IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 64 OF 2021
(Originating from the District Court of Bariadi at Bariadi in Traffic Case No. 15 of 2019)

MUSSA PAWA @ NGANYA .....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

13/7/2022 & 24/5/2023

S.M. KULITA, J.

This is an appeal from Bariadi District Court. The Appellant herein, **MUSSA PAWA @ NGANYA** was convicted and sentenced to pay a total fine of Tsh. 300,000/= or to serve the imprisonment of 1 year for the two counts of Causing Death through Careless Driving, which were the 1st and 2nd counts as per the charge sheet. The Appellant was also convicted and sentenced to pay a total fine of Tsh. 200,000/= or to serve the imprisonment of 1 year for the eight counts of Causing Bodily Injuries through Careless Driving, which were charged as the 3rd to the 10th counts. Aggrieved with both, convictions,

and sentences, the Appellant lodged this appeal relying on the following 6 (six) grounds;

1. That the case at the trial court was not proved at the required standard.
2. That the appellant was convicted on the defective charge.
3. That the trial Magistrate didn't consider the defense case which was plausible.
4. That the trial Magistrate didn't consider the evidence of PW4 and defense witnesses who testified that the accident was not caused by the fault of the Driver but the Engineer employed to construct the road who didn't put the divergence directives nor sign board.
5. That there was no proof that the Appellant was not in a reasonable speed as held by the trial court.
6. That the trial Magistrate erred in law in relying on the fact that the motor vehicle involved in the accident make Fuso was not made to carry passengers, while it was not among the charges during trial.

The matter was argued through oral submissions. While the Appellant is represented by Mr. Agricola Evarist, Advocate from MOKI Advocate, the

Respondent, Republic, is represented by Ms. Gloria Ndondi, State Attorney from the Attorney General's Chamber, Shinyanga.

In his oral submission in respect of the 1st ground of appeal, Advocate for the Appellant, Mr. Agricola Evarist stated that the trial court convicted the Appellant basing on the careless driving while that thing had not been proved during trial. He said that, what was proved was just occurrence of the accident. The Counsel added that PW3 testified to the effect that there were directives signs at the scene but there were no explanation on the kind of sign and whether they were visible to the users of the road.

Further submitting on the 1st ground that the case was not proved beyond reasonable doubt, the counsel stated that in their testimony the prosecution witnesses stated that the motor vehicle involved in accident is owned by SDA Church, the same applied to the Vehicle Inspection Report (Exh. P1) while the charge sheet transpires the owner being Bupandagila Secondary School.

Mr. Agricola Evarist also stated that the evidence of PW1, PW6 and PW7 are hearsay. They never witnessed the occurrence of accident.

The Counsel also alleged that the accident happened on 18/04/2019 but the sketch map of the scene was drawn on 21/04/2019, that is 3 (three) days

later. He said that, this creates a doubt on the contents that were inserted therein.

As for the ground of appeal involving defectiveness of the charge, Mr. Agricola Evarist submitted that in grounds No. 1 and 2 where the Appellant has been charged with ***Causing Death through Careless Driving*** the cited provisions in a charge sheet were sections 41, 27(1)(a) and 62(2)(a) of the Road Traffic Act [Cap 168 RE 2002]. He argued that section 62(2)(a) which was cited as the penal provision is wrong. He said that the penalty for that offence is found in the provision of section 62(2)(b). He said that that is a proper provision for penalizing the convict of the offence of ***Causing Death through Careless Driving*** under ***section 41 of*** the Road Traffic Act [Cap 168 RE 2002]. He further argued that section 62(2)(a) is for the penalty of ***Causing Death through Dangerous Driving*** which falls under ***section 40*** of the Road Traffic Act.

Further submitting on the defectiveness of the Charge, the Counsel stated that the charge sheet has been drawn in contradiction of section 33 of the Criminal Procedure Act. He said that from the 3rd to the 10th counts the charge sheet has been read "ACCUSED" instead of "COUNT" which is fatal.

