



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 48 OF 2019

DANIEL NGUGI THIONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence dated 5th December, 2019 of Hon. E. Kimilu, Principal Magistrate, in Naivasha CMCTR No. 23 of 2015)

JUDGMENT

1. The appellant was charged with the offence of causing death by dangerous driving and careless reckless driving contrary to **Sections 46 and 49 (1)** of the **Traffic Act, Cap 403**. After hearing the evidence of ten prosecution witnesses and the defendant, the trial court convicted the appellant on both counts. He was sentenced to two years imprisonment on count one, and fined Kshs 50,000/= or one year imprisonment in default on count two.

2. The appellant has appealed against both conviction and sentence under twelve grounds which are summarised by him as follows:

a) That the trial magistrate failed to appreciate the contradictions and inconsistencies in the prosecution evidence as against the defence evidence.

b) That the sentence of imprisonment meted against the appellant was manifestly harsh.

3. Briefly, the facts are as follows: On 4th July 2015 at about 10:10pm at Kinungi area along Naivasha-Nairobi Road, the appellant drove motor vehicle KCB 419J carelessly resulting in an accident involving five cars. The accident resulted in the death of one person.

4. The appellant argues that the evidence availed by the prosecution proves that visibility was limited; that there was a tyre burst causing the vehicle to lose control; that there was no contemporaneous evidence of the appellant's intoxication; that the alleged evidence of intoxication was an afterthought as it had not been provided when recording prosecution witness statements; that the evidence that a lady passenger of the appellant was naked was not credible and was in fact contradicted.

5. On those aspects of evidence, the appellant cited the following authorities:

a) **Gabriel Wambua Kilili v Republic [2006] eKLR** where it was held that proof that an accident was caused by dangerous driving was the onus of the prosecution.

b) **Michael Mumo Nzioka v Republic [2019] eKLR** where the court stated:

“The general rule as regards the effect by discrepancies in the evidence of witnesses have in discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling, substantial or deliberate. See Law of Evidence (10th Ed) Vol. 1 at 46. As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”

6. The appellant also impugned the harshness of the sentence arguing that “*unless an element of extreme carelessness or recklessness that clearly shows that the driver of the motor vehicle did not have any regard to the safety of other road users*” is shown, the person convicted should be given an option of a fine other apart from a custodial sentence.

7. In this regard, the appellant cited **Orwenyo Missani v Republic [1976-80] 1 KLR 1446** in which Justices Madan and Chesoni (as they were) are cited stating as follows in **Govind Shamji v Republic**:

“The offence of causing death by dangerous driving is not an ordinary type of crime and that there are cases where a custodial sentence is merited for example, when there is a compelling feature such as an element of intoxication or recklessness. recklessness.”

8. The state conceded the appeal on grounds 1, 2 and 3 which are worded in the Petition of Appeal as follows:

1. That the learned Trial Magistrate erred in law and in fact in holding that the Appellant was intoxicated at the time of the accident yet the alleged intoxication was not proved at all by the Prosecution beyond reasonable doubt.

2. That the learned Trial Magistrate erred in law and in fact in holding that the tyre burst on the Appellant’s motor vehicle resulted after the occurrence of the accident despite no evidence having been led by the prosecution to prove these allegations.

3. That the learned Trial Magistrate erred in law and in fact in dismissing the Appellant’s defence that the tyre burst was the reason and cause of the accident.

9. On the first ground the DPP conceded that: numerous unsupported assumptions and conclusions were made by the trial magistrate as follows, and I quote:

“We concede that the trial magistrate made numerous assumptions in her judgment which were not proved in evidence. At page 61: Although accused was not tested for alcohol content, the circumstances surrounding the accident and its occurrence are clear that accused could not control the vehicle because he was under influence of alcohol. He also disappeared from the scene until the following day because he was afraid of the test for alcohol.

Just to mention, the market value of accused vehicle is not worth being left at a scene of accident at night.”

