



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 116 OF 2016**

**STEPHEN KIRAGU KAGWIMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(An appeal from the original conviction and sentence of Hon. Ruguru N., Senior Resident Magistrate, in Mombasa Chief Magistrate's Court Traffic Case No. 2129 of 2015 delivered on 18<sup>th</sup> August, 2016).

**JUDGMENT**

1. Through an amended charge sheet, the appellant was charged with the offence of driving without due care and attention contrary to Section 49(1)(a) of the Traffic Amendment Act No. 2 of 2012, Chapter 403 Laws of Kenya. The particulars of the charge were that on the 21<sup>st</sup> February, 2015 at about 3:45a.m., along Moi Avenue in Mombasa District within Mombasa County being the driver of a motor vehicle registration number KBM 076L make Mistubishi Lancer, drove the said vehicle on a public road without due care and attention to other road users, hit and knocked down one female adult pedestrian aged 60 years namely Judith Mugo Mukui who was crossing the said road from left to the right side as he was heading towards Docks direction. As a result of the accident she sustained a fracture on her right leg and severe pain on her abdomen and bruises on her face.

2. The appellant was found guilty as charged. He was ordered to pay a fine of Kshs. 30,000/= and in default he was to serve a sentence of 6 months imprisonment. He paid the fine.

3. He was aggrieved by the decision of the lower court and the law firm of K'bahati & Company Advocates filed a petition of appeal on 19th August, 2016 raising the following grounds of appeal:-

- i. The Court erred in law in convicting the appellant with the offence of careless driving when the Prosecution did not prove the case against him beyond reasonable doubt;
- ii. The Court did not consider the law relating to the offence of careless driving and thus erred in convicting the appellant;
- iii. The Court did not evaluate and analyze the evidence on record and so failed to see the glaring contradictions and disparities, that raised a reasonable doubt in the prosecution's case;
- iv. The evidence on record did not prove beyond reasonable doubt that the appellant was guilty of any act or omission, which was a departure from the standard of driving expected of a reasonably prudent driver;
- v. The Court relied on worthless and discredited evidence of Judith Mukui Mugo (PW1) to convict the appellant, when the said evidence did not prove the ingredients of the offence of careless driving;
- vi. The court erred in law and fact in relying on the evidence of persons who were neither at the scene at the time of the accident, nor witnessed the occurrence of the accident, to convict the appellant;
- vii. The court did not consider the defence of the appellant and rejected the same without reason, advancing a speculative theory, which was neither raised in evidence, nor canvassed by the parties;
- viii. The court erred in finding that Judith Mukui Mugo (PW1) was standing off the road, when the evidence on record clearly showed that she was crossing the road at the time of the accident;

ix. The court did not consider the submissions tendered by the appellant;

x. The appellant's conviction was based on speculation and conjecture rather than the actual evidence on record;

xi. The court did not direct itself to the burden and standard of proof in criminal cases and erred in law in shifting the burden to the appellant;

xii. The court erred in law in not considering that Judith Mukui Mugo (PW1) equally had a duty in law to observe due care in relation to other users of the road; and

xiii. The evidence of the appellant showed that the accident was caused by the negligence of Judith Mukui Mugo, yet the court made no finding on the twin issues of causation and blameworthiness.

4. The appeal proceeded by way of filing of written submissions. The appellant's Counsel K'Bahati & Co. Advocates filed their submissions on 4<sup>th</sup> November, 2019. The said Counsel relied on the decision in **Republic vs Wallale** [1958] EA 582 to show that a conviction for driving without due care and attention cannot be founded on the mere fact of a collision but must be made on a finding of fact that the driver charged with the offence was guilty of some act or omission which was negligent and which was a departure from the standard of driving expected of a reasonably prudent driver.

5. Counsel for the appellant also relied on the case of **Jesanni v Republic** [1969] EA 600 to demonstrate that a conviction may not be based merely on the fact of a collision.

6. He cited the case of **G.M. Daya v Republic** [1964] E.A 529 as well where the court held that a person cannot be convicted of careless driving when the finding is based solely on opinion evidence of his speed.

7. In making reference to the evidence of the complainant who testified as PW1, the appellant's Counsel stated that she did not see the vehicle or know what hit her. As such, she did not tender evidence to prove that the appellant was guilty of any act or omission which was either negligent or a departure from the standard of a reasonably prudent driver.

8. It was argued that the evidence by prosecution witnesses was full of contradictions and discrepancies such as by PW1 saying that she was hit while standing on the roadside waiting to cross the road and then saying that she was standing on the pavement. It was further stated that PW1 said she was not crossing the road but the particulars of the charge were that she was crossing the road from the left to the right.

