REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. E008 OF 2021

EVANS MASIRA NYANG'AU.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgement of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered on the 23rd day of February 2021 in the original Nyamira Chief Magistrate's Court Traffic Case No. 31 of 2020)

JUDGEMENT

In the court below the appellant herein was charged with two counts of **Causing death by dangerous driving contrary to Section 46 of the Traffic Act** and one count of **Riding a motor cycle without a driving licence contrary to Section 103B (5) as read with Section 103 (b) (7) of the Traffic Amendment 2021 Gazette Notice No. 163 dated 9th November 2012.**

He pleaded not guilty on all three counts but after hearing and considering the evidence of five prosecution witnesses and the unsworn evidence of the appellant the trial Magistrate found him guilty on the two counts of causing death by dangerous driving and convicted him. The trial Magistrate however omitted to make any finding on the charge of **Riding a motor cycle without a driving licence.** For the two counts of causing death by dangerous driving the trial court after hearing the accused's mitigation sentenced the appellant as follows:

> **"…….to compensate the mother to the deceased girls, namely Divinah Kwamboka, the sum of Kshs. 300,000/- for Count 1 and the sum of Kshs. 300,000/= for Count 2. In default, the accused is to serve five (5) years imprisonment for each count. Prison sentence is to run concurrently. The money is to be deposited in court for onward transmission to the complainant. Right of Appeal within 14 days."**

Being aggrieved the appellant preferred this appeal. The grounds of appeal are: -

> **"1. THAT the Learned Trial Magistrate erred in Law and fact in convicting and sentencing the Accused person to compensate the mother to the deceased girls namely Divinah Kwamboka the sum of Kshs. 300,000/- for count No. 1 and the sum of Kshs. 300,000/= for count 2. In default the accused to serve 5 years imprisonment for each count the sentence that was manifestly excessive in the circumstances contrary to the provisions of Traffic Act Chapter 403 of the laws of Kenya.**
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> **2. THAT the Learned Trial Magistrate erred in law and fact in convicting and sentencing the (appellant) without considering that the Traffic accident was beyond his care and control.**
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> **3. THAT the Trial Magistrate erred in law and fact in failing to give adequate consideration to the appellant's evidence in his defence and more particularly the circumstances which lead to the fatal road Traffic Accident.**
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> **4. THAT the trial Magistrate erred in law and fact in not evaluating the evidence on the nature of the Road, the weather conditions, skidding and sliding episodes and the oncoming Motor Vehicle Reg. No. KCC 718W.**
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> **5. THAT the whole conviction was against the weight of evidence adduced as the prosecution did not prove their case beyond reasonable doubt as evidenced in the proceedings.**
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> **6. THAT the Learned Trial Magistrate erred in law and in fact by failing to consider the demeanor of the prosecution witnesses, the appellant's evidence and the mitigation factor."**

By the appeal the appellant has urged this court to quash the conviction and set aside the sentence. The appeal which is vehemently opposed, proceeded by way of written submissions. The firm of Rioba Omboto & Co. Advocates appeared for the appellant and Senior Prosecution

Counsel Majale for the respondent.

In his submissions, Learned Counsel for the appellant submitted that the appellant was no longer pursuing the appeal against conviction and the appeal would be on the sentence only. Counsel faulted the trial Magistrate for failing to consider the nature of the road, the weather conditions (skidding and sliding) and the oncoming vehicle No. KCC 718W in arriving at his sentence. Counsel submitted that it is trite that unless the prosecution has established an element of extreme carelessness or recklessness then the convicted person should be given an option of a reasonable fine or other sentence other than a custodial sentence. Counsel contended that a custodial sentence does not necessarily serve the interest of justice or the public interest except where there exists compelling elements of intoxication or recklessness. In support of the above submission Counsel relied on the case of **Gorid Shanyi v Republic** cited with approval in the case of **Genesio Kariithi Wambu v Republic [2018] eKLR** where Madan and Cheson JJ stated: -

> ***"The offence of causing death by dangerous driving is not an ordinary time (sic) of crime. While it cannot be given an aura of protection by putting it in a glass case of its own, the people who commit this offence do not have a propensity for it, neither is it a type of crime committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interest of justice as well as the interest of public. There are of course cases where a custodial sentence is merited, for example, where there is a compelling feature such as an element of intoxication or recklessness."***

Counsel submitted that the appellant was not intoxicated, was a first offender, was remorseful and the prevailing circumstances – the nature of the road (corner), the rain and the oncoming vehicle – could have contributed to the accident. Counsel urged that the sentence imposed by the trial court was harsh and manifestly excessive and the same should be substituted with a reasonable fine. Counsel proposed a fine of Kshs. 100,000/-.

