



REPUBLIC OF KENYA



**Rimba v Republic (Criminal Appeal E099 of 2023)
[2024] KEHC 10371 (KLR) (22 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10371 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E099 OF 2023
RN NYAKUNDI, J
AUGUST 22, 2024**

BETWEEN

SWALEH KITSAO RIMBA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of dangerous driving contrary to Section 46 of the [Traffic Act](#) in Eldoret Chief Magistrate's Court Cas No. 765 of 2018. The particulars of the offence were that on the 15th day of March 2018 on or about 0900 hrs at Annex area along Eldoret-Nakuru road within Uasin Gishu County, the accused person, being the driver of motor vehicle registration no. KAV 086J/ZC 4331 Mercedes Benz lorry, did drive the said motor vehicle on a public road in a manner which is dangerous to the public, without having regard to all the circumstances of the case, including the nature, condition and amount of traffic which might reasonably be expected to be on the road, hence failed to keep to your (sic) nearside and collided with one motor cycle registration no. KMDL 983D Bajaj Boxer where its rider, Calistus Wamalwa Sitati, died on the spot.
2. In the alternative, the accused person was charged with the offence of driving a defective vehicle on a public road contrary to section 55(i) of the [traffic act](#). The particulars of the offence were that on the 15th day of March 2018 at about 0900 hrs at Annex area along Eldoret-Nakuru road within Uasin Gishu County being the driver of motor vehicle registration no. KAV 086J/ZC 4331 Mercedes Benz lorry, he did drive the said motor vehicle on a public road while being defective not fitted with a speed governor gadget, driver seat in poor condition, as it's worn out, rear shock absorber unsecured.
3. The appellant pleaded not guilty and the matter proceeded to full hearing. PW1 was Dr. Kibet Keitany who is a pathologist at Moi Teaching and Referral Hospital. He produced the post mortem which proved the cause of death was multiple blunt trauma injuries pursuant to a road traffic accident.



4. PW2 was Corporal Kipkeu of Tarakwa police station who testified that on 15th march 2018 at 2am he was informed that there was an accident at Annex area. He headed to the accident scene with PC Simiyu and Cpl Daliti. They found motor vehicle registration no. KMDC 938D Bajaj. There was a motor vehicle heading to Nairobi and the motorcycle in the other generation. He concluded that the accused person was at fault.
5. PW3 was P.C Simiyu who testified that on the material date he accompanied PW2 to the scene of the accident and found that a lorry had knocked down the found motor vehicle registration no. KMDC 938D Bajaj. He stated that the driver of the lorry was to blame.
6. The accused person was placed on his defence. In his defence, he denied causing the accident. He stated that the deceased caused the road abruptly when the trailer crossed the road abruptly. The trailer was too close that he could not avoid hitting the rider. He admitted that there was no speed governor and other defects on the lorry.
7. Upon considering the evidence before the court and the testimonies of the witnesses, the trial court convicted him of the main charge and sentenced him to serve 3 years imprisonment. On count 2, he was sentenced to pay a fine of Kshs. 50,000/- in default serve 12 months imprisonment, which sentence was to run consecutive to the first sentence.
8. Being aggrieved with the conviction and sentence, the appellant instituted the present appeal vide a petition of appeal dated 19th October 2023 premised on the following grounds;
 - i. That the learned trial magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt.
 - ii. That the learned trial magistrate erred in law and in fact in failing to acquit the appellant of the charges against him for want of proof beyond reasonable doubt.
 - iii. That the learned trial magistrate erred in law and in fact in failing to independently analyze and/or evaluate the evidence on record hence an erroneous determination.
 - iv. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant without taking into account the weight of the defence evidence adduced.
 - v. That the learned trial magistrate erred in law and in fact in failing to appreciate and find all the charges preferred against the appellant had not been established and proved as required by law.
 - vi. That the learned trial magistrate erred in law and in fact on count two by penalizing the appellant with a very harsh fine disregarding the circumstances of the case as the failure to fit the trailer with a speed governor , rear shock absorber unsecured and the driver seat worn out and in poor condition was not his fault as he was a mere employee but rather the owner of the trailer/motor vehicle the appellants' employer.
 - vii. That the learned trial magistrate erred in shifting the burden of proof to the appellant.
 - viii. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant basing only on a sketch map showing where the trailer/motor vehicle and the motor cycle were found after the accident and concluding that the appellant was driving on the wrong side of the road as there were no eye witness on the part of the prosecution on 15.03.2018 at 0900 hrs the time of the accident who witnessed if the appellant was indeed driving on the wrong side of the road.