9. The appellant's Counsel submitted that the evidence of PW1 was contradicted by that of PW3 and PW5. He stated that PW3 said he saw a woman lying on the inner lane on the road. PW5 on the other hand stated that the pedestrian was crossing the road from the left to right. He further said that PW1 told him she was crossing the road when the vehicle hit her.

10. It was therefore the appellant's Counsel's view that due to the contradictions there was doubt as to whether PW1 was hit while on the pavement or while crossing the road. He contended that the doubt was never resolved by the Trial Court, thus leading to a reasonable doubt being cast on the prosecution's case. The appellant's Counsel further submitted that the prosecution failed to prove any negligent act or omission on the part of the appellant, as it did not show how the appellant drove without due care and attention.

11. The appellant's Counsel was of the view that the Trial Magistrate convicted the appellant based on a theory that was not canvassed in evidence. This was given the evidence of the appellant who said that after the accident as he was alighting from his vehicle he saw street boys and fearing for his life, he drove off. The second error which was said to have been made by the Trial Court was when it noted that the appellant did not report the accident.

12. The appellant's Counsel concluded his submissions by stating that the Trial Court gravely erred in rejecting the appellant's defence as unbelievable without giving cogent reasons for so doing. He cited the case of **Joseph Nyaramba Karura V Republic** (1982-88) EA 555 where the court held that failure of a Trial Judge to consider the case for the defence constituted a breach of the rules of natural justice and was therefore sufficient to unsettle the Judgment. He prayed for the appeal to be allowed for failure by the prosecution to prove its case beyond reasonable doubt.

13. The Director of Public Prosecutions through Mr. Muthomi, Prosecution Counsel, filed its written submissions on 23<sup>rd</sup> October, 2019 to oppose the appeal. He submitted that PW1 in cross-examination indicated that she was knocked down when standing on a pavement. In re-examination she stated that she was hit while standing off the road.

14. It was pointed out that although the appellant stated that he stopped at a distance of 10 meters from the scene of accident, he drove off after noticing some street children, PW3 who arrived at the scene shortly thereafter did not indicate having seen any street children.

15. It was submitted that the claim by the appellant that he was driving at 30 km/ph was controverted by the evidence of his motor vehicle's side mirror coming off and the victim being smashed on the windscreen. It was pointed out that the foregoing was evidence of a person who was driving at a high speed.

16. As to what constitutes "fault" on the part of a driver who is charged with an offence of driving without due care and attention contrary to Section 49(1) of the Traffic Act, Mr. Muthomi relied on the case of **Orweyo Missiami v Republic** [1979] KLR 285, where the court outlined what constitutes fault.

17. The prosecution submitted that the contradictions, inconsistencies and/or discrepancies were minor and did not affect the veracity of the evidence adduced by the prosecution.

18. In concluding his submissions, Mr. Muthomi indicated that the analogy used by the Trial Magistrate to describe the conduct of the appellant was a matter of style in writing the Judgment and could not be used as the basis of setting aside the conviction. He prayed for the appeal to be dismissed.

#### **EVIDENCE ADDUCED BEFORE THE TRIAL COURT**

19. The evidence that was relied on to convict the appellant was adduced by PW1, the complainant. She was Judith Mukui Mugo. She testified that on 21<sup>st</sup> February, 2015 at 3:45a.m., she was within Mombasa town after alighting from a matatu. She stood after she passed the elephant tusks as she intended to cross over to the other side of the road. Her intention was to go to Jubilee House. It was her evidence that she was hit by a motor vehicle as she was standing by the roadside. She stated that she did not see the vehicle. She lost consciousness. She did not know the person who took her to Coast Province General Hospital (CPGH). She was discharged on the same day. She reported the accident to Central Police Station and she was issued with a P3 form. She sustained a fracture on her left leg and skull and other injuries on her head.

20. PW2 was Geoffrey Dzila, a Motor Vehicle Inspector based at Miritini. He stated that on 21<sup>st</sup> February, 2015 he inspected motor vehicle registration No. KBM 076L make Mitsubishi. He found that it had a shattered windscreen and that the side mirror was damaged. The other motor vehicle parts were serviceable. He produced the motor vehicle inspection report.

21. PW3 was Albert Abima Osor, a Tuk tuk driver. He recounted that on 21<sup>st</sup> February, 2015 at 3:15 a.m., he was driving motor vehicle registration No. KTWA 774R, a Tuk tuk, along Moi Avenue. On reaching Wimpy, he saw a woman lying on the road. He stopped his Tuk tuk and alighted. He saw that she was bleeding from the mouth. He touched her and realized she was still breathing. He called Tuk tuk drivers who helped him to put the woman aboard his Tuk tuk.

