



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan, Law & Potter JJ A)

CRIMINAL APPEAL NO. 6 OF 1980

BETWEEN

JOHN NJERU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant was prosecuted on two counts of causing death by dangerous driving arising out of the same accident, contrary to section 48 of the Traffic Act. After recording and considering the evidence given by eight prosecution witnesses and by the appellant, the magistrate acquitted the appellant on both counts. The Republic appealed against this acquittal to the High Court which ordered a retrial.

Section 354(3)(ba) of the Criminal Procedure Code provides that in an appeal from an acquittal the High Court may hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit.

In general, a retrial should be ordered only when the original trial was illegal or defective, as otherwise an order for retrial would give the prosecution an opportunity of filling gaps in its case; see *Aloys v Uganda* [1972] EA 469, which followed the earlier decision *Fatehali Manji v The Republic* [1966] EA 343. This is particularly so where the first trial has resulted in an acquittal.

To justify a conviction of causing death by dangerous driving there must be a situation which was dangerous when viewed objectively and also some fault on the part of the driver causing that situation; see *Atito v The Republic* [1975] EA 278. On the evidence before him the magistrate found that the appellant was unaware that the brakes of the vehicle, which (according to the appellant's uncontradicted evidence) he applied in good time, were not functioning properly, he not having been informed of their defective nature when he took over the vehicle as a result of its regular driver suddenly feeling dizzy. The magistrate subjected the evidence to scrutiny, said that he did not believe the evidence of the regular driver, and also further found that there was no fault on the appellant's part.

We are therefore of the opinion that the trial was neither illegal nor defective, there was nothing to vitiate it, and the order for retrial ought not to have been made. We therefore allow this appeal, set aside the order for retrial made by the High Court and restore the order of acquittal of the appellant made by the magistrate.

Appeal allowed.

Dated and delivered at Mombasathis 9th day of May 1980.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

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