001

DAVID NGUGI MWANIKI ……APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Machakos

(Mwera, J) dated 30th October, 2000 in H C CR APP No 125 of 2000)

JUDGMENT

Immediately upon the conclusion of the hearing of this appeal, we allowed the appeal, quashed the conviction which had been recorded against David Ngugi Mwaniki, the appellant herein, set aside the sentence of imprisonment as well as the orders disqualifying him from holding a driving licence and ordered that he be released from prison unless otherwise lawfully held. We reserved our reasons for doing so and we now give those reasons.

The appellant was tried and convicted by the Senior Principal Magistrate at Machakos on a charge of causing death by dangerous driving contrary to section 46 of the Traffic Act, cap 403 of the Laws of Kenya. The particulars of the charge were that:

"On the 9th day of January, 2000 at about 1:30 pm along Machakos - Masii road near Kaseve area in Machakos district of the Eastern province, being the driver of motor vehicle Reg No KAJ 915C Isuzu lorry you drove the said vehicle recklessly or at a speed or in a manner that was dangerous to the public having regards (*sic*) to all the circumstances of the case including the nature, condition and use of the road at the time and the amount

of traffic which was actually or might reasonably be expected to be on the road and thereby caused the death of Daniel Musau.".

Upon his conviction on the charge, the appellant was sentenced to three years imprisonment and the magistrate also cancelled his driving licence and disqualified him from holding one for four years after serving the sentence. The appellant appealed to the High Court at Machakos, but on the 31*st* October, 2000, the High Court (Mwera, J) dismissed his appeal against the conviction, confirmed the sentence of three years imprisonment but reduced the order of disqualification to three years so as to conform with the law. The appellant then appealed to this Court for the second time and that being so only points of law can arise for our consideration.

The appellant's advocate, Mr J M Njenga who has represented the appellant right from the Court of the magistrate filed a memorandum of appeal containing three grounds. Those grounds were that:-

1.The learned judge erred in law in upholding the conviction and sentence of the lower court yet the offence had not been proved beyond reasonable doubt and/or to the required standards.

2.The learned judge erred in law in failing to give his own independent consideration, reasoning, review, and/or analyse (*sic*) of the evidence adduced at the trial.

3.The learned judge erred in law in upholding the sentence and conviction. Ground three was abandoned. The sentence was lawful and that being so, this Court would have no business interfering with it. On the recorded evidence, we think there was sufficient material upon which a reasonable tribunal, properly directing itself as to the facts and the law applicable to those facts, could come to the conclusion that the appellant was guilty of the offence. The only thing relied on very heavily by Mr Njenga was that one of the witnesses called by the prosecution (PW2) supported the appellant's case and that that being so the prosecution had not even proved a *prima facie* case to warrant the appellant being put on his defence, let alone being convicted on the charge. We agree with Mr Njenga that the evidence of PW 2 was in entire agreement with the case put forward by the appellant. That witness had been sitting in the lorry's cabin with the appellant and his case exonerated the appellant from any blame for the accident which caused the death of Daniel Musau who was seated with another person at the back of the lorry. But both Courts below disbelieved PW 2. PW 2 was a turn-boy in the appellant's vehicle. Concerning the evidence of PW 2 and the appellant the magistrate found as follows:

"..... and in any case, I do not believe the accused and PW3 [he actually meant PW 2] who was his conductor. These are witnesses who struck the Court as untruthful. They tried to allege that they didn't know that they had passengers at the back. Two people cannot board a moving vehicle without the driver through the mirror (*sic*) or hearing any sound. This is a far-fetched lie .....".

The learned judge, for his part, confirmed the magistrate on that

point in the following words:

"Much weather was made of the state of things that Mutuku's (PW2's) evidence exonerated the appellant as to speed and on-coming *matatus* trying to over-take each other. That the appellant tried to avoid hitting one of them head-on. This is the same witness who told the learned trial magistrate that the appellant had no other place to go to in the confusion that arose, yet Police Constable Sebere (PW4) saw and drew sketch –maps to the contrary. No wonder the learned trial magistrate did not believe the appellant and his conductor PW2. ...".

Mr Njenga did not contend before us that there was no evidence at all upon which the two Courts below could have come to these conclusions.

In *Peters v Sunday Post Limited* [1958] EA 424 it was held:

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has plainly gone wrong, the appellate court will not hesitate so to decide.".