22. He testified that he called the police and informed them about the accident. He further stated that he saw a Mombasa County Patrol vehicle, stopped it and gave them a side mirror he had collected on the road for motor vehicle registration No. KBM 076L. He was advised to report the accident to Central Police Station. He did so and then took the woman (PW1) to CPGH. PW3 stated that he saw PW1 on the road 10 meters away as he was heading to Docks. He further stated that there were no other vehicles heading to Docks direction when he saw the woman lying on the road. He took a police officer to the scene of the accident.

23. PW4, Dr. Mirfit Shatry produced the P3 form showing the injuries sustained by PW1. He said that a CT scan showed a fracture of the temporal-parietal bone, cut wound in the tongue, she also had both medial/lateral malleola and subluxation of right ankle. The injuries were about a month old when the P3 form was filled.

24. PW5 was No. 77589 PC Peter Mwenda of Central Police Station, Traffic Section. He stated that on 22<sup>nd</sup> February, 2015 he was assigned a hit and run accident case involving motor vehicle registration No. KBM 076L and a female pedestrian. He testified that the accident was reported by a Tuk tuk driver who found the victim at the scene of the accident and took him (sic) to hospital. PW5 said that the driver who had caused the accident reported the matter later in the day. He detained the vehicle which had a dent on the right side. It had no side mirror. PW5 testified that the Tuk tuk driver had collected the side mirror from the scene of accident. He stated that the pedestrian (PW1) was crossing the road from the left to the right.

25. PW5 gave evidence that the left hand side mirror had the vehicle's registration No. KBM 076L. He further testified that PW1 reported that she was crossing the road from the left to the right and that the vehicle was heading from town to the Docks. He stated that the driver of the vehicle told him that he stopped after the accident but saw a group of street boys shouting, he feared for his life and drove off. He returned later in a Tuk tuk but did not find PW1. He then decided to go home.

26. In his defence, the appellant stated that on 21<sup>st</sup> February, 2015 at 3:45a.m., he was driving motor vehicle registration No. KBM 076L along Moi Avenue from Mombasa towards Dock direction. He was driving at 30 Km/ph in the inner lane. He further said that on reaching Mombasa Gas Welders, a pedestrian suddenly rushed into the lane and hit herself on the left hand side mirror. She was then thrown on the windscreen. He further said that the pedestrian (PW1) entered the road without due care and attention and did not heed to the hooting of his motor vehicle. He claimed he applied brakes, swerved to the right side and hooted while still in the inner lane.

27. The appellant in his defence also said that he stopped 10 meters from the scene of the accident. He further stated that he alighted from the vehicle, saw street boys and fearing for his life he drove off. He returned to the scene aboard a Tuk tuk but found PW1 had been taken to hospital. He said he reported to Central Police Station at 9:00a.m. In his view, he drove his vehicle carefully and with due attention to other road users.

#### **ANALYSIS AND DETERMINATION**

28. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced in the lower court and draw its own conclusion while bearing in mind that it never had the opportunity to see or hear the witnesses testify, see **Okeno vs Republic** [1972] EA 32.

29. The issues for determination are:-

**i. If the appellant drove without due care and attention; and**

**ii. If the contradictions and/or discrepancies on record should be resolved in favour of the appellant; and**

**iii. If the prosecution proved its case beyond reasonable doubt.**

**If the appellant drove without due care and attention.**

30. In order for this court to reach a determination on if the appellant caused the accident, the court has to consider if fault on the part of the appellant was established. In *Orwenyo Missiani v R (1979) EA 289* the then Court of Appeal cited the case of *R v Gosney* [1971] All ER 220 where it was held 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 of Appeal, 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 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 is a momentary lapse, even though normally no danger would have arisen from it, is sufficient.**

31. There were no eye witnesses to the accident. The only evidence available is that of PW1 as against the appellant’s version of how the accident happened. An analysis of the evidence of PW1 and PW2 leads this court to believe the evidence adduced by the two witnesses. With regard to PW1, this court does not doubt that she was standing by the roadside on the left side of the road. She further said that she was standing by the pavement. Mr. K’Bahati took issue with the said evidence and contended that the witness contradicted herself. I see no contradiction as it is common knowledge that pavements are generally speaking found by roadsides.

32. PW1 said in her evidence that she had alighted from a matatu and was waiting to cross the road from the left to the right side of the road towards Jubilee House. The appellant in his defence claimed that PW1 rushed onto the road and hit herself against his vehicle. It must be recalled that the accident happened in the early morning at 3:45a.m. Not many vehicles or pedestrians would be expected to be on the road at that time. The Tuk tuk driver, PW3, who took PW1 to hospital, said in his evidence that there were no other vehicles heading to Docks direction when he noticed the woman lying on the road. The foregoing evidence indicates that there were few vehicles on the road at the time the accident happened. In the absence of heavy traffic on the said road, PW1 could not have been rushing to cross the road as the appellant claimed.

