REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 966 OF 1976

REPUBLIC.....APPELLANT

VERSUS

FRANCIS WAHOME.....RESPONDENT

JUDGMENT

The respondent, Francis Wahome, had been charged before the First Class Magistrate on two counts: (1) causing death by dangerous driving, contrary to section 46 of the Traffic Act, and (2) driving a motor vehicle in an unsafe condition in contravention of section 55(1) as read with section 58(1) of the Traffic Act.

We note from the record that the respondent appeared for plea on 20th July 1976 when he pleaded not guilty and the trial was fixed for 30th August 1976. On that date Mr Sehmi for the respondent took a preliminary objection to the notice of intended prosecution served upon the respondent and argued that it was not proper since it did not specify the place of accident and that it was not sufficient to state the road where the accident took place and that it was not sufficient to state a vague time when the accident took place. However, he subsequently withdrew his submission as regards the time of the accident.

The magistrate found that the “notice was not enough” and the prosecution could not proceed, and he dismissed the charge of causing death by dangerous driving “as the notice was not adequate”. Although the magistrate does not state so expressly, it is clear that he acquitted the respondent in respect of that charge. The Republic has now appealed against that acquittal on the ground that:

The magistrate erred in law in finding that the notice of intended prosecution served on the respondent did not contain any or any adequate particulars of the place where the alleged offence had been committed, and in acquitting the respondent.

The relevant provision of the Traffic Act dealing with warnings to be given before prosecution is section 50 and we consider it necessary to set it out in full:

Where a person is prosecuted for an offence under any of the sections of this Act 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 office 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 the said fourteen days a notice of the intended prosecution, specifying the nature of the alleged offence and the time and the place where it is alleged to have been committed, was served 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 or 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.

The first point which becomes immediately obvious is that the magistrate must have failed to notice the provision of section 50(c)(ii). Had he realized that the burden of proof on this issue was on the respondent, he would not have allowed it to be argued as a preliminary objection. In *Greene v The Republic* [1970] EA 62, 63, this Court said, after quoting the relevant provisions of section 50(c):

This is subject to a *proviso* the relevant part of which reads: '(ii) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved.'

It is clear from this that the burden of proving the invalidity of the notice is on the accused. The magistrate was, therefore, wrong in calling upon the prosecution to prove the validity of it. The proper procedure would have been for him to allow the accused to produce evidence in support of his contention. The prosecution would have been entitled to rebut any evidence given by the accused.

Upon appeal, commenting on this observation, Spry JA stated, at page 75:

The objection was tried as a preliminary issue but, as the judges in the High Court pointed out in their judgment, on a wrong footing. It appears to have been overlooked that the onus of proving non-compliance with section 50 is on the accused person ...

This appeal must, therefore, succeed on this point alone. But we consider it pertinent to set out the position regarding notice of intended prosecution for the guidance of magistrates dealing with traffic cases. But before we do so, we would refer again to section 50(b) of the Traffic Act which does away with the necessity of intended prosecution if: "Within fourteen days of the commission of the offence a summons for the offence was served on him".

According to the charge-sheet, the alleged offence of causing death by dangerous driving was committed on 17th July 1976. Within three days of that date, that is to say on 20th July 1976, the respondent was before the Court facing that charge. We do not know whether a summons for the

offence was served upon him. It is also, of course, open to argument that the reading of the charge to him in Court and taking a plea within the stipulated period, might well be considered as sufficient service upon him.

In his arguments before the lower court and before us Mr Sehmi relied mainly on the English case, *Young v Day* (1959) 123 JP 317. We have been unable to obtain the full report of that case. But according to Archbold: *Criminal Pleading, Evidence and Practice* (39th edn), paragraph 2867c, page 1200, its facts were as follows:

A notice of intended prosecution was served on a motorist alleging that he had driven dangerously 'along the Hathfield to Bethersden Road'. The road in question was about four miles long, and the dangerous driving alleged was that he had narrowly avoided colliding with a stationary vehicle on the off-side of the road. The Divisional Court held that the notice did not sufficiently specify the place where the offence was alleged to have taken place.

The present case is clearly distinguishable from *Young v Day* but before we demonstrate how, we consider it necessary to set out the background to a notice of intended prosecution. The classic case on the subject is *Venn v Morgan* [1949] 2 All ER 562, 564, in which Oliver J stated:

The object of the notice is to call the attention of the driver of the motor car to the time and circumstances in respect of which he may be charged so as to give him ... an opportunity, in good time while memories are still fresh, to prepare his defence.

As Lord Goddard CJ observed in *Pope v Clark* [1953] 2 All ER 704, 705, 706:

In my opinion the principle we have to bear in mind here is that there is a distinction between the construction to be placed on provisions of a statute which are mandatory and provisions which are merely directory. In this connection I may quote a passage from *Maxwell on Interpretation of Statutes* (10th edn), page 376: 'It has been said that no rule can be laid down for determining whether the command [of the statute] is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice (*R v Ingall* (1876) 2 QBD 199, 208, per Lush J), and, when the result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially'.

In *Woodward v Sarsons* (1875) LR 10 CP 7333 Lord Coleridge CJ giving the judgment of the court, said (LR 10 CP 746): '... the general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially'.

In the above-quoted case it was held that the incorrect statement in the notice of intended prosecution as to the time of the collision did not invalidate the notice.

In *Venn v Morgan* [1949] 2 All ER 562, it was held that it is sufficient if the notice states the nature of the alleged offence by merely referring to the section under which it is intended to prosecute.