- ix. That the learned trial magistrate erred in convicting the appellant based on speculative circumstantial evidence.
 - x. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant when there were contradictions on the part of prosecution documents that is the certificate of examination and test of vehicle for both the trailer and motor cycle.
 - xi. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant without sufficient evidence and in rejecting the appellants' defence.
 - xii. That the learned trial magistrate erred in law and in fact in imposing a harsh sentence without considering the appellants' mitigation and the circumstances of the case.
 - xiii. That the learned trial magistrate erred in law and in fact despite asking the appellant to provide authorities prior to sentencing showing not all cases of death by dangerous driving must be punished by a custodial sentence which were provided, he went ahead and stated that the provided precedents were very old and not binding to this court as he wanted recent ones post 2010 onwards thus arriving at a very harsh sentence towards the appellant.
 - xiv. That the learned trial magistrate misdirected himself in law and fact by arriving at a decision which was inconsistent with other court's decisions which have stated that not all cases of causing death by dangerous driving must be punished by custodial sentence.
 - xv. That the learned trial magistrate erred in law and in fact in disregarding the appellant's evidence on record, written submissions, the applicable law, judicial precedents and/or authorities thus arriving at erroneous decision and very harsh sentencing.
9. The parties were directed to prosecute the appeal vide written submissions.

Appellants' submissions

10. The appellant filed submissions dated 29th January 2024 through the firm of Kogo & Company Advocates. The appellant sought to Counsel submitted that the Appellant is a first-time offender, and a truck driver with over ten (10) years' experience who is very remorseful for the prevailing circumstances. Counsel cited the 2016 Judiciary of Kenya, Sentencing Policy Guidelines and urged that being a first-time offender, and remorsefulness stand as mitigating circumstances that warrant a more lenient penalty, under provisions of The 2016 Judiciary of Kenya, Sentencing Policy Guidelines. With regards to the circumstances surrounding the incident, the Appellant was neither intoxicated nor reckless when driving Motor Vehicle KAV 086JCZ 433 Mercedes Benz. As such, there are no compelling elements of extreme carelessness or recklessness to attract a custodial sentence. Counsel cited the case of Govind Shamji -v Republic. Madan in support of this submission.
11. It is the Appellant's case that Counsel for the Appellant in the trial court relied on authorities which here held to be too old and not binding on the court. Further, that given the predicament at the Trial Court counsel annexed authorities' post 2010 for reference. Counsel cited the case of Francis Karanja Mwangi v Republic (2019) on the issue that not all cases of causing death by dangerous driving must be punished by a custodial sentence. Further, that here, as in the Mwengea case, there was no evidence that the appellant was driving under the influence of alcohol or any other intoxicating substance (or) deliberately taken risk and/or controlled the motor vehicle with care and abandon, had a bad driving record, or with selfish regard for other road users or passengers.
12. Learned counsel submitted that the trial Magistrate erred in arriving at a decision which failed to take into account precedents provided as they were deemed to be too old hence giving a harsh sentence.



