



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E027 OF 2020

BERNARD WAMBUA KUU APPELLANT

VERSUS

REPUBLICRESPONDENT

Coram: Hon. Justice R. Nyakundi

The appellant in person

Mr. Mwangi for the state

J U D G E M E N T

The appellant faced eight (8) counts of Causing Death by reckless driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya. The particulars were that on the 13th February 2016 at about 9:am at Bonje area along Mombasa-Nairobi road in Kilifi County within the coast Region, the appellant being a driver of a driver of a motor vehicle Registration Number KBB 476A ZC 2679 make Nissan Diesel UD Trailer, did drive the said motor vehicle along the said public road recklessly at a speed and manner which was dangerous to the public and other road users having regards to the circumstances of the case, including the nature, condition and use of the road and amount of traffic which might be expected to be on the road at the time, lost proper physical control of the motor vehicle veered off the road to the other lane and collided with a motor vehicle registration number KCC 135R Nissan Matatu which was oncoming causing death of Christine **Lona Kamwale, Jovelina Nyache Kina, Dorothy Otieno Odhiambo, Josephine Syokwa Masinzi, Erustus Moseti, Grace Mbole, Agripa Meisie** and **Benson Munguti Muthama** in counts 1 to 8, respectively, and damages to both motor vehicles.

The appellant was found guilty of each of the eight counts and sentenced to two years imprisonment. He was dissatisfied by the learned trial magistrate's decision and preferred the instant appeal based on the following grounds:

- 1. The learned trial magistrate erred in law in denying the appellant the right to legal representation.*
- 2. That the learned trial magistrate erred in law by denying the appellant the right to a fair trial.*
- 3. That the trial court erred in law and fact by failing to appreciate the unique circumstances surrounding the occurrence of the accident in particular the evidence of the appellant the appellant that the accident was caused by a front tyre burst.*
- 4. The learned trial magistrate failed to appreciate the fact that there were material contradictions and inconsistencies that undermined the prosecution's case.*
- 5. The learned trial magistrate erred in law and fact by attaching excessive weight to the testimonies of the prosecution witnesses, which was basically hearsay and majority of which were not eye witnesses and/or present at the time of the accident.*
- 6. The trial court erred in law by denying the appellant a non-custodial sentence and failed to appreciate the discretionary powers bestowed upon Courts to award a non-custodial sentence where the law does not expressly provide so.*
- 7. That the trial magistrate erred in finding the appellant guilty.*

Facts

(PW1); Kelvin Mulwa, told the court that on 13/02/2016 he was travelling in the Matatu from Chinganwe to Mariakani when on reaching Bonje area when a lorry from the opposite direction lost control and knocked the Matatu. The accident broke his leg. He explained that the

road section at the area that the accident transpired is a dual carriage way. He referred the court to his P3 form (P.exh1).

In cross-examination, he started that the accident occurred at 8:am and that he was able see clearly as the lorry crossed from it's side into their side. The matatu was not over speeding and was on the outer lane.

(PW2); Juma Karisa Kadenge, he was the conductor for the matatu. He testified that the lorry moved from it's lane crossing over the trench to the opposite carriage way and proceeded to knock the matatu. He mentioned that the lorry driver was over speeding hence his inability to control the lorry. He also suffered some injuries in the accident. He referred the court to his P3 form (P.exh 2). He reiterated his testimony but conceded that he couldn't read the speedometer's of the vehicles involved.

(PW3); Saida Daniel Kombe, (PW4); Sylvester Oduor Ogallo, PW5; Jackson Mulaiya Mbole, PW6; Gladys Nasambu Waswa, PW8; Beatrice Syonzau who were all not eyewitness testified to confirm that they lost relatives or family members in the accident in question. They identified the bodies of the deceased persons and produced post mortem reports before the trial court.

(PW7); Jonathan Ndwisya Musyoka, testified that he was boarded matatu at Changwamwe around about to travel to Voi. On reaching Bonje a lorry travelling from the opposite direction swerved from it's lane and hit the matatu on the driver side. He lost consciousness for a while and when he regained it, he found himself lying on the ground. He was taken to Mariakani Hospital. Some people died at the scene. He further explained that the lorry crossed a ridge that separates two carriages at the scene and hit the matatu while it was on it's rightful lane. In cross-examination, the witness stated that the matatu was moving at a low speed since there were other vehicles ahead of it. His attention was drawn by a woman who was seated behind the driver when she screamed.

(PW9); Cpl Philip Kurgat of Mariakani police station visited the scene of the accident soon after it's occurrence. He found the matatu and the lorry. There were seven bodies of people who had perished in the accident. Other people had severe injuries. He explained that the accident happened when the driver of the lorry lost control and crossed over the other side of the road meant for the oncoming vehicles where it collided with the matatu. He confirmed that all the right deceased victims died as a result of the accident.

He produced vehicle inspection reports made for both the matatu and the trailer following the accident and the same is marked as P.exh1 & 2. The Matatu suffered extensive damages. He also drew rough and fair sketch plans which he produced in evidence together with the legends as P.exh 13 (a-c). Upon cross examination by the appellant, he told the court that he did not witness the accident and that he was not sure of what made the trailer cross over to the other side of the road. In re-examination, he opined that the driver of the trailer was to blame for the accident for failing to drive without care. That marks the end of the prosecution case.

