Republic v Kibe (Criminal Appeal 21 of 2018)
[2023] KEHC 17666 (KLR) (Crim) (24 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17666 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 21 OF 2018

LN MUTENDE, J

MAY 24, 2023

BETWEEN

REPUBLIC .... APPELLANT

AND

JOEL KAMAU KIBE .... RESPONDENT

(Being an appeal originating from Traffic Case No. 2808 of 2016 at the Milimani Chief Magistrate's Court-by Hon. B. M. Nzakyo – SRM on 24th April,2017)

JUDGMENT

1. Joel Kamau Kibe, the Respondent, was arraigned, following allegations of having committed offences thus:

    I. Causing Death by Dangerous driving contrary to Section 46 of the *Traffic Act*. The particulars being that on 2nd February,2016 at about 03:00am along UN Avenue, near Whispers, Gigiri area within Nairobi County being the driver of Motor Vehicle Registration Number KBQ 959 J make Range Rover, he drove the said motor vehicle on the said road in a manner which was dangerous to other road users in that he knocked a Sentry box where the security guard was injured namely Charles Wachira who later succumbed to the injuries.

    II. Careless driving contrary to Section 49(1) of the *Traffic Act*. Particulars of the offence being that on 2nd February,2016 at about 03:00am along UN Avenue, near Whispers area within Nairobi County being the driver of Motor Vehicle Registration Number KBQ 959 J make Range Rover, did drive the said motor vehicle on the said road without due care and attention to other road owners as a result he lost control and hit a sentry box and a security guard namely Daniel Ochieng Omollo was injured.

III. Driving a Motor-Vehicle under the influence of alcohol contrary to section 44 (1) of the *Traffic Act*. Particulars being that on 2nd February,2016 at about 03:00am along UN Avenue Whispers area within Nairobi County, being the driver of motor vehicle registration number KBQ 959 J make Range Rover, he drove the said motor vehicle while under the influence of alcohol beyond the required limit 0.35ml /l of breadth having taken 0.63 mg/l of breadth, thereby exceeding the limit by 0.28mg/l breadth .

2. Facts presented by the prosecution were that PW1 Daniel Ochieng Omolo, PW2 Hillary Wanjala and Charles Wachira (Deceased) worked for Chancery Security Ltd as Security Guards. On the 2nd February,2016, while on duty at about 3.00am, at the security guard booth/box, a driver of motor-vehicle registration number KBQ 959 J hit the concrete barrier and booth causing fatal injuries to one of them. PW1 who was inside the booth recalled seeing the motor vehicle moving at a high speed prior to the accident. He sustained injuries on his knees and chest. PW2 who moved to assist the deceased who was beneath the motor vehicle sought assistance from other guards and they managed to remove him. PW3 Joshua Karanja, their supervisor went to the scene of the accident and found them injured. He caused those injured to be taken to Kiambu Hospital, however, the deceased was pronounced dead upon arrival.

3. The scene was visited by police officers, PW6 No. 79321 PC Aden Abdi and PW8 No. 625579 PC Margaret Muthoni. They found the subject vehicle extensively damaged on the frontside. Also damaged were the security booth, metal bar and barrier. They arrested the Respondent and caused him to be taken to Gigiri Police Station while he visited the injured at the hospital but found the deceased having succumbed to injuries sustained. Since the Respondent seemed drunk he notified the NTSA personnel. PW7 Dennis Mureithi an Enforcement officer with NTSA went to the Station to carry out a breath test for alcohol limit. PW11 No. 49874 Senior Sergeant John Mukhamati witnessed the exercise being conducted.

4. PW10 Dr. Peter Ndegwa, a pathologist, performed an autopsy on the body of the deceased and concluded that the cause of death was multiple organ injuries due to both blunt and sharp trauma consistent with motor vehicle accident.

5. PW9 Samuel Orenge, a gazetted Vehicle Inspector inspected the motor vehicle and made a report thereof. PW12 No. 83810 Sergeant Elizabeth Wangui investigated the case and issued the respondent with a Notice of Intended Prosecution. She visited the scene and established the presence of a speed bump some 22.1 metres before the gate. Following the breath test carried out and the results obtained she concluded that the respondent was drunk hence the accident. In the result, she caused the respondent to be charged.

6. The court considered evidence adduced and found the prosecution having failed to establish a prima facie case warranting the Respondent being placed on his defence on the third count hence acquitted him of the charge pursuant to Section 210 of the *Criminal Procedure Code*, but placed him on his defence on the 1st and 2nd counts.