Counsel cited the case of Samuel Karanja Kimani-v-Republic (2016) eKLR and the case of Anthony Munyi Kibuthi -v- Republic Misc. Cr. Application No. 3/2017, on the issue of the conviction of the accused without considering the option of a fine. Additionally, counsel cited the case of [*Genesisio Kariithi Wambu -v- Republic, Criminal Appeal No.51 of 2017*](#), where Justice L.W. Gitari, in allowing the appeal, and setting aside the sentence considered that the appellant was a first offender, he stated that, "...Be thus as it may the court ought to have considered the mitigation and the fact that the appellant was a first offender. The sentence often years was harsh and manifestly excessive."

13. Counsel submitted that in this case, the Appellant/Applicant was denied an option fine on sentencing of the first count of causing death by dangerous driving which is unfair. Counsel prayed that the Appellant be allowed to an option of fine. Further, that the Appellant has been sufficiently punished. The Appellant has been in lawful custody for nearly Three weeks (3) before he was released on bail pending the hearing of this appeal. He cited the case of [*Bernard Ngatia Wachira v R \(2020\) Criminal Revision 209 of 2019*](#) in support of this submission.
14. Counsel urged that the Appellant be admitted to payment of a fine within the court's discretion as opposed to a custodial sentence and cited the case of [*Evans Masira Nyang'au v Republic. Criminal Appeal No. E008 of 2021*](#) in support of this submission. Further, that it is upon the Court's discretion to vary a sentence, and as such we plead with this Honourable Court does exercise its discretion judiciously, and in good faith.
15. On the issue of judicial discretion on sentencing, counsel relied on the case of [*Genesisio Kariithi Wambu -v- Republic, Criminal Appeal No. 51 of 2017*](#), and the Court of Appeal in [*Ahmed Abolfathi Mohammed & Another -v- Republic, Criminal Appeal No. 135 of 2016*](#) (unreported) in urging that the Appellant be admitted to payment of a fine within the court's discretion. Further, that the Appellant is employed as a truck driver who is a family man and the sole bread winner and/or provider for his wife and five (5) children. Further, he has a clean driving record of ten years at the time of accident.

Respondent's case

16. Senior Prosecution Counsel Mark K Mugun filed submissions on the appeal on 19th February 2024. He submitted that it is trite law that sentence is a matter that rests in the discretion of the trial court and that an appellate court will only interfere with that discretion in certain circumstances. These principles were espoused by the Court of Appeal in the case of Bernard Kimani Gacheru v Republic [2002] eKLR.
17. According to section 46 of the [*Traffic Act*](#), which the Appellant was charged with, any person convicted of the offence of causing death by dangerous driving or obstruction, shall be liable to imprisonment for a term not exceeding ten years and the court shall cancel the driving licence held by that individual for a period of three years. He cited the case of Timothy Orwenyo Missiani v Republic [1979] eKLR where the Court of Appeal expressed itself on the factors to be considered when sentencing a person convicted of causing death by dangerous driving. The Court took note that an offence of causing death by dangerous driving is not an ordinary type of crime. It was held:

"This passage in our view sets out the correct principles of sentencing persons convicted of offences contrary to section 46 of the [*Traffic Act*](#). To the same effect is the judgment of the High Court of Kenya in *Govid Shamji v The Republic* (unreported) in which Madan and Chesoni JJ said:

The offence of causing death by dangerous driving is not an ordinary type of crime. While it cannot be given an aura of protection by putting it in a glass case of its own, the people who commit this offence do not have a propensity for it, neither is it a type of crime



committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interests of justice as well as the interests of the public. There are of course cases where a custodial sentence is merited, for example, when there is a compelling feature such as an element of intoxication or recklessness.”

18. Counsel referred the court to the case of *Paul Thiga Ngamenya v Republic* [2018] eKLR, which was an appeal against the sentence of 1-year imprisonment for a similar offence as this one, Odunga, J. (as he then was) after quoting the law in the case of *Francis Karioko Muruatetu* and the judiciary sentencing guidelines, had the following to say regarding sentencing:

“I have considered the fact there has been a sharp rise in the prevalence of road traffic accidents in this country most of which are caused by recklessness on the part of the drivers. Overlapping has become the order of the day for motorists in this country. In my view one way of curbing such reckless loss of lives and limbs by people who are only interested in financial gain is to impose a sentence whose objective is geared towards retribution, deterrence and denunciation.”

