REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO 341 OF 1987

BETWEEN

KARIUKI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from Conviction and Sentence of the Resident Magistrate's Court at Kitui)

June 28, 1988, **Torgbor J** delivered the following Judgment.

The appellant was convicted on two counts of causing death by dangerous driving under section 46 of the Traffic Act cap 403 of the Laws and sentenced on both counts to a concurrent term of two years imprisonment. His driving licence was also suspended for three years after completion of the term of imprisonment.

The main grounds of appeal are that the trial magistrate erred in rejecting the defence and further that the sentence was excessive.

The prosecution relied on eleven witnesses PW 1 Gabriel Gakua was a mechanic. The appellant was an inspector of mechanics. Gabriel was in the Company of 4 other mechanics including the appellant and road testing motor vehicle number GK 113V when it overturned and two persons in the vehicle died. His evidence was that the vehicle was at the material time going downhill but not at great speed and was in the process of overtaking a Volkswagon when the driver lost control and overturned. He didn't know why their driver lost control of the vehicle, a Range Rover. He thought they were doing about 60 KPH at the time.

Andrew Muli Keter, PW 2, another mechanic on board the Range Rover at the material time, said that the driver of the Volkswagon signaled for them to overtake the Range Rover started going "Zig Zag'. He thought they were doing 70-80 KPH at the time when their vehicle overturned.

PW 3, Sumaili Ndoto Kunuvwa, was a passenger in the Volkswagon said their vehicle was going slowly when it was hit by the Range Rover. PW 4, Joseph Mwendwa Ndoto, the driver of Volkswagon said he

was at the material time doing about 60 KPH and he thought the Range Rover was driving at speed and in a zig zag manner and it hit the Volkswagon when overtaking it. He had moved to his extreme left to enable the Range Rover to overtake. The inference is that he was taking care to enable the vehicle behind his to overtake safely. PW 5, the father of PW 4 added nothing evidentially significant to what his son said, nor did PW 6 another passenger in the Volkswagon. PW 7, brother of the deceased Pius Omata Ndiwa (count 1), identified the body for post mortem examination. PW 8, Inspector George Mwenja, with other police officers went to the scene of the accident, took measurements and drew a sketch plan. He noted skid marks made by the Ranger Rover, and the point of impact. After completing his investigations he charged the appellant with the said offences.

PW 9, Asham Ngoma Masoud, a chief vehicle inspector the Range Rover after the accident but found no defects prior to the accident. In crossexamination he made a significant remark to the effect that a Range Rover which has a high center of gravity will not overturn merely because of that gravity but that it may not be fully controlled at a speed of over 150 KPH.

PW 10, the Pathologist, performed the Post Mortem examination on Douglas Wanjohi Ndegwa (count 2) while PW 11, Dr Samuel Odera did the same on the deceased Pius Klamota Ndiwa (count 1).

The appellant in his testimony said he was a mechanical Inspector attached to the Ministry of Transport and Communications Kitui. He was at the material time road testing the Range Rover and was in the process of overtaking the Volkswagon when one of the wheels of his vehicle touched the corrugation on the right side of the road causing his vehicle to spin and swerve to the left. He had started gathering speed to overtake and was trying to steer to the right side to avoid collision when he lost control of the Range Rover. The brakes of his vehicle could not hold the ground because of the loose soil on the murram road and the gradient. He confirmed the statement of PW 9 to the effect that the Range Rover has a high center of gravity.

The immediate impression one gets on the evidence is that this was an unfortunate and tragic accident resulting in the deaths of two colleagues of the appellants. Was the appellant driving dangerously and at speed in a manner dangerous to the public at the material time" I am of the view that he did so, on the evidence of both the prosecution witnesses and the appellant himself. This accident would not have occurred had the appellant exercised case and caution in overtaking the Volkswagon. Murram roads are common in this country and the condition on such roads makes it necessary for drivers to exercise care and caution when driving on them.

