



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO 87 OF 2018

REPUBLIC.....APPELLANT

VERSUS

FRANCIS SHICHENJE.....RESPONDENT

Being an Appeal from the Judgment of Hon C.N.C. Oruo (SRM)

delivered at Maseno in Senior Resident Magistrate's Court

in Traffic Case No 2 of 2020 on 25th July 2018

JUDGMENT

INTRODUCTION

1. The Respondent herein was charged with the offence of failing to maintain parts and equipment of a motor vehicle contrary to section 55(1) as read with section 58 (1) of the Traffic Act Cap 403(Laws of Kenya).
2. The particulars of the offence being that on the 22nd day of April 2018 at around 3.00p.m at Maseno-Busia road in Kisumu County, being the driver of Motor Vehicle Registration Number KCP 912W make Toyota Vigo did fail to maintain parts and equipment, driving the same vehicle while fitted with cracked windscreen.
3. He pleaded not guilty. The Prosecution indicated that it had two (2) witnesses to prove its case but only one (1) testified and it closed its case.
4. In her decision that was delivered on 25th July, 2018, the Learned Trial Magistrate, Hon C. N Oruo, Senior Resident Magistrate, acquitted the Respondent herein, pursuant to Section 210 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
5. Being aggrieved by the said Ruling, the Appellant lodged this Appeal on 6th September 2018. In its undated Petition of Appeal, the Appellant raises two (2) grounds of Appeal.
6. Both parties have filed their respective Written Submissions and asked this court to render its decision on the said submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
8. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

9. Having considered the Grounds of Appeal and the respective Written Submissions by parties herein, it was the considered view of this court that issues that had been placed before it for determination were as follows:-

a. Whether the Learned Trial Magistrate erred in Law and fact in closing the prosecution case prematurely.

b. Whether the Learned Trial Magistrate erred in Law and fact by making a finding of no case to answer against the Respondent herein. accused person.

10. Both issues were interrelated and the court therefore found it prudent to address the same together.

11. In its Written Submissions that were dated 24th November 2020 and filed on 25th November 2020, the Appellant had contended the Prosecution was forced to close its case without its key witness. It pointed out that the charge was clear and it was not in contention that the Respondent was arrested, driving a motor vehicle which had a cracked windscreen. It further averred that the Prosecution was not given enough opportunity to further buttress its case. It therefore urged this court to allow the appeal and place the Respondent on his defence.

12. On the other hand, in his submissions dated 23rd November 2020 and filed on 20th January 2021, the Respondent submitted that the Prosecution closed its case even before the Learned Trial Magistrate could rule on its application for adjournment and that it was not just for it to accuse the court of having closed its case. He was emphatic that he and the court indulged it to call the motor vehicle inspector but failed to do so and instead closed its case.

13. It was his submission that the Learned Trial Magistrate was right on her findings on the evidence placed before her as she found that the charge sheet was defective, and that the motor vehicle inspector did not testify as to what extent the said crack would endanger the road users and those on board the vehicle. He thus urged this court to dismiss the Appeal herein.

14. A perusal of the proceedings showed that on 28th June 2018, the Respondent indicated that he was ready to proceed. The Prosecution was not on the ground that the Motor Vehicle Inspector who was expected to testify was engaged in other duties. It had intended to call him first before calling the Investigation Officer.

15. The Respondent's advocates informed the court that he had attended court from Nairobi and insisted on the Prosecution proceeding with the witnesses who were present. He appeared to have been the arresting officer. The Prosecution obliged and called No 75437 PC Eliud Lepapa. On being cross-examined, he conceded that he did not take the motor vehicle for inspection. The Prosecution then applied for an adjournment to enable it call the Motor Vehicle Inspector, which application was granted. The matter was adjourned to 25th July 2018.

16. On the said date of 25th July 2018, the Prosecutor indicated to the court that the Motor Vehicle Inspector was unlikely to make it to the court on that date. The Respondent's counsel opposed the application for adjournment whereupon the Prosecution closed its case. The Respondent's counsel submitted. However, the Prosecution did not do so.

17. In her Ruling on whether the Respondent had a case to answer or not, the Learned Trial Magistrate found that the Charge Sheet was defective as it did not disclose the exact particulars of the offence. She also found that the Motor Vehicle Inspector did not testify on the extent of the crack.

18. It was evident from the proceedings that the Prosecution closed its case on its own volition. The Trial court therefore had no other option but to rule on whether the Respondent herein had case to answer as it ought to do have done in accordance with Section 210 of the Criminal Procedure Code.

19. Indeed, Section 210 of the Criminal Procedure Code provides:

“If at all the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall forthwith acquit him.”

20. It was hence not correct for the Prosecution to have contended that it was forced to close its case. Notably, the Prosecution did not ask the Trial Court to set aside the proceedings so that it could bring witnesses to adduce evidence. Perhaps if it had done so and its request was rejected and it appealed, this court could have considered whether or not the Learned Trial Magistrate had exercised her discretion judiciously. It could not approbate and reprobate on the issue of closing its case.

21. The court did not wish to delve into the evidence that was adduced in court as that was really not before this court for consideration. What was in contention was whether or not the Learned Trial Magistrate erred when she found the Respondent not to have had a case to answer. Having carefully re-evaluated the evidence on record, this court was satisfied that the Learned Trial Magistrate proceeded correctly in delivering her Ruling as envisaged in Section 210 of the Criminal Procedure Code.

22. Indeed, Section 210 of the Criminal Procedure Code provides:

“If at all the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall forthwith acquit him.”

DISPOSITION

23. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 6th September 2018 was not merited and the same be and is hereby dismissed.

24. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MARCH 2021

J. KAMAU

JUDGE