7. In his defence the Respondent stated that he was coming from a business meeting with a friend when the accident occurred. He testified that he was conversant with the road as he lived at Runda. That there were no road signs showing there was a road barrier. That the barrier was opened for the car ahead of him, then after going over the bump as he accelerated to cross the barrier, it was suddenly closed. He swerved to avoid the barrier and the vehicle veered off the road and hit the plastic box that was in the middle of the road and he stopped, He came out to find guards having gathered, Inside the security box was an injured person. His colleagues refused to take him to hospital until the police arrived at

the scene. That he engaged the police and went to the Police Station as required. The following day he learnt of the passing of the deceased.

8. Further, he urged that the barrier had been declared illegal by the Nairobi County Government, He denied having been careless in his manner of driving.

9. The trial court considered evidence in totality and believed the explanation given by the Respondent. It reached a finding that no fault was proved on the part of the Respondent and that the security barrier having been illegal it caused hazard. The court also found that the poorly secured plastic security box contributed to the accident. Consequently, it acquitted the Respondent on the 1st and 2nd counts.

10. Aggrieved, the Appellant proffered the appeal on grounds that:

    (a) The court erred in law in finding that the prosecution had not proved its case beyond a reasonable doubt when it had done so on both counts.

    (b) The court erred in failing to thoroughly analyse the evidence of all witnesses and exhibits before arriving at the conclusion that there was insufficient evidence.

    (c) The court erred in finding that the respondent was not over speeding because the vehicle air bags did not deploy after the Impact without any evidential basis for this finding.

    (d) The trial magistrate erred in finding that the accident was caused by a barrier and security box in the middle of the road when indeed the respondent was fully to blame for the fatal accident.

    (d) The trial magistrate erred in acquitting the respondent despite his admission in his sworn defence that his vehicle hit the security box resulting in the deceased death and serious injuries to Daniel Omollo.

    (e) The court erred in finding that the prosecution had not proved fault on the part of the respondent yet the prosecution proved that he was solely responsible for the accident by driving his motor vehicle dangerously and carelessly without due care and attention.

    (f) The trial magistrate erred in finding that the medical evidence was necessary to prove careless driving.

11. The appeal was disposed through written submissions. The appellant submits that for the court to convict, as held in the case of *Republic versus Gosney* (1971) All ER 220, there must have been a situation which viewed objectively, was dangerous and also some fault existed on the part of the driver. That the respondent failed to control the motor vehicle having driven it while under the influence of alcohol, that PW1 testified that he saw a vehicle coming from one side towards Runda at high speed where he hit the security box causing injuries to himself and fatal injuries to his colleague, and. the Investigating Officer confirmed existence of skid marks which was evidence of over speeding.

12. That the respondent testified that the barrier was not new to him and thus he was aware of it. He was a resident of Runda estate and it was upon him to exercise caution when approaching it. That the respondent admitted that as he approached the barrier and that there was a car ahead of him but in a blink of an eye, he knocked the security box causing fatal injuries to one security guard. That the only explanation was there having been fault on his part. Reliance was place on the case of *Atito vs*

Republic (1975) EA 281.It is their case that the respondent caused the accident and not the barrier or security box.

13. Further, that the *Traffic Act* was amended, did away with the offence of careless driving and substituted it with the offence of Driving Without Due Care and Attention, therefore, the respondent was charged with an offence which was known in law and the issue of medical evidence having not been produced does not hold and is not applicable since the count was non-existent.

14. The appeal is opposed by the respondent who urges that the evidence failed to prove the ingredients of the offence which were, that the respondent was driving without due care and attention. The speed which he was driving the motor vehicle was also not proved. That the air bags did not deploy which meant that the respondent was not over speeding, the burden of proof was on the prosecution which was not discharged.

15. That the respondent's action was reasonable as he swerved to avoid hitting the barrier which was closed abruptly by someone he could not see. That it was evident that he drove reasonably and the court found rightly that the prosecution evidence fell below the test of beyond reasonable doubt. That his explanation and defence was not challenged.

16. The respondent relied on the provisions of Section 17 of the *Evidence Act* and the case of *R vs Ahamad Abolfathi Mohammed & Anor.* (2019) eKLR where the Supreme Court outlined the difference between an admission and a confession. He submits that his admission was not conclusive proof of the charges preferred against him. That the magistrate did not err in finding that the prosecution failed to prove fault on the part of the respondent. That he did what was best in the circumstances by swerving to the right and had no intention of hitting the security box. He urged that he did not cause a dangerous situation. Further, that there must be some fault on the part of the driver causing the dangerous situation, fault involved a failure below the care and skills of a competent and experienced driver in relation to the manner of driving and to the relevant circumstances of the case. In this regard he referred to the case of *Ngure vs R* (2003) E.A ; *Peter Nguu v R* (2021) eKLR ; and, *Atito v R* (1975) EA 278 page 280.

17. The respondent also submits that he took all reasonable steps to avoid hitting the barrier which was closed abruptly, evidence that was not challenged by the prosecution.