As we have said Mr Njenga did not contend before us that there was no evidence on record to support the conclusions of the trial magistrate which were confirmed by Mwera, J. It was not contended that the two Courts did not appreciate the weight or bearing of circumstances proved by the prosecution. All that the appellant appears to be complaining of is that PW 2 having been a witness called by the prosecution ought not to have been disbelieved. There is no law or rule, and Mr Njenga did not contend to the contrary, that where a prosecution witness gives evidence which is favourable to the accused person, such

witness ought not to be disbelieved. We do not think there was much substance in ground one in the appellant's memorandum of appeal. Nor could ground two take the matter any further. While we agree with Mr Njenga that there is a legal duty on a first appellate court:

".... to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld - " (see *Okeno v Republic* [1972] EA 32), we are far from being convinced that Mwera, J did not do so. The learned judge clearly gave his own independent consideration of the recorded evidence and it cannot be said he was wrong because he reached the same conclusions as the trial magistrate had done. With respect to Mr Njenga, none of the grounds of appeal raised by him on behalf of the appellant could have succeeded.

We, however, allowed the appeal on a ground which was raised by the Court itself and which Mr Bw'onwong'a for the Republic was unable to resist. We have already set out elsewhere the charge on which the appellant was tried and the particulars of that charge. Section 46 of the Traffic Act is in the following terms:

"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 ..."

As long ago as 1968, Mr Justice Mosdell, as he then was, correctly recognised that this section creates four separate offences namely causing the death of another by driving a motor vehicle on a road:

(i) recklessly, or

(ii) at a speed, or

(iii) in a manner, or

(iv) by leaving a vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public.

The question that faced Mosdell, J in the case of *Shah v Republic* [1969]

EA 197 was whether a charge which alleged in its particulars that Shah had driven his motor car Reg No KJB 574 on the main Malindi – Mombasa road

"at a speed or in a manner which was dangerous to the public ..." was a duplex charge. The learned judge in the *Shah* case had no doubt that the charge was duplex for he specifically said:

".... I hold, therefore, that though counts 1 and 2 are duplex there was no miscarriage of justice - and this ground of appeal fails. ..." Before reaching this conclusion, the learned judge had gone through and considered previous authorities on the matter, including the cases of *Odda Tore & Another v R*, (1934) 1 EACA 114 and *Cherere s/o Gukuli v Reg* (1955) 22 EACA 478.

In *Odda Tore's* case, the information on which the appellants were tried had stated in its particulars that the appellants had murdered two persons who were named in one count. The charge was held to have been duplex but the Court found that there had not been a failure of justice and upheld the conviction. The Court said at page 117:

"The question therefore for this Court is has there been a failure of justice? We think after examining all the facts that the accused were not embarrassed or prejudiced for it is clear in this case that had there been two separate counts the evidence on each of them would be the same. But that is not to say it will be so in

all cases. Clearly an accused person where he is charged , as in *Rex v Molloy* (*supra*) and *Rex v Disney* (*supra*) with distinct offences in one count even though they are created by the same enactment, would be embarrassed in his defence. We therefore wish to guard ourselves in this judgment from saying that although duplicity is an irregularity it can in all cases be overcome by a resort to section 367. Unless this Court is able to say without hesitation that the accused has not been prejudiced by the duplicity there will be no other course open to it than to quash the conviction.

In this case, however, the Court is satisfied that the accused have not been embarrassed or prejudiced by the duplicity of the information and although it is bad in law, we shall allow the conviction to stand. The appeal is therefore dismissed."

What we gather from the extract above is that Odda Tore and his accomplice were charged on one information which stated that on a particular date at a particular time and place they murdered X and Y. The Court held that each murder should have been charged in a separate count but that as they were charged in one count, the information was bad for duplicity. The Court, however, found as a fact that the appellants were not in fact embarrassed or prejudiced in their defence. In *Cherere s/o Gukuli V Rex* (*supra*) Cherere was charged under the then section 61 B of the Penal Code which provided that:

"Any person who administers, or is present at and consents to the administration of, any oath, or an engagement in the nature of an oath, relating to the unlawful society commonly known as '*Mau Mau*' is guilty of a felony and shall be sentenced to death." Cherere was charged on two counts each of which stated in its particulars that he was "administering or being present at and consenting to the administration of an oath relating to the unlawful society commonly known as "*Mau Mau*" contrary to section 61B of the Penal Code". He was convicted on the charge and sentenced to death. He appealed to the Court of Appeal for Eastern Africa and it was held:

"(2)Where two or more offences are charged in the alternative in one count, the count is bad for duplicity contravening section 135 (2) of the Criminal Procedure Code; the defect is not merely formal but substantial. Where an accused is so charged, it cannot be said that he is not so prejudiced, because he does not know exactly with what he is charged, and if he is convicted, he does not know exactly of what he has been convicted."

Delivering the judgment in which numerous previous authorities including *Odda Tore's* case, were considered, Sir Newnham Worley, the Vice President of the Court, concluded the judgement in the following manner:

"... We think it is impossible to say, and certainly no Court has so far as we are aware ever yet said, that an accused person is not prejudiced when offences are charged in one count in the alternative: he does not know precisely with what he is charged, nor of what offence he has been convicted. It is, indeed, very difficult to say that a breach of an elementary principle of criminal procedure has not occasioned a failure of justice. ..."