On the ground of the trial court failing to consider the evidence of the defense side, the Appellant's Counsel stated that the Driver (Appellant) didn't drive the motor vehicle carelessly. It just happened that he suddenly met the earthen rubble (kifusi) on the road while driving, and in reducing the rate of defects that could have happened, the Appellant used the alternative means which was driving the vehicle on the ditch and finally knocked the edge of the bridge. He added that in such a situation the Driver can't be regarded guilty as per MASUMBUKO ATHUMAN V. R [1991] TLR 9.

It is also the submission of the Appellant's counsel that there was no proof that the Appellant was driving at excessive speed. He said that a Police Officer who drew a sketch map (PW7) never shown in the map, a place where the driver pressed the brake and the point where the vehicle stopped. The counsel averred that the witness just opined that the Appellant was driving at excessive speed without any proof on that fact.

As for the last ground of appeal, the Advocate, Agricola Evarist submitted that the trial Magistrate erred in law in relying on the fact that the motor vehicle involved in the accident make Fuso was not made to carry passengers, while it was not among the charges during trial. The counsel stated that the trial Magistrate ought not to incorporate it in the judgment.

The Appellant's Counsel concluded by praying for the decision of the District Court to be quashed and the sentence set aside by allowing the appeal.

In her reply thereto, the Defense Counsel, Ms. Gloria Ndondi, State Attorney submitted in respect of ground No. 1 by stating that the case at the trial court was proved beyond all reasonable doubts. She said that according to PW3 who was a passenger in the said car sitting in the cabin the earthen rubble was viewable. Had the Driver been careful in driving he could have stopped the car, but there is no even the evidence that the Driver had attempted to slow it down. The State Attorney further submitted that even the testimonies of PW1, PW2, PW4 and PW7 as they can be read in the record transpire in the record that the Appellant was careless. She also said that the scene of crime is a public road which was used by several drivers without causing accident, which means that they were considering the cautions set over there. She added that, the fact that the Appellant was driving during the night, he was supposed to be more careful, even if there were no precaution signs at the scene.

Nevertheless the State Attorney submitted that at the scene of crime there were directives for "*Diversion*" and "*Men at Work*" meaning thereby the place

was under construction. That is according to the testimonies of PW1 and PW4 during trial.

As for the issue of ownership of the vehicle the Counsel submitted that it has no merit at all as the matter in question is accident in which the vehicle in question was involved, and there is no dispute that the Appellant herein is the one who was driving the said car when the accident occurred. She said that that fault of discrepancy on the name of the owner of the vehicle does not go to the root of the case.

Submitting on the issue of hearsay evidence at the trial court, Ms. Ndondi stated that the testimonies of PW1 and PW7 are not hearsay as they never based on witnessing the accident. She clarified that, PW1 as the DTO (District Traffic Officer), having received the information that there was an accident, he started to act on it. She said that his testimony as to what he had done was a direct evidence as per section 62(1)(a) of the Tanzania Evidence Act. The State Attorney had the same opinion on the testimony of PW7, the one who drew the sketch map of the scene on 21/04/2019.

As for the issue of defectiveness of the charge on counts No. 1 and 2 the counsel submitted that the said defect of citing section 63(1)(b) instead of

section 63(2)(b) of the Road Traffic Act is curable under section 388 of the Criminal Procedure Act. She said that the said fault does not lead to miscarriage of justice as the offence charged has been established.

Submitting on the faults seen on Counts No. 3 to No. 10 Ms. Ndondi stated that it was just a typing error, instead of typing the word "COUNT" the typist typed it "ACCUSED" on top of the heading "STATEMENT OF THE OFFENCE" on each of those eight counts. She said that the Appellant's Counsel never given any explanation as to how that said error prejudiced the Appellant.

The argument that the defense evidence was not considered in the impugned judgment was replied by the State Attorney to the effect that it was considered. She said that the appellant stated in his defense that he was not negligent, he alleged the source of accident being the earthen rubble that had been left on the road by the road Contractor without any road mark to indicate it. The State Attorney went ahead submitting that, in her analysis on that evidence adduced by the Accused during trial, at page 10 of the judgment the trial Magistrate stated that, had the driver been driving at a reasonable speed he could have managed to stop the car when he saw the earthen rubble on the road. This is an implication that the defense case was considered in determination of the case.