18. On need for medical evidence, the respondent urges that the treatment notes produced to prove the injuries sustained by Daniel Omollo were not enough. That the burden was on the prosecution to prove that the injuries were occasioned by the accident. That the prosecution ought to have called a medical doctor to give evidence on the extent of injuries and whether they resulted from the accident. In this regard, the respondent relied on the case of *Bukenya vs Uganda* (1972) EA 549.

19. On whether the court can order a retrial herein, the respondent submits that the trial was not illegal or defective to warrant retrial orders. That there is no compelling evidence or new evidence to move the court on this ground as the evidence was insufficient and nothing new may alter the acquittal to a conviction. Relying on Article 50 of the *Constitution* he submits that his right to fair trial should not be jeopardized as such an order would cause grievous injuries to him having been acquitted in 2017.

20. This being the first appellate court, its mandate involves reassessing reanalysing and coming up with its independent conclusions. The court must consider that it did not have the advantage of seeing or hearing the witnesses during trial. (See *Okeno v Republic* (1972) EA 32).

21. Section 348 A of the *Criminal Procedure Code* provides that :

> When an accused person has been acquitted on a trial held by a subordinate court, ..., the Director of Public Prosecutions may appeal to the High Court from the acquittal ... on a matter of law.

22. The respondent herein was acquitted following the trial by the subordinate court, the appellant, therefore, faults the trial court for returning the verdict of an acquittal. By law the court's jurisdiction is limited; regardless of the wider powers bestowed upon a first appellate court to reassess, re-analyze and come up with its own conclusion. However, the court should consider whether the findings of the court were informed by evidence.

23. On Count I, the respondent was stated to have contravened Section 46 of the *Traffic Act*(Act) which provides for the offence of causing death by driving. The provision of the law enacts 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.

24. In the instant case the prosecution was required to prove that the respondent, without reasonable consideration to other road users drove the car in a manner that was dangerous such that he caused a real or potential danger to the public, even oneself. This meant that he carried a degree of fault.

25. In the case of *Atito v Republic* [1975] EA 281 the Court of Appeal stated that:

> " To justify a conviction for the offence of causing death by dangerous driving there must not only be a situation which viewed objectively was dangerous but there must also be some fault on the part of the driver causing the situation."

26. In the case of *Republic v Gosney* (1971)All ER 220 it was held by the Court of Appeal, that in order to justify a conviction there must have been a situation which, viewed objectively, was dangerous and also some fault on the part of the driver. In regard to this element of fault, Megaw L.J. reading the judgment of the court, stated (at page 224):

> " Fault" certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame... fault involves on a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient."

27. In the case of *[Orweryo Missiani v Republic](#)* [1979] KLR 285 at page 289, the Court of Appeal observed that:

> "Fault" certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame ..... Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient."

28. According to Section 46 of the *Act*, acts that constitute dangerous driving or a dangerous situation include driving a motor-vehicle on a road in a manner as to be dangerous to the public. The particulars of the offence as captured indicate that the accused drove the vehicle in a manner that was dangerous to other road users, in that he hit the sentry box where the deceased was fatally injured.

29. The prosecution was required to prove that the respondent drove the motor vehicle on the public road which was used for driving and that he drove in a manner that was dangerous to the public, having regard to all circumstances of the case.

30. It is not in doubt that there was a barrier along the public road

    that the respondent said he was familiar with as he resided at Runda Estate and that the barrier was erected to deter commercial vehicles from using the road that leads to the estate.

31. None of the prosecution witnesses could tell the speed at which the respondent was driving the vehicle as they were not inside the vehicle. On inspection the speedometer of the motor vehicle could not be tested due to extreme damage. Evidence adduced however proves the fact of the respondent having failed to apply brakes despite the presence of speed breakers that would have made the vehicle to slow down.

32. The respondent explained that he swerved to avoid impact of a barrier that was closed abruptly which was evidence that he drove reasonably. But, he added that he never saw the security guards or persons who closed the barrier. According to the sketch plan adduced in evidence, the distance between the speed bump and the first point of impact was some 8.1 meters; the distance between the first point of impact and the barrier point was 14.1 meters. The motor vehicle inspection report showed that the vehicle had no pre-accident defects that could have contributed to the accident. By his own admission the respondent was conversant with the area and aware of the presence of the sentry/security box. The purpose of speed bumps is to slow down to a safe speed. A driver in the circumstances would be expected to reduce speed.

33. A competent driver in this regard would have been careful enough so as to ensure he avoided any potential danger by having regard to all circumstances that were within his knowledge. The test of dangerousness therefore would be based on obviousness. Although the respondent introduced presence of another vehicle that was let to go and the barrier suddenly closed. The question begging would be what a man acting with judiciousness could have done in the circumstamstances? If this were the case, a prudent driver would have swerved to the left but not the right.