On his part Senior Prosecution Counsel Majale urged this court to dismiss the appeal for lack of merit. He submitted that the sentence was well grounded in law as provided in **Section 46** of the **Traffic Act** and the **Sentencing Policy Guidelines** which speak of compensation to victims of offences.

This is an appeal against the extent and legality of the sentence imposed by the trial court. On appeal, this court is entitled to interfere with a sentence where it is harsh or excessive and as provided in **Section 354 (3) (b)** of the **Criminal Procedure Code** it may increase or reduce the sentence or alter the nature of the sentence.

I have considered the sentence imposed by the trial court, the submissions by Counsel for the parties and the law. The sentence was an order for compensation to the mother of the deceased by a sum of Kshs. 300,000/- for each life lost or in default to serve five (5) years imprisonment on each count with the terms of imprisonment being ordered to run concurrently. I am of the view that while compensation of the victims of offences is encouraged by the law and the Sentencing Policy Guidelines, these sentences are not in conformity with the law and hence cannot stand. To begin with, while **Section 46** of the **Traffic Act** provides for a sentence of imprisonment for ten years but does not provide for an option of fine, there is a long line of cases to the effect that a court must of necessity consider a fine as the first option unless the prosecution establishes 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. Indeed, in the case of **Govid Shamji v Republic (supra)** the Judges were clear that a custodial sentence would only be merited where for example there is a compelling feature such as an element of intoxication or recklessness. It is my finding therefore that the trial Magistrate erred in failing to consider an option of fine but instead sentenced the appellant to a concurrent term of five years imprisonment on each count if he did not pay compensation for the lives lost.

Secondly, a trial Magistrate wishing to order compensation must do so in conformity to the law. The **Traffic Act** does not in itself have a provision for compensation so we must fall on **Section 175** of the **Criminal Procedure Code** and more especially on **Section 175 (2)** which states: -

> **"(2) A court which—**
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> **(a) convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and**
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> **(b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the "injured party"), may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned."**

While **Section 175 (2)** clothes a trial court and an appellate court with power to order compensation, such compensation must take into account the conditions set out in **subsection 3 (a)** and **(b) of Section 175** of the **Criminal Procedure Code.** Those subsections provide: -

> **"(3) No order shall be made under subsection (2) –**
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> **(a) so as to require payment of an amount that exceeds the amount that the court making the order is authorised by law to award or confirm as damages in civil proceedings; or**
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> **(b) in any case where, by reason of –**
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> **(i) the complexity of evidentiary matters affecting the quantum of damages;**

(ii) the insufficiency of evidence before it in relation to such damages or their quantum;

(iii) the provisions of the Limitation of Actions Act (Cap. 22); or

(iv) any other circumstances, the court considers that such an order would unduly prejudice the rights of the convicted person in respect of the civil liability."

In my view the case against the appellant did not meet the threshold of **subsections 3 (b) (i), (ii)** and **(iv)** in that this being a case concerning loss of life the damages would of necessity be awarded and assessed under the **Law Reform Act** and the **Fatal Accidents Act** and the evidentiary matters affecting quantum of damages in such a case is usually complex. Secondly, there was no sufficient evidence before the trial court in relation to the damages awardable and it would appear that the trial Magistrate plucked the figures from the air so to speak and clearly this could very easily prejudice the rights of not just the convicted person in respect of civil liability but also of the victim or person in whose interest the order for compensation was made as victims are also entitled to compensation under **Section 23** of the **Victim Protection Act.** This prejudice to the victim would arise when you take into account that the principle of vicarious liability would cease to apply or attach as the owner of the motor cycle was not a party to the traffic case and cannot be condemned unheard and if the appellant cannot raise the amount of compensation ordered the victim may never recover the compensation.

Section 175 (5) of the **Criminal procedure Code** gives this court power to affirm, quash or vary an order for compensation made by the trial court. In the premises I am minded to quash the order and to vary the sentence so that the appellant is now sentenced to a fine of Kshs. 100,000/- (one hundred thousand shillings) on each count and in default to serve three (3) years imprisonment on each count the default sentences being ordered to run concurrently from the date he was first sentenced. The family of the deceased shall be left to pursue compensation in a civil action. Right of appeal to the Court of Appeal explained.

Judgement signed, dated and delivered at Nyamira Electronically via Microsoft Teams on this 23rd day of September 2021.

E. N. MAINA

JUDGE