10. I note that this quote is on page 56, not 61 (as stated by DPP), of the typed record of proceedings.

11. On the second ground the DPP conceded that the trial court’s holding concerning the alleged tyre burst were assumptions not adduced by evidence. The DPP stated that the trial magistrate’s findings at page 62 paragraph 2 of the record were that:

“Failure by motor vehicle (sic:inspector) to inspect a tyre from the land cruiser that was reaped off at the point of impact does not make prosecution case weak in any way. Accused left the car at the scene. The tyre must have been left at the scene or thrown off after the impact.”

12. I note that this quote is at page 57 of the typed proceedings and not at page 62 (as stated by the DPP).

13. The DPP further conceded that the evidence of PW10 Martin Githinji, the vehicle inspector, showed that all tyres on the appellant’s vehicle were in good state and none was missing. However, when PW10 was shown a photograph of the motor vehicle D. Exhibit 1, he confirmed that the front tyre was missing. This was a contradiction of evidence and a gap in the prosecution case on the crucial facts as to what transpired before the occurrence of the accident, was not filled.

14. The DPP, in conclusion conceded that the conviction was unsafe.

15. After due and careful consideration of all the evidence on record, the documents availed and submissions of the parties, I agree with both counsel that the prosecution evidence did not achieve the required level of proof of the elements of the offences beyond reasonable doubt.

16. On intoxication, PW4 and PW7 were the eye witnesses who testified that the appellant was drunk as he had a smell of alcohol. PW4 admitted in cross-examination that the alleged evidence of drunkenness was not in his statement to the police; but that he reported that fact to the police.

17. PW7 said he could smell alcohol from the mouth of the driver of the Prado V8. In cross-examination he admitted that in his statement to the police he did not make any mention of the driver of the Prado V8 (appellant’s vehicle).

18. The Investigating Officer PW9 Corporal Ahmed Wako in his testimony stated that the driver of the Prado (Appellant) was suspected to be drunk by other drivers at the scene. He was taken by ambulance to Nairobi and surfaced in Naivasha the following morning. No sample was taken from him for alcohol analysis.

19. On the basis of the above evidence, the determinations by the trial court that “the accused could not control the vehicle because he was under the influence of alcohol *“and that the accused disappeared from the scene until the following day because he was afraid of the test alcohol”* were unfounded on evidence and thus unwarranted.

20. On the issue of the tyre burst and whether it contributed to the appellant’s defence that it was the cause of the loss of control, the evidence is as follows. Testifying as DW1, the appellant stated that as he was driving to Nairobi from Naivasha he heard a loud bang. Thereafter the airbags exploded when the collision occurred. He realized that the bang was a tyre burst and because of it he could not steer the vehicle and could not control it, and could do very little after that.

21. PW10 the motor vehicle inspector produced his report on the inspection of four vehicles including the Toyota Land Cruiser belonging to the appellant (KCB 419J). The report is stated that all tyres were in good state. In cross-examination PW10 conceded, that the report did not show that the front tyre was missing, as shown in a photo of the vehicle.

22. The trial magistrate determined that, given that other drivers (PW3, PW4 and PW7) who went to the appellant could not tell what had happened, *“the theory of the tyre burst hence the accident (was) an afterthought”*. PW3 said he saw the Prado driving zigzag, and that the front tyre had *“busted due to impact of the accident”* and *“had not busted before the accident”*. Later in cross-examination he said, the *“Prado had no tyre burst”*. PW4 said the front tyre was of *“the V8 driven by the accused was damaged extensively. Front tyre was totally damaged hanging.”*

23. From the above evidence which has substantial inconsistencies on the tyre burst, I do not think it is possible to make any conclusion concerning whether or not there was in fact a tyre burst and, if so, how substantially it contributed to the accident.

24. Ultimately, I accept the concessions of the DPP on the basis that there cannot be said to have been any proof beyond reasonable doubt as to the appellant’s careless or reckless driving.

25. Accordingly, the appeal succeeds and the conviction is quashed and sentence set aside in its entirety.

Administrative directions

26. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

27. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

28. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 19TH DAY OF APRIL, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Mr. Wairegi for the Appellant
3. Appellant - Daniel Ngugi Thiongo - present in court
4. Court Assistant – Quinter Ogutu