34. It is obvious that the speeding vehicle went over the bump hump undeterred and crashed into the barrier. The impact resulted into the concrete barrier being damaged. The question whether there was opposition to the barrier remaining at the place did not absolve the respondent from blame, from the responsibility of the accident that occurred.

35. Looking at the postmortem report, injuries sustained by the deceased were serious. These included gaping penetrating wounds on the abdomen, fractures and dislocation of the right and left hip joints; fractures of the right and left femurs; severed abdominal aorta, bilateral femoral vessels; crushed testis, fractured lower jaw and fracture and dislocation of lumber sacral spinal column vertebral. It was a violent crash. The respondent's conduct of driving in a dangerous manner resulted into losing control and hitting the sentry box where the deceased sustained fatal injuries.

36. On Count II, the respondent was charged with the offence of Careless Diving Contrary to Section 49(1) of the *Traffic Act*. The charges were brought in the year 2016, and, the trial court does not seem to have interrogated whether the charge was known in law. As correctly submitted by counsel for the appellant, the *Traffic Act* was amended by the *Traffic (Amendment No.2) Act*,2015, which did away with the offence of careless driving and substituted it with the offence of driving without due care and attention. The provision of the law as amended enacts as follows:

> Driving without due care and attention.
>
> 1. Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable—
>
>   a. For a first offence, to a term of imprisonment not exceeding one year or a fine not exceeding one hundred thousand shillings;

37. It is the law that an accused person must be charged with an offence known in law. In the case of *Henry O. Edwin vs Republic* (2005) eKLR the Court of Appeal stated that:

> " It is trite law that an accused person must be charged with an offence that is known in law. Particularizing the charge enables the accused person know the offence with which he is charged, and the likely sentence that he would get should he be convicted…We have looked at the *Act*. Section 5, the section under which the appellant was charged, provides for "penalty for other acts connected to narcotic drugs, etc."… There is no section 5(b). The appellant was therefore charged under a non-existent provision of law. This renders the charge sheet fatally defective."

38. In the instant case the charge brought under Section 49(1) of the *Traffic Act* was defective as it was based on an unknown law. The Investigating Officer failed to appreciate that the *Traffic Act* was amended by the *Traffic Amendment Act No. 2*, 2015, which did away with the offence of careless driving that was substituted with the offence of driving without due care and attention.

39. On Count III, the respondent faced the charge of Driving a motor vehicle under the influence of alcohol contrary to Section 44 of the *Traffic Act* that enacts as follows:

    1. Any person who, when driving or attempting to drive, or when in charge of a motor vehicle on a road or other public place, is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

    2. A person convicted of an offence under this section shall, without prejudice to the power of the court to order a longer period of disqualification, be disqualified, for a period of twelve months from the date of conviction, for holding or obtaining a licence.

40. In this regard, the prosecution was duty bound to prove that the person indicted, while in control of the vehicle was under the influence of drink or drug such that he was incapable of having proper control of the vehicle. In accord with that, the prosecution called evidence of a breathalyzer test that was done. It was urged that the alcoholic content in the blood of the respondent exceeded the normal level of alcohol in the blood which impaired his judgment level.

41. PW7 testified to have conducted the test and found the respondent having 0.63mg/liter of alcohol which was above the normal content of 0.35mg/liter. He referred to the alcohol test slip bearing serial number 14050036 and the respondent's identification number.

42. The most accurate method of measuring the amount of alcohol in the body is blood alcohol test. The name of the operator per the document was indicated as Sergeant Mukhamati, as opposed to that of PW7. PW9 Sergeant Mukhamati on the other hand stated that he found the test having been done but could not remember the officer who produced / prepared the receipt, as his duty was to escort the respondent for testing.

43. There was discrepancy of who did the actual testing. The evidence adduced was not satisfactory. PW7 also failed to prove the fact of having been allocated a breathalyzer machine. The credibility of this evidence was questioned, and rightly so.

44. Having considered what transpired at trial, bearing in mind the limitation as to matters of law as provided by Section 348A of the *CPC*, am also mindful of the fact that as I consider matters of the law I cannot close my eyes to evidence on record. In this regard, I find the finding of the trial court on Count II and III, having been proper that I affirm. However, on Count I the finding was improper and erroneous.

45. The upshot of the above is that I quash the order of the court acquitting the respondent on Count 1 which I substitute with an order convicting him for the offence of causing death by dangerous driving contrary to Section 46 of the *Traffic Act*. Consequently, I direct him to appear before the trial court / Chief Magistrate's Court, Milimani, on the 6th day of June, 2023 with a view of the court complying with Section 216 of the *Criminal Procedure Code*, and, Sentencing. In default, a warrant of arrest to issue.

46. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 24TH DAY OF MAY, 2023.

L. N. MUTENDE

JUDGE

In the presence of:

Mr, Kiragu for ODPP (Appellant)

Mr. Njenga for Respondent

Court Assistant- Mutai