As for the issue of PW4 corroborating the evidence of defense witnesses that the accident was not caused by the fault of the Driver but the Engineer who was employed to construct the road who didn't put the divergence directives nor sign board, the State Attorney submitted that the said witness who was in the cabin during the accident just stated what she had witnessed. She said nothing as to whether the Driver attempted to stop or to slow down the car when he met earthen rubble on the road. Ms. Ndondi was of the view that, basically the Appellant was required to stop when he met the said earthen rubble on the road.

Submitting on the issue of Speed, the State Attorney said that it was excessive as compared to the circumstances of accident. She said that failure of a Driver to stop when he found the earthen rubble on the road implies that the speed was great. Also the fact that he was driving during the night and carried passengers on the car, extra careful was needed. The Counsel submitted that the accident occurrence indicates that the Appellant was careless/negligent.

As for the last ground of appeal, that the trial Magistrate erred in law in relying on the fact that the motor vehicle involved in the accident make Fuso was not made to carry passengers, while it was not among the charges

during trial the state Attorney replied that the Appellant was actually wrong for that as he had not submitted any document during trial that he was permitted to carry passengers, though he alleged in his defense to have been so permitted by police.

In rejoinder the Appellant's Counsel, Mr. Agricola Evarist submitted that the Appellant met the earthen rubble in a sudden manner for lack of road sign for the alert. He also reiterated that the defect in the statement of the offence in a charge sheet which includes name of the owner of the vehicle that caused the accident, as well as wrong citation that have been noticed and the fault in writing Counts Serial Numbers from the 3rd to the 10th counts, makes the charge sheet incurably defective. He said that those defects in a charge sheet are incurably defective.

The counsel concluded by praying for the appeal to be allowed, by this appellate court quashing the conviction and set aside the penalty imposed against the Appellant by the District Court.

Upon going through the rival submissions of both parties as well as the pleadings and the lower court records I have noted that there is no dispute that on 18/04/2019 at about 2000 hours the Appellant herein was driving

the Motor Vehicle with Registration No. T 657 AZQ and that the said vehicle got an accident by leaving the road, driven on the ditch and finally knocked the bridge edge. That in doing so the Driver (Appellant) was avoiding to knock the earthen rubble which was on the road at a place he was about to pass. It is also undisputable that the said scene was under construction and that the said accident caused death of two persons who were passengers in the said vehicle and eight persons were injured.

In my analysis I will be discussing the appeal in general, in a random mode starting with the issue of wrong citation of the penalty provision for counts No. 1 and No. 2 in the charge sheet. On this the State Attorney admitted the fault but she added that the said defect of citing section 63(1)(b) instead of section 63(2)(b) of the Road Traffic Act in the charge sheet is curable under section 388 of the Criminal Procedure Act. She said that the said fault does not lead to miscarriage of justice as the offences charged have been established.

It is ample in the record and the parties herein do not dispute that in grounds No. 1 and 2 where the Appellant has been charged with ***Causing Death through Careless Driving*** and the cited provisions in the charge sheet were sections 41, 27(1)(a) and 62(2)(a) of the Road Traffic Act [Cap 168 RE

2002]. The counsels also do not dispute that section 62(2)(a) which was cited as the penal provision is wrong. The provision for the penalty for the charged offence is found in the provision of section 62(2)(b). The cited provision of section 62(2)(a) is for penalizing the convict of the offence of ***Causing Death through Dangerous Driving*** which falls under ***section 40*** of the Road Traffic Act. The matter at hand which is Careless Driving falls under under ***section 41 of the Road Traffic Act [Cap 168 RE 2002].*** The question is whether the said fault is curable under section 388 of the Criminal Procedure Act as alleged by the State Attorney.

The principle of law according to **section 388 of the Criminal Procedure Act** is that only those faults which do not go to the root of the case can be cured under that provision. Even the Overriding Objective principle which was established to clarify the alike matters wants the court to waive determining the case on technicalities but that should not affect the mandatory requirements of the law. In **MONDOROSI VILLAGE COUNCIL & 2 OTHERS V. TANZANIA BREWERIES LIMITED & 4 OTHERS, Civil Appeal No. 66 of 2017, CAT at Arusha (unreported)** it was held;

> *"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory*

provisions of the procedural law which go to the foundation of the case."