In *Goody v Fletcher* [1962] Crim LR 324, a mistake of one day in stating the date was held not to invalidate the notice; the time and place were correctly given in the notice and the defendant was in no doubt as to the incident referred to. We have emphasised the last sentence because in our view it shows the distinction between *Young v Day* and the present case. As we have said, we have not had the benefit of reading the full report of *Young v Day,* but it would appear that the allegation of dangerous driving in that case was that the defendant had narrowly avoided colliding with a stationary vehicle on the off-side of a four-mile long road. The defendant was in those circumstances reasonably entitled to know the exact place where the alleged incident had taken place. Here, the allegation is that the dangerous driving of the respondent caused the death of Joseph Oyoko.

It is obvious that the respondent must have knowledge of the place where this incident occurred. Furthermore, in his ruling, the magistrate seems to have accepted Mr Sehmi's submission that Juja Road is ten miles long. No evidence was properly recorded as it should have been and we fail to understand why Mr Sehmi was allowed to get in such evidence, through the back door, if we may use that expression.

In *Beresford v St Albans' Justices* (1905) 22 TLR 1, where the notice of intended prosecution specified that the offence had been committed between Markyate and St Albans, two places which were between ten and twenty miles apart, it was held that the defendant was not misled by it and the notice was valid. On a motion for rule *nisi* for a *certiorari* to bring up a conviction by the St Albans Justices to be quashed, Ridley J said (on the same page):

Another point had been raised as to sufficiency of the notice of intention to prosecute under section 9(2) of the Act. This had alleged the offence to have been committed at a place between Markyate and St Albans, and Mr Hemmerde had informed them that Markyate was between ten and twenty miles from St Albans. It was question of degree in each case. No doubt the notice was intended to give the person charged an idea of the offence of which he was accused, and if there was any suggestion here that he had been misled or taken by surprise, and had no idea of what was alleged against him, the case might have been different. But this was not so here. The rule must therefore be refused.

Darling J concurred with Ridley J and had nothing to add. The above case was decided in 1905. But here at home, and reported in 1957, we have *Hunter v R* [1957] EA 561. In this case the notice of intended prosecution was sent to the appellant in the following terms (see page 562):

Re KAH 172. As the registered owner of the above car I hereby require you under section 107 of the Traffic Ordinance 1953, to provide me with the name and address of the person driving it on Sunday 26th May, at about 5.15 pm. At this time the vehicle was on 'A' route proceeding towards Nairobi and it is alleged that it was driven in a dangerous manner.

On appeal, Sir Ronald Sinclair CJ considered with approval *Venn v Morgan* and *Pope v Clarke,* to which we have already referred, and also applied the *dictum* of Branson J in *Milner v Allen* [1933] 1 KB 698, 703:

... A 'notice of intended prosecution' ... (means] no more than a notice that a prosecution was in contemplation. There is no reason for applying to the word 'intended' the meaning that the intention should have been irrevocably arrived at before the notice is sent out.

Sir Ronald Sinclair CJ then went on to hold, at pages 562, 563:

In our opinion, the letter dated 28th May which was sent to the appellant was a sufficient notice of the

intended prosecution. It specified the nature of the alleged offence and the time and the place where it was alleged to have been committed, and we think that when the registered owner of a motor vehicle is informed in writing by a responsible police officer that it is alleged that the motor vehicle was driven dangerously at a certain time and place, there is clear intimation that the police are contemplating a prosecution.

It is interesting to observe that the only description of the place in the notice was “A” route proceeding towards Nairobi and, according to the evidence which emerged, “A” route was the name of one of the roads linking Limuru with Nairobi.

In *Attorney General v Hussein Mohamed* (unreported) which was by way of case stated (which was the procedure applicable to appeals by the Republic at that time), Sir John Ainley CJ and Miles J dealt with a notice of intended prosecution under section 50 of the Traffic Act, and, *inter alia*, made the following observation:

... It is yet apparent to us that when dealing with notices of this nature we should deal with them in a practical manner. If there was an adequate warning of the prosecution it mattered nothing to the respondent under what provision of the law the warning was given. The question is whether the respondent was adequately warned within the period of the allegations which would be made against him ...

In *Ndungu Mwaura v The Republic* [1976] Kenya LR 214, the Court traced the history of the offence of causing death by dangerous driving and was of the view that, from the nature of the offence and the legislation involved, there was no reason why a notice of intended prosecution should be given for this offence; but felt itself bound by the implication in *Greene’s* case and held that some notice is necessary in cases of causing death by dangerous driving. In considering the effect of a notice of intended prosecution which was argued to be invalid because it had been issued under a different section from which the appellant was charged, the Court stated: “... we would indeed apply the views of the English Courts, that a modicum of common sense must prevail”: and held the notice to be valid.

One has only to look at the particulars in the charge-sheet to see the futility of Mr Sehmi’s objection. The particulars describe the place of the incident as “Juja Road in the Nairobi area”. It is apparent from the record that no objection was taken to the charge-sheet; and had one been taken it would easily have been disposed of by the court ruling that the place was sufficiently described for the respondent to be able to answer the charge. By the same token of logic, we see no reason why such an objection in respect of the notice of intended prosecution should have been allowed to succeed when that notice would not, in any event, form the basis of a conviction, but is merely meant to give sufficient warning to the respondent to prepare his defence.

We rule that the preliminary objection was prematurely taken and in any event, if the notice of intended prosecution describes the place of offence as “Juja Road”, it was sufficient and adequate notice to him and caused him no prejudice, especially when it is to be observed that he was before the Court facing a charge within three days of the alleged offence.

Accordingly we set aside the magistrate’s order of acquittal on the first count of the charge of causing death by dangerous driving and direct him to proceed to hear it on its merits. We assume that the second count of the charge is pending the determination of this appeal and should also be now continued with.

Appeal allowed.

Dated and Delivered at Nairobi this 27th July 1977.

A.A.KNELLER **S.K.SACHDEVA**

JUDGE **JUDGE**