19. Counsel urged that the foregoing case laws suggest that a custodial sentence should be meted out when the offender was reckless or intoxicated and not where there was a moment of inattention or misjudgement. The case laws further suggest that the primary consideration in sentencing in cases like this, should be retribution, deterrence and denunciation.
20. The facts and evidence adduced in this case reveal that at the time of causing the fatal accident, the Appellant was not under the influence of drugs or any intoxicating substance. The facts also reveal that the Appellant was trying to overtake another motor vehicle but misjudged the speed with which the deceased was riding his motor cycle. He tried to correct this error of judgement by swerving the car to the road’s shoulder, which the deceased also did, and that in so doing, his vehicle collided with the deceased’s motor cycle leading to the death of the deceased. The facts also revealed that the Appellant had maintained a clean driving record. He was a first offender with a clean driving record. Considering all these, the Appellant should have benefited from leniency from the court as prescribed by the series of the foregoing case laws. A 3-year sentence would therefore seem harsh and excessive in the circumstances.
21. In light of the above, the Republic concedes that the sentence was excessive. We would urge this Honourable Court to condemn him to:
- i. Pay a fine of an amount to be determined by his Lordship.
 - ii. Cancel the Appellant’s licence for a period to be determined by His Lordship

Analysis & Determination

22. As this is a first appeal, I must first set out the duty of the court as was stated in *Kiilu & Another vs. Republic* [2005] 1KLR 174 where the Court of Appeal stated that:

“1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.



2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

See also *Okeno vs. Republic* [1972] EA 32 on the same subject.

23. From the submissions on record, it is apparent that the appellant only seeks to appeal against the sentence alone. In the premises, it is my considered view that the following issues arise for determination
24. First and foremost, this court needs to address the ingredient of the offence of causing death by dangerous driving whether it was proved beyond reasonable doubt. What was expected of the trial court, when admitting evidence of PW1, PW2, &PW3 it was for the prosecution to lead evidence to prove the following elements:
 - i. Death of a human being occurred
 - ii. The death was caused by a motor vehicle
 - iii. That motor vehicle was being driven carelessly.
 - iv. The accused was driving the motor vehicle at the material time
25. On whether Calistus Wamalwa Sitati's death the trial court admitted that the post mortem report which was also corroborated circumstantially by the witnesses who were summoned by the prosecution. The post-mortem report indicated that the deceased suffered multiple injuries to the respiratory system, Cardio-Vascular System, Digestive system, Genito-urinary system, Head, Nervous system, spinal column and spinal cord. The pathologist opined that the cause of death was multiple injuries due to blunt force trauma due to Road Traffic Accident.
 - a. Whether the sentence was harsh and excessive in the circumstances

Whether the sentence was harsh and excessive in the circumstances

Section 46 of the *Traffic Act* provides as follows;

Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence whether or not the requirements of section 50 have been satisfied as regards that offence and be liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by Part VIII of cancelling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of three years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later.



26. It follows that the punishment for this offence does not expressly provide for an option of a fine. The principles of sentencing in cases of this nature were set out by our Court of Appeal in the case of *Onweyo Misiani Vs The Republic* (1979) K.L.R. Page 285. Law Miller and Porter JJA then confirmed the correctness of the principles set out by Madan and Chesoni JJ (as they then were) in the case of *Govind Shamji Vs The Republic* (unreported) and we quote:

“The offence of causing death by dangerous driving is not an ordinary type of crime. While it cannot be given an accord of protection by putting it in a glass cage of its own, the people who commit this offence do not have a propensity for it, neither it is a type of offence committed for gain, revenge or lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interests of the public. There are of course cases before a custodial sentence is merited, for example, when there is a compelling feature such as element of intoxication or recklessness”.