The error of wrong citation is among the grave fault in litigations. This dispute touches the statutory fault. The cited provision of section 62(2)(a) is for penalizing the convict of the offence of ***Causing Death through Dangerous Driving*** whose penalty is different to that of section 62(2)(b). It is the matter which goes to the root of the case, hence Section 388 (1) of the Criminal Procedure Act cannot be used to cure it. According to **JACKSON VENANT V. R. CRIMINAL APPEAL NO. 118 OF 2018, CAT at BUKOBA (unreported)** it was held that, if the defect in the charge sheet is incurable under section 388 of the Criminal Procedure Act , the proceedings and the resultant judgment in respect of the said charge cannot stand. In the circumstances of this case, I am of the considered opinion that the appellant was prejudiced during trial in respect of trial for counts No. 1 and No. 2. It means there was no fair trial against him in respect of those two counts.

For the aforesaid reasons I find the Appellant herein was wrongly convicted and sentenced by the trial court. That being the case, this ground of appeal is allowed. Thus, conviction against him on the 1st and the 2nd counts are hereby quashed and the sentences set aside.

Another fault that was challenged by the Appellant's Counsel in respect of the charge sheet was that, the charge sheet had been drawn in contradiction of the requirements of section 33 of the Criminal Procedure Act. He said that from the 3rd to the 10th counts the charge sheet has been written the word "ACCUSED" in places where it was supposed to be read "COUNT", the fault of which he opined to be fatal. On the other hand the Respondent's Counsel, Ms. Ndondi stated that it was just a typing error, that instead of typing the word "COUNT" the typist typed it "ACCUSED" on top of the heading "STATEMENT OF THE OFFENCE" on each of those eight counts. She said that the Appellant's Counsel never given any explanation as to how that said error prejudiced the Appellant.

My opine on that argument is that, contrary to the prior settled issue where the fault in the charge sheet was "wrong citation", on this fault, I can agree with the Respondent's Counsel that it was just a typing error, that the one who typed it inserted the word "COUNT" instead of "ACCUSED" just before the line with the heading "STATEMENT OF THE OFFENCE" on each of those eight counts. The said parts were supposed to be read "3rd COUNT, 4th COUNT and so on, up to the 10th COUNT" but the words ACCUSED used to be inserted for COUNT. However, the Appellant's Counsel never submitted

as to how the said fault prejudiced his client, the Appellant. The fact that it was just a typing error and there is no any explanation produced to show how the Appellant was prejudiced for the said error, I find the argument with no legal weight as the same is curable under section 388 of the CPA. In **BENEDICT KILEMBE V. R, CRIMINAL APPEAL NO. 170 OF 2009, CAT at Mbeya (unreported)** it was held that the fact that conviction entered against the Accused did not prejudice him in anyway, the charge sheet is curable under Section 388 of the Criminal Procedure Act because no failure of justice was occasioned thereto. Therefore, counts No. 3 to 10 stand still as the fault that has been noticed is minor which does not go to the root of the case.

Turning to the ground that the trial Magistrate didn't consider the evidence of PW4 and defense witnesses who testified that the accident was not caused by the fault of the Driver but the Engineer employed to construct the road who didn't put the divergence directives nor sign board at the scene, the court has this to say; the core issue is whether the Appellant was negligent in causing the deaths and injuries. According to the submissions and the trial court's record the Appellant alleges that the source of accident is the earthen rubble that had been left by the Road service Contractor at the scene where

he was repairing, without putting precaution marks for the users of the road. That fact is disputable as the records transpire in the testimony of PW1 and PW7 that before the scene there was a precaution sign for maintenance and diversion ahead.

The core disputable issue to be determined here is whether the Appellant was negligent for causing the said deaths and injuries. According to the submissions and the trial court's record the Appellant alleges that the source of accident is the earthen rubble that had been left on the road by the Contractor at the scene where he was repairing without putting the precaution marks for the users of the road. That fact was disputed by the Respondent during trial as well as before this appellate court. The records transpire in the prosecution witnesses asserted during trial prior to reaching the scene there were precaution signs for diversion and road maintenance.

