



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANGA**

**CRIMINAL APPEAL NO E006 OF 2021**

**JOHNSON KANYI MAINGI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Hon. V Ochanda SRM, in Muranga CM Traffic Case No 126 of 2012 issued on 27/4/2021 and 6/5/2021 respectively)*

**JUDGEMENT**

1. The appellant was charged, tried and convicted and sentenced to three (3) years CSO on two counts of causing death by dangerous driving contrary to section 46 of the Traffic Act Cap 403 laws of Kenya.
2. Being aggrieved by the said conviction and sentence, he filed this appeal and raised the following summarized grounds of Appeal
  - A) Neither post-mortem report nor death certificate was produced to connect the appellant with the death of the deceased persons
  - B) No inspection report on the subject motor vehicle was produced by the prosecution
  - C) There was no proof that the appellant caused death of the deceased persons by driving in dangerous manner, which would have and did put the public at risk
  - D) There was no single eye witness produced by the prosecution as at the time if the occurrence of the accident
  - E) The trial court failed to consider the appellant statement of defence and erred in shifting the burden of proof to the same.
3. When this appeal came up for hearing, Mr. Kirubi for the appellant submitted that the prosecution case against the appellant was not proved and that the prosecution witnesses only identified the bodies of the deceased for the purposes of post mortem examination. The only other prosecution witness was the police officer who produced the sketch plan and that the elements of the offence were not proved.
4. It was submitted that the only evidence on record as to the occurrence of the accident, was the appellants evidence on oat, which was not challenged by way of cross examination and that no driver sets out to cause an accident which leads to death and that as stated in the case of **PHILIP V REPUBLIC NRB CIVIL APPEAL NO 240 of 1998** the offence of causing death by dangerous driving is not an ordinary type of crime, people who commit it do not have the propensity for it.
5. It was submitted that there must be an objective test whether any other person would have done the same thing if in the position of the appellant as was stated in the case of **OMONDI v REPUBLIC MOMBASA HIGH COURT CRIMINAL APPEAL NO 447 of 1999**. It was submitted that the prosecution as stated in the case of peter kinyanjui nganga vs republic nyeri vcriminal appeal no 203 of 2004 must prove that the accused was driving the vehicle in a dangerous manner that is being dangerous to the public.
6. It was finally contended that trial court based her conviction on her own reasons which was not supported by the evidence on record and therefore the conviction was not safe.
7. Ms Otieno for the state conceded to the appeal and stated that there was no evidence tendered by the prosecution to sustain a conviction.
8. The court is not under an obligation to allow the appeal on the ground that it was conceded to by the prosecution and being a first appeal

the court is under a duty to re-evaluate the evidence tendered before the trial court and to come to its own conclusion thereon.

9. PW1 Stephen Kanyiha Mwangi and PW2 Geoffrey Irungu Mwangi identified the body of the deceased for purposes of post-mortem examination. PW3 John Joseph Maina was called on phone and rushed to the scene and found a breakdown trying to remove the motor vehicle from the scene. He then saw the body of his brother and did not witness the accident. PW4 Faith Muthoni identified the body of the deceased at the mortuary same as PW5 Joseph Macharia Maina, while PW6 Mathew Githiya Maina confirmed that the deceased was carried on the said lorry and later identified his body, which evidence was confirmed by PW8 George Mbogo Mwangi. PW7 Geoffrey Kirige Maina also attended to the post-mortem.

10. PW9 Corp Maurice Mwakachola, the investigating officer went to the scene and where the motor vehicle had overturned on a gentle slope in a marram road, in his opinion the driver was speeding and was unable to control the motor vehicle when it reached the spot where there was an abrupt stop. In cross examination he stated that he did not have the inspection report and that he used to see the appellant driving along the said road.

11. When put on his defence the appellant stated that he had thirty years' experience and that the road was so bad with many potholes and stones. he was doing a speed of 30-40 km when he tried to break and the motor vehicle overturned. It was his evidence that the motor vehicle knocked something which caused its steering to lock and he denied speeding.

12. In convicting the appellant this is what the trial court said "given the fact that the driver had driven on this road for four years is an indication that he was well acquainted with the topography of the road. It is that familiarity perhaps that led him to negotiate a bend after a gentle slope downwards, dangerously and carelessly. This was a self-involving accident. Having been unable to control the vehicle at the bend which lack of control can only be explained that the driver was driving at an excessive speed. He was unable to negotiate the bend and the fact that the accident occurred is an indication that his manner of driving put the public at risk".

13. As submitted by the appellant and correctly conceded to by the State, the trial Magistrate finding herein above was not supported by the evidence on record and this being a criminal trial where the prosecution is expected to prove its case beyond reasonable doubt, the court fell into error for which her judgement cannot stand.

14. There being no eye witness produced by the prosecution, and having erroneously put the appellant on his defence, the same was only expected to give a probable explanation on how the accident occurred, which he successfully did as his evidence was not challenged by way of cross examination and would therefore agree with the submissions by the appellants Advocate that the prosecution case was not proved beyond reasonable doubt as there was no evidence tendered to prove that the appellant drove in a dangerous manner which would have put the public at risk.

15. The issue before the trial court was not that the accident occurred, it was for her to determine that the said accident and subsequent death of the deceased persons was caused by appellant driving in a dangerous manner, which I am unable to find having re-evaluated the evidence tendered before the trial court.

16. I therefore find and hold that the prosecution failed to prove its case against the appellant beyond reasonable doubt and hereby set aside the conviction and quash the sentence thereon. The appellant shall be set free forthwith unless otherwise lawfully held.

**SIGNED DATED AND DELIVERED AT MURANGA THIS 20th DAY of APRIL 2022**

**J. WAKIAGA**

**JUDGE**

In the presence of:-