IN THE COURT OF APPEAL

AT NAKURU

(Coram: Nyarangi, Platt & Gachuhi JJA)

CRIMINAL APPEAL NO.67 OF 1986

BETWEEN

WAWERU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nakuru, Omolo J)

JUDGMENT OF THE COURT

In January of this year, the appellant appeared at the Resident Magistrate's Court Nakuru on seven counts of causing death by dangerous driving contrary to section 46 of the Traffic Act, cap 403, and on one count of failing to comply with the conditions of Road Service Licence contrary to section 8 (1) (c) as read with section 24 of the Transport Licensing Act, cap 404. The appellant is recorded to have replied to each of the first seven charges in these terms:

"It is true. I caused death by dangerous driving."

To the last count, the reply according to the court record was,

"It is true I failed to comply with R S conditions".

The recording of the replies to the charges was followed by a narration of the facts as the prosecution perceived them. The appellant's response to the narration was:-

"It is true I admit all the facts narrated by the prosecution."

The trial magistrate then proceeded to find the appellant guilty of the first seven counts and of the eighth count and to convict him of the charges. For each of the first seven counts, the appellant was sentenced to 5 years' imprisonment, the sentences to be served concurrently and for the remaining count, he was sentenced to a fine, of Kshs 1000 in default 1 months' imprisonment. His appeal against conviction to the High Court, Nakuru (Omolo Ag J) was dismissed but the sentence was reduced to 31/2 years on each count to run concurrently from the date of conviction and sentence. The sentence of fine on the last count was upheld and so was the five-year disqualification.

The appellant was aggrieved by the decision of the High Court and so appeals to this court on grounds which we summarise as follows: The magistrate and the judge erred in their findings about the mode of taking a plea and in holding that the appellant had unequivocally pleaded guilty to all the ingredients of the offence of causing death by dangerous driving, erred in concluding that the facts stated by the prosecution and admitted by the appellant disclosed an offence of causing death by dangerous driving and erred in assessing the sentence on wrong principles and therefore that the sentence of 31/2 years should be reduced.

Mr Mirugi Kariuki's contention and submission was that the pleas were equivocal, that the answers to the eight charges don't amount to pleas of guilty for the reason that the ingredients of the offence in each of the charges, in particular "in a manner dangerous to the public" is complex to appreciate and that for an accused to be held to have admitted the ingredients of dangerous driving he must specifically admit the essential ingredient of fault on his part. Counsel urged that the phrase "dangerous driving" is capable of diverse interpretations. With regard to the facts outlined by the prosecution, Mr Mirugi Kariuki urged that it was a misdirection for the magistrate and the judge to have satisfied themselves on the basis of the facts that the appellant had no defence. Replying, Mr Etyang retorted that there is no appeal against sentence, that the facts as outlined to the trial court and accepted by the appellant, viewed objectively, disclosed an element of dangerous driving on the part of the appellant and that the appellant understood the charges and pleaded guilty unequivocally to each charge.

This is a second appeal and so can only be entertained on points of law. The essential question of law for determination, put succinctly, is whether there was evidence on which the trial and first appellate courts could find as they did.

If we may start with the appeal against sentence. We say the real point in that appeal which Mr Mirugi Kariuki attempted to develop with great vigour, was directed at the claimed severity of sentence. However, ever since 1982, this court "shall" not hear an appeal on severity of sentence (section 361(1)(a) of the Criminal Procedure Code (cap 75)). Since then, the pendilum has not swung back and so the decision *Missiani v R [1979] KLR 285* which was relied on by the appellant's Advocate, where sentence was treated as a matter of law (now severity of sentence is a matter of fact) has been overtaken by a statutory provision. Besides, in *Missiani* the Court of Appeal was considering whether it was proper for the High Court to enhance a sentence, a matter in respect of which the Court of Appeal has jurisdiction by virtue of section 361 (1) (b) of the Criminal Procedure Code. The situation is different here.

There is evidence that the charges were read out, the ingredients explained and then interpreted to the appellant. There is no suggestion that the appellant is not proficient in Kiswahili. The appellant must be taken to have understood the charges before replying. The facts in support of the charges which the appellant readily admitted as being correct, mentioned and particularized a railway crossing, the hooting and continued hooting by the goods train driver for any vehicles that might have been approaching the railway crossing, the apparent lack of heeding the warning and the subsequent but unsuccessful application of the emergency brakes of the goods train. Those facts clearly alleged against the appellant that he was at fault by not keeping proper lookout. Considered objectively, there existed a dangerous situation during the continued hooting by the driver of the goods train caused by the appellant's fault in not heeding the warning:

See *Atito v R* [1975] E A 278. Those facts supplemented the explanation by the trial magistrate of the ingredients of the charges and it could not reasonably be argued that the lower courts erred in accepting those facts and concluding that the appellant's plea was unequivocal. The narration and interpretation of the facts of the alleged offence before the entry of convictions and asking the appellant if he agreed with

the facts is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charges before pleading. There is no evidence that the appellant disputed the facts or sought to assert additional facts. On all this evidence, the lower courts were perfectly entitled to find as they did: *Adan v Republic* [1973] E A 445 at p 446, letters B-D, H-I.

Accordingly, both as a matter of reasonable approach and upon well established authority, this court has concluded that the appeal is unmeritorious and is dismissed. That is the order of the court.

Dated and Delivered in Nakuru this 24th day of September 1986.

J.O.NYARANGI

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JUDGE OF APPEAL

H.G.PLATT

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

I Certify that this is a

true copy of the original

DEPUTY REGISTRAR