The Appellant's Counsel alleged that PW3 testified to the effect that there were directives signs at the scene but he gave no explanation on the kind of signs and whether they were visible to the users of the road. However, page 14 of the typed proceedings transpires the testimony of PW1, the District Traffic Officer (DTO) stating that, before approaching the scene of crime there were two wooden road signs, one showing a caution that there were

men at work ahead, while the other one indicates a diversion. PW7, a Police Officer who drew the sketch map of the scene also stated the same thing in his testimony.

In his further submission the Appellant's counsel stated that the Appellant was not careless in driving as alleged. He asserted that, the appellant's carelessness had not been proved at the trial court. On this, I can agree with the State Attorney that the Appellant was careless in driving and this was successfully proved by the Republic during trial. As rightly argued by the trial Magistrate that, had the Appellant been driving at a reasonable speed, keeping in mind that it was night, he could have managed to stop the car when he met the earthen rubble. The allegation that it was sudden hence failed to stop implies that the speed was not related to the driver's capability to see the said rubble and stop the car. Otherwise the speed was higher as compared to the time that he was driving, which was night. That led him failing to slow down and stop the car even when he met the road signs, and then the earthen rubble.

Thus, contrary to the testimony of the Appellant while defending his case, according to the DTO (PW1) who also visited the scene of crime after the accident, the said road marks were there at the scene. This analysis also

answers the allegation that the defense testimony was not considered by the trial court. The fact that the trial Magistrate had this same view in her judgment, it means she considered the defense case as well in the analysis of evidence. Further, in her analysis on the issue of consideration of the defense evidence during composition of the judgment, the trial Magistrate stated at page 10 of the judgment that, had the driver been driving at a reasonable speed, he could have managed to stop the car when he saw the earthen rubble on the road. This is an implication that the defense case was considered by the Magistrate in determination of the original case.

As for the issue of PW4 corroborating the evidence of defense witnesses that the accident was not caused by the fault of the Driver but the Engineer who was employed to construct the road but didn't put the divergence directives nor the sign boards, the State Attorney submitted that the said witness who was in the cabin during the accident just stated what she had witnessed. She said nothing as to whether the Driver attempted to stop or to slow down the car when he met with the earthen rubble on the road. She just praised him for managing to escape the rubble before the accident. That evidence by PW4 has nothing to prove that the Appellant was not negligent. The most

important thing that he could do was for him to stop the vehicle when he met the earthen rubble ahead while driving.

In his grounds of appeal the Appellant also came up with the issue of contradiction on the name of the owner of the motor vehicle, if it is Bupandagila Secondary School as mentioned in the charge sheet or SDA's as it was stated by some witnesses. This argument has no merit as the matter in question is accident, in which the vehicle in question was involved. There is no dispute that the Appellant herein is the one who was driving the said car when the accident occurred. Further there is nowhere stated by the Appellant nor anybody else as to what was the difference between the said two names. In short, I find this issue on variance of names regarding the owner of the vehicle between that read in the charge sheet and that mentioned by some witnesses in their testimonies does not go to the root of the case. Nobody has been prejudiced for that. In **ELIA BARIKI V. R, Criminal Appeal No. 321 of 2016, CAT at Arusha** while referring **DICKSON ELIA NSHAMBA SHAPWATA V. R, Criminal Appeal No. 92 of 2007**it was held *interalia* that;

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in*

isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter"

This ground also lacks merit, hence I dismiss the same as well.

For the foregoing reasons, **I hereby allow the two grounds of appeal falling on counts No. 1 and 2,** both involving *Causing Death through Careless Driving,* **for wrong citation** in the charge sheet. I thus proceed to quash the conviction entered against the Appellant and set aside the sentences imposed against him on those two counts. As for the **other grounds of appeal,** I find them **unmeritorious, hence dismissed**.

In upshot the **appeal** is **partly allowed** to the extent narrated above.

S.M. KULITA
JUDGE
24/05/2023