33. PW3 collected the left hand side mirror for motor vehicle registration No. KBM 076L from the scene of the accident. He put PW1 who lay injured on the road aboard his Tuk tuk and drove to Central Police Station where he made a report. He then took her to CPGH where she was treated and discharged on the same day.

34. When the appellant’s motor vehicle was examined by PW2, it was established that the left hand side mirror was damaged and the windscreen was shattered. Inasmuch as the appellant said that he was driving at a speed of 30km/ph, that cannot be true. The impact of the collision tore off his left hand side mirror and shattered the windscreen of his motor vehicle. The said evidence is not indicative of the appellant having driven his car at 30km/ph. The degree of injuries sustained by PW1 as per the P3 form leads to the conclusion that the collision happened when the appellant was driving his car at a high speed without paying due regard to other road users.

**If the contradictions and/or discrepancies on record should be resolved in favour of the appellant.**

35. The appellant’s Counsel outlined a contradiction in the evidence of PW1 and PW5. This court’s evaluation of the evidence is that PW5 who was the Investigating Officer is the one who contradicted the evidence of PW1. In his evidence, he said that PW1 was crossing the road from left to right when the accident happened. This court notes that PW1 in her evidence stated that she was waiting to cross the road when she was hit by the appellant’s motor vehicle. Her evidence was not that she was crossing the road. This court further notes that PW5 was not an eyewitness to the accident, and therefore his version as to how the accident occurred must give way to the evidence of PW1, the complainant.

36. The discrepancy that was brought out by Counsel for the appellant was that the particulars of the charge were that PW1 was crossing the road when the accident occurred, yet PW1 in her evidence said that she was standing on the pavement. The Counsel for the appellant was correct in submitting that there was a variance between the said particulars and the evidence of PW1 in that aspect. This court has perused the submissions made by the appellant’s Counsel in the lower court, before the appellant was put on his defence. This Court notes that the discrepancy which has been raised now was also raised before the said court. The said discrepancy should have been addressed by the Trial Court. This court has considered if failure by the Trial Magistrate occasioned any prejudice on the appellant. This court’s finding is that it did not as the appellant was represented by an Advocate. Although the charge sheet was not amended, the defect in the particulars of the charge is curable under the provisions of Section 382 of the CPC. It is also the finding of this court that the error is not fatal to the prosecution’s case.

**If the prosecution proved its case beyond reasonable doubt.**

37. The appellant’s Counsel contended that the appellant’s defence was not considered. In the Judgment by the Trial Magistrate, she did consider the defence which was raised by the appellant but found it to be unbelievable. She also found that if the complainant had thrown herself at the appellant’s vehicle, the motor vehicle’s side mirror would not have come off.

38. This court has borne in mind the defence raised by the appellant. As said, the evidence adduced indicates that the accident happened at 3:45a.m. As per the evidence of PW3, there were no vehicles heading to the direction of the Docks when he found PW1 lying on the road. Had the appellant driven with due care and attention, the accident would not have happened. The conduct of the appellant of leaving PW1 lying bleeding on the road after the accident leaves a lot to be desired. Although he said he feared being attacked by some street boys he saw

close the scene of the accident, PW3 made no mention of having seen the said boys nearby. Instead of going to report the accident to the police station, the appellant did not do so immediately after the accident. He said that after leaving the scene, he went back in a Tuk tuk but did not find the woman. He then went home instead of reporting to the Police that he had knocked someone down. He left the fate of PW1 in the hands of the gods, as the Trial Magistrate so ably put it.

39. This court finds no fault in the style used by the Trial Magistrate in expressing what befell PW1. She analyzed the evidence and arrived at a proper finding. Her style in writing the Judgment cannot be faulted.

40. PW1 was consistent in her evidence that she was standing on the pavement by the roadside when the accident happened. This court believes her evidence that she was not crossing the road as was alleged by the appellant in his defence or as stated in the particulars of the charge. This court therefore upholds the conviction against the appellant.

41. On the issue of sentence, the appellant was ordered to pay a fine of Kshs. 30,000/= or serve 6 months imprisonment. The sentence was neither harsh nor excessive. The same is hereby upheld. The upshot of the foregoing is that the appeal herein lacks merit. It is hereby dismissed in its entirety. The appellant has 14 days right of appeal.

**DELIVERED, DATED and SIGNED at MOMBASA on this 31<sup>st</sup> day of January, 2020.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Appellant present

Mr. Odera for the appellant

Ms. Mwangeka, Prosecution Counsel for the – DPP

Mr. Oliver Musundi- Court Assistant