The particular road in question was a murram road. Care and caution was necessary. The evidence of PW 2, a mechanic and colleague of the appellant’s who was in the Range Rover at the time was that as the driver of the Volkswagon signalled the Range Rover to overtake the latter started going “zig-zag”. That the appellant drove in a zig-zag manner was also noted by the driver of the Volkswagon and said so in his evidence.

Driving in a zig-zag manner on a public road just before or when overtaking another vehicle at speed is a dangerous thing to do and in this case it resulted in an accident. PW 9, a chief vehicle inspector inspected the Range Rover and found no defects prior to the accident. It was his evidence also that a Range Rover has a high centre of gravity and becomes difficult to control at a speed of over 150 KPH.

The appellant’s evidence is that he had started gathering speed to overtake the Volkswagon and was trying to steer clear of the volkwagen when he lost control of the range rover. As the appellant was a mechanical inspector he could be expected to be aware that the Range Rover has a high centre of gravity and his own evidence suggest that he was aware of this fact. He could also be expected to be

aware that the Range Rover is difficult to control at great speed.

On the evidence I am satisfied that the accident occurred because the appellant lost control of the Range Rover and that he did so because he was driving in a zig-zag manner which was dangerous and he also drove at such speed that rendered that vehicle uncontrollable and that therefore he was at fault, that is to say his standard of driving fell below the required standard of skill.

In *R v Gosney* [1971] 3 All ER 220, the English Court of Appeal Criminal Division stated that the offence of dangerous driving was not an absolute offence and that to justify a conviction

"there must be, not only a situation which, viewed objectively was dangerous but there must also have been some fault on the part of the driver causing that situation"

and further that:

"Fault involved a failure; a falling below the care and or skill of a competent and experienced driver in relation to the manner of the driving and to the relevant circumstances of the case...."

"...The fault need not be the sole cause of the dangerous situation. It is enough if it is, looked at sensibly, a cause"

I am guarded by this statement which has been considered, approved and applied in the local cases noted below in connection with sentence.

Therefore on the evidence I find the convictions proper. The principle of sentencing on a charge of causing death by dangerous driving has been stated in a number of cases, English and local. (see *R v Guilfoyle* [1973] 2 All ER 844; *Govind Shamji v Republic* (unreported) CA 30 of 1975; *Njuguna Kabanya v Republic* CR 97 of 1979 and *Orweryo Missiani v Republic* [1979] KLR 285).

In *R v Guilfoyle* cited with approval in *Orweryo Missiani v Republic* the English Court of Appeal Criminal Division, distinguished two categories of cases of this nature by stating;

"first, those in which the accident has risen through momentary inattention or misjudgment and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or his passengers, or with a degree of recklessness. A subdivision of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs."

"Offenders too can be put into categories. A substantial number have good driving records, a fair number have driving records which reveal a propensity to disregard speed restrictions, road signs or to drive carelessly, and a few have records which show that they have no regard whatsoever for either the traffic law or the lives and safety of other road users."

In my judgment the appellant, on the evidence, drove with a degree of recklessness and in a manner that showed a selfish disregard for the safety of other road users and of his passengers two of whom died as a result of the accident occasioned by such driving. The appellant was treated as a first offender as no record of previous convictions had been received by the prosecution department and he also sustained injures through the accident. Although the evidence is silent on the appellant's driving experience, I accept the statement in his sworn evidence that he has never before this incident been involved in an accident. I would set aside the sentences on the two counts and substitute the following:

On Count 1 appellant is fined Shs 11,000 (eleven thousand) in default 12 months' imprisonment. On Count 2 appellant is fined Shs 11,000 (eleven thousand) in default 12 months' imprisonment. The default sentences to run consecutively. The appellants driving license to be suspended for one year after payment of the said fines or after the total term of 2 years' imprisonment whichever alternative mode of sentence is chosen by the appellant.

Order accordingly.

Dated and delivered at Machakos this 28th day of June, 1988

A. TORGBOR

JUDGE