**Njau v Republic**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 25 March 1974

**Case Number:** 162/1973 (66/74)

**Before:** Trevelyan and Muli JJ

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*[1] Criminal Practice & Procedure – Sentence – Dangerous driving – Causing death – Custodial*

*sentence substituted for fine.*

**JUDGMENT**

The considered judgment of the court was read by

**Trevelyan J:** The appellant, for reward, carried about fifty schoolboys and two of their masters in his lorry. At the time with which we are concerned, the boys were in the back of the vehicle and the two masters and another driver were in the driver’s cabin. The appellant was driving. The appellant was charged on 4 counts of causing death by dangerous driving, pleaded not guilty to each of them, a trial was held, and he was convicted. He was ordered to pay a fine of Shs. 1,000/- (with a default of 6 months’ imprisonment) on each count and to be disqualified for holding a driving licence for 3 years, this disqualification not being attached to any of the counts. He appealed against both conviction and sentence but abandoned his appeal against sentence in limine. For its part, the Republic asked us to enhance it. The prosecution case was that the appellant began to drive so fast that the boys asked him to stop by shouting and banging on the roof over his head and that the masters also asked him to drive more slowly, but that, in spite of the fact that the vehicle was going downhill on a road possessed of bends, he resolved to, and did, drive yet faster, so that the inevitable happened, the vehicle went out of control, adopted an erratic course, and turned over. Several of the passengers were injured; four boys were killed. The defence case was that as the appellant was negotiating a right-handed bend, the vehicle, as he told the court below, “leaned towards the left side and lost control because the weight was on the side of the lorry. I saw that the lorry would overturn on the left side. Therefore, I began to bring it to the road. In doing so it hit the embankment on the right side of the road and overturned”. He also said that he was in third gear, was going at a speed of no more than 20 m.p.h., and that the brakes failed. The road, at the point which concerns us, is 24 ft. wide (with a deep valley on its left) and an inspection of the vehicle revealed that it was “practically a new lorry”, defective only in that its offside front hanger was loose, but this could not have been the cause of the accident. One may ask why, going so slowly, the lorry had to cross the entire road and hit an embankment on its other side, and one may point to the fact there was almost no cross-examination as to speed, it being not until the appellant gave his evidence that he said that he was doing no more than 20 m.p.h. in third gear. For reasons which he gave, the trial magistrate accepted the prosecution case and rejected that of the defence. His decision was right. It was suggested to us that the witnesses to the accident might have given false or exaggerated evidence because some boys had been killed. But it is not so. Nor are we not dealing with a case where the suggestion of excessive speed was thought of and raised after the accident, for the witnesses said that they asked the appellant to slow down before the accident occurred. It was either so or it was not. The magistrate was, on a consideration of the case as a whole, entitled to believe what these witnesses told him. In the light of the unchallenged report as to the examination of the vehicle, he could not have accepted that the lorry’s brakes failed, for obviously they did not. It would have been better had he in terms said that the lorry was not excessively loaded on one side, which he did not, but he believed the evidence of the boy who said that he saw no-one “climbing the rail”, he did not accept from the appellant that the vehicle had more than about 50 aboard, and he found that no emergency or unforeseen circumstance had arisen. He came to the conclusion that the accident occurred simply because, in the circumstances obtaining, not only was the appellant driving too fast and dangerously, but that he increased his speed and drove yet more dangerously when his passengers told him to decrease it; which was a rejection. It is true that there was a difference of evidence – not to be unexpected in a case happening upon the moment – as to when the lorry first adopted its erratic course, a master saying that it was before the vehicle hit the embankment and a boy saying that it was later, and that without explaining why he so found, the magistrate said that it was earlier. But he was right so to find; and it would make no difference if he was not. On the clear facts of the case the vehicle’s load was not unequally distributed – it would have called for even greater care and less speed had it been – there was no failure of brakes, and there was no emergency; the vehicle was simply going far too fast in the circumstances obtaining. The appellant did what any reasonable person in the absence of explanation would say was a thoroughly dangerous piece of driving. On our evaluation of the evidence there is no question of doubting his guilt. He committed the offences charged and was correctly, inevitably, convicted of having committed them. The appeal against conviction is dismissed. As we have said the Republic seeks enhancement of the sentences. We have heard counsel arguing for and against the application and, having done so, are of the opinion that both on the facts and on the law, the awards cannot be allowed to stand. It is a very bad case indeed. Knowing that a large number of boys was in his control, knowing that his passengers were concerned at the manner of his driving, and knowing the road for what it is, instead of slowing down, the appellant increased speed, and, as a consequence, lost control of the vehicle, which turned over with such tragic results. There was an undoubted risk-taking arising from a deliberate and calculated judgment on his part. In *Wanjema v. Republic*, [1971] E.A. 493, this court said that imprisonment should only be considered for this offence where there was an element of risk-taking, and, in *Khalif v. Republic*, [1973] E.A. 364 it was pointed out that its gravity is greater where it arises from a deliberate and calculated judgment to do something which any reasonable driver would recognise as unsafe. Clearly, then, does the appellant merit a substantial custodial sentence. No reasonable driver would have done what he did, i.e. selfishly to ignore the reasonable safety, to say nothing of the pleas, of his passengers. In *R. v. Guilfoyle*, [1973] 2 All E.R. 844, the English Court of Appeal, said at p. 845: “. . . For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers, or who have driven recklessly, a custodial sentence with a long period of disqualification may well be appropriate.” These cases to which we have referred, cover the facts of this appeal exactly. We would not lightly interfere with the discretion as to sentencing exercised by a magistrate, particularly one so experienced as the magistrate in this case, but fines, upon the facts, were a totally inadequate award and were imposed without regard to the principles to which we have drawn attention. We cannot, in justice, allow them to stand. It is true that it is now some eight months since the appellant was sentenced in the court below, and we are not insensible to the effect that our orders will have upon a man whose business is concerned with the use of motor vehicles, but a proper sentence must be imposed. We set aside the awards of fines and their default sentences and, in their place, we order that the appellant shall serve 3 concurrent years’ imprisonment on each of the 4 counts calculated from the date of the original sentences. We also increase the period of disqualification to 5 years and attach it to each count; also concurrent, of course. The fines which have been paid must be repaid.

*Order accordingly.*

For the appellant:

*HS Daine* (instructed by *Daine & Wariithi*, Nairobi)

For the respondent:

*AR Rebello* (State Counsel)