27. Considering the fact that the appellant was not found to have been intoxicated or under the influence at the time of the accident, I am inclined to agree with the submissions of the prosecution that the sentence was excessive in the circumstances. It is my considered view that it is in the interests of justice to provide the appellant with an option of a fine in default of which he shall serve a custodial sentence. Additionally, it would be appropriate to revoke/cancel the appellants’ license for a certain period of time as per the powers conferred upon this court under section 76 of the *Traffic act*. In considering the appropriate penalty, to impose in this case, the trial magistrate identified the factors that he needed to consider as including the gravity of the offence, the character and the record of the offender, the character and design and manner of execution of the offence and the possibility of reform and rehabilitation. Omitted from the trial magistrate’s factors are personal and evidential circumstances of the Appellant and that sometimes the offence of causing death by dangerous driving comes with it extraneous factors that is the reason why the mens rea element is not strictly construed to the facts of the offence. There is also the other factor of the trial court not factoring in the prospect of reform and social re-adaptation of the Appellant. This court also take into account that the mitigation offered of the Appellant being a first offender with a ten years experience accident free as some of the factors to count towards leniency in the period to be imposed as a penalty for the blameworthiness of the Appellant.

28. According to the prosecution evidence motor vehicle registration No. KAV 086J /ZC4331 Mercedes lorry was on the 15.3.2018 was being driven along Annex area Eldoret Nakuru road, when it got involved in a road traffic accident with motorcycle registration No. KMDL983D which was at the time being driven by the deceased. The prosecution adduced evidence that the alleged careless Act of the Appellant substantially was the operating cause of the events leading to the death of the deceased. Therefore, the issues of causation were never challenged by the Appellant to raise a doubt against the prosecution case. On the other hand, circumstantial evidence from the prosecution witnesses drove the point home that at the material day and time the Appellant was in control of the subject motor vehicle before it was managed in such a dangerous manner and unjustifiably failing to observe the standard of care resulting into the aforesaid accident. All matters including speed, navigation, control, directing of the subject motor vehicle were under the operation of the Appellant. In this kind of cases, it is not a necessity to prove that the Appellant intended to drive dangerously was aware that his or her conduct was dangerous to the public. In my considered view, the ingredients of the offence of causing death by dangerous driving were all proven to the prosecution including placing the Appellant at the scene of the crime.



29. It is important to analyse and discuss briefly the issue of sentence. In this respect, the court must consider the weight which was accorded the sentencing principles and case law by the learned trial magistrate in arriving at the final verdict.

30. It is trite that on Appeal there is a cautionary safeguard in the underlying statement that in exercising discretion to interfere with sentence of a trial court this court can only do so within the guidelines issued by the court of Appeal in Benard Kimani Gacheru vs Republic (2002) eKLR restated that:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court, similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the dissertation for the trial court on sentence unless, anyone of the matters already states is show to exist.

31. The same court reiterated the entrenched principles in Shadrack Kipkoech Kogo -vs R Eldoret Criminal Appeal No. 253 of 2003 the Court of Appeal stated thus: “Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these the sentence itself is so excessive and therefore an error of principle must be interfered (See also Sayeka -vs R (1989 KLR 306)

32. Given this background, there is merit to review the sentence imposed by the trial court.

33. I hereby find as follows;

- i. The appeal on conviction is dismissed whereas on sentence being guided by the above principles, this court interferes with the first count by reviewing the custodial sentence and have it substituted with a fine of 100,000 in default 18 months imprisonment.
- ii. In so far as the second count is concerned, the fine of 50,000 imposed by the trial court in default 12 months imprisonment is affirmed.
- iii. Finally the sanction of cancelling the Appellants drivers licence be conditioned to 24 months from the date of delivery of the trial court judgement.
- iv. It is so ordered.

DELIVERED DATED AND SIGNED AT ELDORET ON THIS 22ND DAY OF AUGUST 2024

In the presence of

Mr. Mugun for the State

M/s Mugalo for the Accused

Accused

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R. NYAKUNDI

JUDGE