Defence Case.

The appellant denied having driven the trailer in a reckless and/or dangerous manner. He attributed the accident to a front tyre burst which made it difficult to control the trailer as he was going downhill at the time.

Finding and Determination.

I have considered the appeal and all the evidence on recorded as adduced before the trial court, the issues which requires the court's attention for determination are whether the prosecution proved their case against the accused beyond a reasonable doubt and whether there were material discrepancies in the prosecution evidence adduced before the trial court.

This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

In all the eight counts, the Appellant was accused of contravening the provisions of **Section 46** of the **Traffic Act** that provides thus;

“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 whether or not the requirements of section 50 have been satisfied as regards that offence and be liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by Part VIII of cancelling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of three years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later.”

The Appellant was stated to have driven the motor vehicle in a manner dangerous to the public having regard to all circumstances of the case, the nature, condition and use of the road and the amount of traffic that was reasonably expected to be on the road.

In the case of **Timothy Orwenyo Missiani v Republic [1979] KLR 285** the court states that:

“As regards the first question, it is relevant to consider the degree of blame worthlessness in the part of the driver which has to be proved by the prosecution before he can be convicted of the offence of causing death by dangerous driving.”

In **Republic vs Gosney 11971[All ER 220** it was held by the Court of Appeal, Criminal Division, that in order to justify a conviction there must have been a situation which, viewed objectively, was dangerous and also some fault on the part of the driver. In regard to this element

of fault, **Megaw L.J.** reading the judgment of the court, said (at page 224):

“Fault” certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame... fault involves on a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient.”

The evidence of the eyewitnesses who were travelling in the matatu was very cogent and consistent that the trailer which travelling at a very high speed crossed over the demarcation separating the dual carriageway’s and proceeded to hit an oncoming matatu which was in it’s the right course. The appellant did not deny that he was the driver of the trailer on that material date. The investigating officer, who produced inspection reports for both the matatu and the trailer as P.exh 1 & 2 stated that the matatu suffered extensive damages. In cross examination he told the court that he did not witness the incident that accident and that he was not sure of what made the lorry cross over to the other side of the road. In re-examination, Pw9, opined that the appellant was to blame for the accident for failing to drive without care.

The appellant blamed the accident on a tyre burst but however in view of the aforementioned inspection reports, there were no pre-accident defects noted on the vehicles which were involved in the accident. During cross-examining the Investigating Officer, no efforts were made by the appellant to bring to the attention of the court and the witness that the accident was caused by a tyre burst. It only came out in his defence and lamented even more in his submissions, which is a time when the veracity of his testimony can not be sufficiently tested. Further his version of the story on that part alone is not in tandem with that of (PW9) encapsulated in the inspection reports.

It also noteworthy that from the sketch map and legend produced by the Investigating Officer, it is indicated that the identifiable distance in which the appellant struggled in his attempt to stop the trailer from the point he lost control of it to the point at which the trailer crossed over to the oncoming lane and rammed into the matatu was approximately 30 meters. Which evidence is indicative of the fact that the lorry was moving at a high speed yet it was going downhill. Furthermore that the trailer was able to cross over the middle ridge demarcating the two carriages is indicative of very high and dangerous speed which must have contributed to the appellant's inability to control the trailer. Consequently, there was fault on his part. Therefore the trial Magistrate did not fall into error by reaching a verdict of guilty in respect of the appellant in the circumstances. In the case of **Republic vs Evans (1963) 46** it was held that:

“if a man in fact adopts a manner of driving which the jury think was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best.”

In the case of **Atito vs. Republic [1975] EA 281** the Court of Appeal stated that:

“To justify a conviction for the offence of causing death by dangerous driving there must not only be a situation which viewed objectively was dangerous but there must also be some fault on the part of the driver causing the situation.”

In addition, it is obvious that the appellant vanished into thin air soon after the accident. It is the duty of the person who is involved in an accident where there is damage or injury to a person(s) to stop and report to the police. Failure to do so is also an offence. The appellant has also alleged that there are material discrepancies in the prosecution case but however he did not make an effort to point out any. In my careful perusal of the evidence on record, I did not find any material discrepancies in the prosecution case.

In a sentence, the appellant argued that the sentence imposed by the learned magistrate was harsh and excessive. He argued that the learned trial magistrate erred in failing to consider a non- custodial sentence. The sentence provided for the offence is “ a term not exceeding ten (10) years imprisonment” and the court is clothed with a discretion to cancel a driving licence of the offender. (See Section 76 of the Traffic Act.)

The learned magistrate rightly exercised her discretion in imposing the sentence. The appellant was convicted in each of the eight counts of Causing Death by reckless driving. He was therefore sentenced to serve two years imprisonment in each count, which sentence was to run concurrently.

Therefore, I affirm the conviction and sentence. The appeal is therefore dismissed on both conviction and sentence for it is without merit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

- 1. Mr. Mwangi for the State**
- 2. The appellant**