The distinction we are able to draw between the two cases, that is, the case of *Odda Tore* and that of *Cherere* is that in the former case, the charge was duplex in the sense that it named in one count two persons as having been murdered; there was no question of two offences being charged in the alternative while in the latter case two offences, namely:

(i) administering an oath or an engagement in the nature of an oath;

and

(ii) being present at and consenting to, the administration of an oath or an engagement in the nature of an oath. were charged in the alternative in one count. It is, therefore, not surprising that in the latter case, the Court was prepared to and did assume in favour of the appellant that an embarrassment or prejudice to him was inevitable.

He did not know whether the charge he faced was one of administering an oath or one of being present at and consenting to the administration of an oath. Equally he did not know whether he was convicted of administering the oath or of being present at and consenting to the oath being administered. The same position could not apply in the case of *Odda Tore*; all he was charged with was murder and it was made clear to him that the charge was in respect of two people. The authority of *Cherere* is even more strengthened by the provisions of section 77(2) of the Constitution which are in the following terms:

"72 (2)Every person who is charged with a criminal offence -

(a)....

(b)shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged.

(c)....

(d)....

(e)....

(f)...."

What was the nature of the offence with which the appellant before us was charged? Was it that he had driven his lorry recklessly? Or was it that he had driven his lorry at a speed? Or was it that the manner of his driving would be in issue? These, clearly, were separate offences charged alternatively in one count and in our view, we would respectfully follow the decision of the Court of Appeal for Eastern Africa in *Cherere's* case which correctly set out the law when the Court held that to charge two or more offences in the alternative in one count is not merely a formal but substantial defect and that in such a situation an accused person must be taken to have been embarrassed or prejudiced as he does not know what he is charged with, and if he is convicted, of what he has been convicted.

We note from the very elaborate and well considered judgment of Mosdell, J in *Shah's* case that he did not at any stage of that judgment - refer to this point. He correctly found that the charge was bad for duplicity but then proceeded to hold that no actual embarrassment or prejudice had been occasioned to Shah. We would ourselves prefer the decision in *Cherere* which, in effect, assumes prejudice, for if that was not so, the Court would not have stated as it did that:

"... We think it is impossible to say, and certainly no Court has so far as we are aware ever yet said, that an accused person is not prejudiced when offences are charged in one count in the alternative.".

We are ourselves satisfied that when framing a charge under section 46 of the Traffic Act, the prosecution is bound to choose how it proposes to proceed. The prosecution ought to be forced to choose whether they are alleging that:

(i) the driving was reckless; or

(ii) was at a speed; or

(iii) was in such a manner; or

(iv) the vehicle was left on the road in such a position

or manner or in such a condition as to be dangerous to the public.

We suppose that if the driving partook of each and every one of these elements, then the prosecution can bring them in by the use of the conjunctive "and", which in the view of Mosdell, J appeared to make the

matter, that is, the use of "and" or "or" farcical, for he remarked as follows in the *Shah* case at page 202:-

"... 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 by 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. Moreover, in the instant appeal, the appellant knew of what, in each count, he was convicted because the magistrate enlightened him. ...".

We go back to *Odda Tore's* case and there, as we have seen, the appellants were tried and convicted on one count of an information which alleged that they had murdered two named persons, let us say X and Y. But suppose, for a moment, that the charge had alleged in that one count that the appellants had murdered "X" or "Y"? The offence would remain the same, one of murder. But surely an accused person is entitled to know right from the beginning of his trial the specific person he is being alleged to have murdered? If the conjunctive "and" is used then he knows it is being alleged he murdered both. But it is no good telling an accused person to prepare his case on the basis that it is being alleged he murdered one or the other of X or Y. That is why we have remarked that Mosdell, J does not seem to have drawn any distinction between charging in the alternative two offences in one count and the situation in which the conjunctive "and" is used so that though the charge is duplex, an accused person is not necessarily embarrassed or prejudiced. In the latter case, the duplicity is not necessarily fatal; in the former, it must be necessarily fatal for the reasons given in *Cherere's* case, and it does not appear to matter that the accused was represented by an advocate right from the beginning of the trial and that the advocate should have, but did not, raise objection to the charge. 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. The only risk the prosecution runs in using the conjunctive “and” is that they may well be required to prove both limbs charged, that is, that the appellant drove at a speed AND in a manner dangerous to the public, before a conviction can be had for it may well be argued that if only one limb is proved, then the charge as laid has not been proved. It is for these reasons that we allowed the appellant's appeal on the terms we have already stated.

Dated and Delivered at Nairobi this 3rd day of August, 2001

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B.SHAH

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JUDGE OF APPEAL

E.O.O’KUBASU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR