Ngodi v Republic (Criminal Appeal E004 of 2022)
[2023] KEHC 22935 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22935 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E004 OF 2022

LM NJUGUNA, J

SEPTEMBER 29, 2023

BETWEEN

LAWRENCE NGARI NGODI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. L.W. Kabaria (PM) in the Principal Magistrate's Court at Gichugu Traffic Case No. 2 of 2020 delivered on 05 th April 2022))

JUDGMENT

1. The appellant herein vide petition of appeal dated April 21, 2022, seeks orders that the appeal be allowed, conviction be overturned and sentence set aside, the fine paid be returned to him and any other orders the court deems just. The appeal is premised on the grounds that the learned trial magistrate eared in law and in fact by:

    a. Failing to apply the principles laid down in the case of *Timothy Orwenyo Missiani v Republic* (1979) eKLR;

    b. Failing to make a finding that the prosecution totally failed to avail the evidence that pointed out recklessness, carelessness or any fault whatsoever on the part of the appellant while driving his car on the material day;

    c. Failing to consider the defence as offered by the appellant that he acted in a manner expected of a competent driver under the circumstances;

    d. Making a finding that the appellant was driving at high speed on the material day, whereas there was no evidence to that effect; and

    e. Going against the weight of the evidence adduced and the applicable principles, in the judgment.

2. In the trial court, the appellant was charged with causing death by dangerous driving contrary to section 46 of the *Traffic Act*. Particulars of the offence were that on January 1, 2020 at about 6:30am along Kutus-Kianyaga road near IEBC Kianyaga Offices within Kirinyaga County, the appellant, being the driver of motor vehicle registration number KBU595J, Toyota Fielder, did drive the said motor vehicle on a public road, at a speed or in a manner which was 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 was actually at the time or which might reasonably be expected to be on the road, thereby causing the death of Lewis Mwangi, a pedestrian.

3. A plea of not guilty was entered and the matter proceeded for full trial.

4. PW1 Dr. Ndirangu Karomo who conducted postmortem on the body of the deceased produced the death certificate. He stated in detail the injuries sustained by the deceased as, inter alia, massive internal hemorrhage and head injury caused by blunt trauma in road traffic accident

5. PW2, John Kinyua Nyaga, was a survivor of the accident who stated that he was walking by the roadside when he was hit by the appellant's motor vehicle from behind. That he later learned that the same accident had resulted in a fatality and he survived. That after he was hit by the vehicle, he saw the appellant driving off before he passed out. That he regained his consciousness at Kianyaga Hospital where he was being treated for injuries that he sustained. He identified the driver as the appellant in the dock stating that he had seen his face when he was driving off after knocking him down.

6. PW3, Jane Wanja Njeru, mother of the deceased, stated that the people who had taken the deceased to the hospital went to her house at around 7am to tell her about the incident. That she hurried to Kianyaga Hospital where she found her son but he was not talking. They were referred to Kerugoya Hospital but the deceased was pronounced dead on arrival. That she didn't know which vehicle hit her son.

7. The prosecution closed its case and the court found that the accused person had a case to answer and that the prosecution had established a prima facie case. The appellant was put to his defense.

8. In his defense, the appellant stated that on the material day, he was driving towards Kianyaga from Kutus when a man jumped into the road near the IEBC offices in Kianyaga. That he was driving at a speed of 50KPH and that he only saw the man when he was about 3 meters away. That he swerved to avoid hitting him and also tried to stop the car but it did not stop in good time and he ended up hitting 2 people. That he got out of his car but a hostile crowd was gathering and so he quickly got back into the car and drove off to Kianyaga Police Station where he reported the incident. That later on he was informed that one of those people knocked down by the car, succumbed to injuries. That he blames the person who jumped into the road for the accident.

9. Following the close of the defense case, the trial court, in its judgment, found him guilty of the offence of causing death by dangerous driving contrary to section 46 of the *Traffic Act*. He was sentenced to 12 months imprisonment or a fine of Kshs. 100,000/=. He paid the fine imposed.

10. In this appeal, the parties filed their written submissions as directed by the court.

11. The appellant submitted that the prosecution had failed in properly identifying the vehicle involved in the accident. That PW2 only stated that the vehicle was KBU, that being insufficient description of the vehicle. That there was also no eye witness to the accident who could speak of the identity of the motor vehicle. He relied on the Tanzanian case of Dickson Elia Nsamba Shapwata & Another v The Republic, CR App No 92 of 2007 where the court commented on evaluation of discrepancies, contradictions and omissions in evidence. He also submitted that there was no evidence showing that

he was indeed driving recklessly, yet onus was on the prosecution to prove the case. On this, he relied on the case of *Republic v Silas Magongo Onzere alias Fredrick Namema* (2017) eKLR in making his argument that the prosecution failed to prove the offence beyond reasonable double.

12. The appellant also relied on the cases of *Timothy Orwenyo Missiani v Republic* (supra), *Pandya v R*. (1957) eKLR and Ruwala v R (1957) eKLR in urging the court to consider all the evidence placed before the trial court, afresh and exhaustively and arrive at its own decision. That the investigations failed to bring out the deceased's culpability and that the appellant acted as any other reasonable driver would act under the circumstances. That the defense case was disregarded at trial. That the prosecution did not have its witnesses ready for trial and the investigating officer failed to testify and none of the prosecution's witnesses testified that the appellant was speeding or otherwise driving carelessly. He cited the case of *Bukenya & Others v Uganda* (1972) EA 549. He submitted that the trial magistrate made conclusins about the appellant's driving and occurrence of the accident from evidence that was not available to her by theorizing the events. He relied on the case of Oketh Olale v Republic (1965) EACA 555 on page 557. He concluded by stating that the prosecution had failed to establish that the appellant had caused death by dangerous driving.

13. The respondent submitted that PW2 saw the appellant who was the driver of the motor vehicle thereby placing him at the scene of the accident. That PW3 stated that her son was killed by a motorist who was driving recklessly. That the elements of the offence as stated in section 46 of the *Traffic Act* as well as in the case of *Atito v Republic* (1975) EA 281 have been proved beyond reasonable double and that the appellant was at fault.

14. From all the foregoing, the issue for determination here is whether the prosecution fully discharged its burden of proving the offence beyond reasonable doubt.

15. I begin with reiterating that the role of this appellate court is well defined in the case of *Kiilu & Another v Republic* [2005]1 KLR 174, where the Court of Appeal stated thus:

    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; 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."

16. The offence with which the appellant was charged, is enshrined under Section 46 of the *Traffic Act*, Cap 403 of the Laws of Kenya, which provides that:

    > " 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..." emphasis added.

17. For ease of analysis, I shall break down my discussion into the tenets that the prosecution ought to have proved that the accused person was actually driving a motor vehicle, and the driving was reckless

or at a speed or in a manner which is dangerous to the public, or he left any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public.

18. The prosecution called its witnesses, but I gather from the trial court file that their ducks were not in a row. After the testimony by PW3, the prosecution was unable to secure the testimony of the investigating officer, who was apparently transferred to another work station. When an application to discharge the accused person under section 87(a) was made, the court ruled that the application was not made in good faith and that there was no evidence that the prosecution had done due diligence in securing the investigating officer. It is clear from the prosecution's evidence that the preparation for the case was somewhat inadequate and they were forced to close their case leaving out material evidence.

19. The appellant at trial testified that he was driving at 50KPH and his attempts to stop the car in order to avoid hitting the deceased, failed, even though he swerved. He also stated that the deceased had jumped into the road to cross to the other side and then he turned back to return and that is when the accident occurred. That in this very moment, the appellant ended up hitting two people. PW2 and PW3 stated their version of the events but none of them can testify as to whether the appellant was driving at a speed likely to endanger the public as the trial court stated. PW3 stated that until the time when she was testifying, she did not know the vehicle that had hit her son. PW2 who sustained bodily injuries from the accident stated that when he was knocked down, he saw the face of the appellant as he reversed the car and left the scene. That he also saw the registration number of the vehicle as KBU. His evidence in my view, was not sufficient to form the basis of a conviction.

20. The prosecution did not have any evidence of how fast the appellant was driving or what he did or did not do to avert the accident. As mentioned earlier, there were no eye witnesses even though there is mention of people being present at the scene; those who took the deceased to hospital and then went to call PW3, and those who were gathering at the scene of the accident. This loose end could only have been tied by the investigating officer, if at all any investigations were carried out. In my view, these discrepancies go to the root of the case itself. In the case of Dickson Elia Nsamba Shapwata & Another v The Republic, CR App No 92 of 2007 (supra) the Court of Appeal Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:-

> " 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 inconsistencies and contradictions are minor, or whether they go to the root of the matter."

21. The bottom-line is that a man surely died and another sustained bodily injuries from a road traffic accident, and the law must be applied adequately in the circumstances. However, the law cannot be applied in a haphazard manner lest justice be mocked. The prosecution was bound by the provisions of Section 109 of the *Evidence Act* to prove the offence beyond reasonable doubt as was settled in the cases of *Woolmington v DPP* (1935) AC 462 and *Miller v Minister of Pensions* (1947) ALL ER 373. According to Duhaime's Criminal Law Dictionary, reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.

22. The trial court was guided by the case of *Timothy Orwenyo Missiani v Republic* (1979) eKLR (supra) where the trial magistrate rightly pointed out that the driver is not free of fault in the accident. This case discussed inter alia that, the court, in determining the guilt or otherwise of an accused person, must consider the degree of blameworthiness of the driver in causing the accident. This was also discussed in the case of *Atito v Republic* (1975) EA 281. While it is true that the driver may

have been at fault to a certain extent, it remains the duty of the prosecution to prove the driver's culpability beyond reasonable doubt. In my understanding, the trial court based its findings on the blameworthiness of the appellant without regarding the fact that, that was not the only factor to be considered. Blameworthiness of the driver is considered alongside all other pieces of evidence as against the standard of proof in criminal cases. In my view, the trial court did not apply the findings of the case *Timothy Orwenyo Missiani v Republic* (1979) eKLR (supra) wholesomely in making its determination.

23. In my view, the evidence as adduced at trial would be meaningfully subjected to a balance of probabilities in a civil case but is not enough to satisfy the standard of proof in a criminal case.

24. In the premises, I find merit in the appeal and the same is hereby allowed with orders as follows:

    a. The judgment of the trial court dated April 5, 2022 convicting the appellant is hereby quashed; and

    b. The sentence is hereby set aside. The fine paid by the appellant be refunded to him.

25. It is so ordered.

Delivered, dated and **signed** at **Kerugoya** this **29th** day of **September, 2023.**

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent