



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 123 OF 2018

BETWEEN

JOHN AKAMA MACHUCHU.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. M. Nafula, SRM

dated 28th June 2018 at the Magistrates Court in Ogembo in Traffic Case No. 40 of 2017)

JUDGMENT

1. The appellant, **JOHN AKAMA MACHUCHU**, was charged with the following two counts as follows:

COUNT 1

Causing death by dangerous driving contrary to section 46 of the Traffic Act (Chapter 403 of the Laws of Kenya)

JOHN AKAMA MACHUCHU: On the 17th March 2017 at about 1800Hrs at Nyambunde River Bridge area along Itumbe Igare road in Sameta District within Kisii County being the driver of motor vehicle registration number KCG 545G Make Isuzu FSR did drive the said motor vehicle on the said public road in a manner which was dangerous to the public having regard to amount of traffic which was actually at that time or which might reasonably be expected to be on the road by overtaking motor cycle registration number KMCM 292N make TVS on Nyambunde river bridge and caused the death of one DINAH MORAA ORARE.

COUNT 2

Careless driving contrary to section 49(1)(a) of the Traffic Act (Chapter 403 of the Laws of Kenya)

JOHN AKAMA MACHUCHU: On the 17th March 2017 at about 1800Hrs at Nyambunde River Bridge area along Itumbe Igare road in Sameta District within Kisii County being the driver of motor vehicle registration number KCG 545G Make Isuzu FSR did drive the said motor vehicle on the said public road in a manner which was dangerous to the public having regard to amount of traffic which was actually at that time or which might reasonably be expected to be on the road by overtaking motor cycle registration number KMCM 292N make TVS on Nyambunde river bridge and as a result one Thadeus Nyaberi Bosire and Margret Kwamboka sustained serious injuries.

2. After a full trial, the appellant was convicted on both counts and sentenced to a fine of Kshs. 30,000/- in default 6 months' imprisonment on both counts. He now appeals against conviction and sentence based on the petition of appeal dated 27th November 2018. In summary, he had raised the following issues:

§ That the prosecution failed to prove the offence beyond reasonable doubt.

§ That the trial magistrate erred in law and in fact in convicting and sentencing him based on a defective charge.

§ That the trial magistrate failed to consider that the motorcyclist did not have a driving licence to ride on a public road.

§ That a material witness, Margaret Kwamboka, was not called to testify.

3. The respondent opposed the appeal and supported the conviction and sentence. Counsel for the respondent submitted that the prosecution proved all the elements of the offence beyond reasonable doubt.

4. Before I proceed to consider the grounds of appeal, I remind myself the duty of the first appellate court. It is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction. I must bear in mind that I neither heard or saw the witnesses testify (see *Okeno v Republic* [1972]EA 32). In dealing with this task I shall outline the evidence before the trial court.

5. Thadeus Bosire (PW 1) testified that he was the owner of motor cycle registration number KMCM 292N make TVS Star. On 17th March 2017, he gave two women a lift and when he got to Nyambune River bridge, a vehicle came from behind and knocked them causing the death of one pillion passenger, injured another pillion passenger and also injured him on the head and chest. In cross-examination he admitted that he did not have a driving licence. He also told the court that the motorcycle fell on the left side of the road and the vehicle did not stop. He was examined by Agnes Oirere, a Clinical Officer at Gucha Hospital, who recorded that PW 1 had suffered head wounds, injury to the chest leading to tenderness and bruises on both knees. The P3 form was produced by Peter Ongonga (PW 6).

6. Evans Mosei Moranga (PW 2) testified that on 17th March 2017 he was informed that his sister in law, Dinah Moraa Orare, had died in a traffic accident. He identified her body before the post mortem was done on 30th March 2017 at Lenme Hospital Mortuary by Dr Peter Momanyi (PW 4). PW 4 recorded that the deceased's head was crushed and he concluded that she died as a result of a serious head injury. He also produced the P3 form for Margaret Kwamboka who was involved in the accident and who suffered chest and abdominal injuries which he classified as grievous harm. In cross-examination, PW 4 denied that he treated the said Margaret Kwamboka but he stated that he had her seen her medical records.

7. Simon Macharia Ngugi (PW 3), a motor vehicle inspector, produced the motor vehicle inspection report prepared by another inspector Thomas Chigere who inspected motor vehicle KCG 545G on 29th April 2017. According to the inspection report the vehicle did not have a pre-accident report.

8. The investigating officer, PC Alex Alusa of Ogembo Police Station, testified that on 17th March 2018 at about 6.00pm, the accident was made at the police station. He proceeded, with other officers, to the scene where he found the deceased body lying on the road. He prepared the sketch plan and noted that the accident involved motor vehicle registration number KCG 545G Isuzu lorry belonging to Itumbe Tea Factory and motorbike registration number KMCA 292N. He told the court that the lorry was overtaking the motorcycle when it hit the deceased who was on the motorcycle on the rear part. He noted that the rider was carrying two pillion passengers. He also observed that the accident was at a bridge with a continuous yellow line.

9. In his sworn defence, the appellant denied that he caused the accident. He testified that he was driving the lorry from Itumbe Tea Factory and that he did not overtake any motorcycle at the sharp corner at Nyambunde. He recalled that he overtook 3 other motorcycles after checking the side mirror. He told the court that he was not charged with failing to report the accident as police came to the factory from where he was requested to record a statement.

10. The fundamental issue in this case is whether the prosecution proved the case beyond reasonable doubt. As regards Count 1, **section 46** of the *Traffic Act* provides as follows;

46. 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 ... [Emphasis mine]

11. I have no difficulty finding that Count 1 was proved by the prosecution. PW 1 testified that he was hit from the rear, a fact confirmed by PW 5 and the sketch plan which shows that the motor cycle was hit from the rear. Further, the accident took place near a bridge along the continuous yellow line which does not permit overtaking. The fact that the motorcycle was hit from behind also means that the appellant was driving recklessly by not only overtaking near a bridge in an area that did not permit overtaking but failed to exercise reasonable care by failing to see a motorbike rider in front of him. Finally, the prosecution proved through the evidence of PW 1, PW 2 and PW 3 that the deceased died and died as a result of injuries following the accident.

12. Mr Ondari, counsel for the appellant, contended that the trial magistrate failed to take into account the fact admitted by PW 1 that he did not have a driving licence and hence was not permitted to be on the road. On this issue, I find that the definition of the offence does not turn on the whether the road user is permitted or authorised to be on the road. The purpose of the offence is to protect members of the public hence the use of the phrase, "*dangerous to the public.*" In this case, the motorcycle rider falls within the definition of the public who stands to be protected from reckless driving. Further, the fact that there is an unauthorized person on the road does not relieve the driver of the duty to exercise care and diligence in driving.

13. Count 2 related to the offence of careless driving. **Section 49** of the *Traffic Act* provides in part as follows:

49. (1) Any persons who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons, using the road shall be guilty of an offence ...

14. In **Dickson Muchino Mahero v Republic** NRB CA Crim. App. No. 52 of 2002 [2002] eKLR the Court of Appeal considered the relationship between the offence of causing death by dangerous driving under **section 46** of the **Traffic Act** and that of careless driving under **section 49** as follows;

It is our view that it is by sheer coincidence that the particulars of any charge under section 46, are offences in themselves. Causing death is a distinct offence from dangerous or careless driving or obstruction. The death arising from the manner of driving is merely an aggravating factor as in the case of violence under Sections 296(2) and 297(2) of the Penal Code as will entitle the court to impose a stiffer penalty.

15. As I have already found the appellant was driving without due care and attention by overtaking the motor cycle at a bridge where overtaking was not permitted while failing to exercise due care and attention in relation to the motorcycle that was ahead of him. The injury of the pillion passengers is in my view evidence that he committed the offence as alleged.

16. Mr Ondari challenged the conviction on the basis that the second pillion passenger was not called as a witness hence the offence was not proved. A reading of **section 49(1)** of the **Traffic Act** does not include injury of a person as an essential element of the offence thus even if the prosecution did not prove that Margaret Kwamboka was not injured the charge would not fail. In any case, there was sufficient evidence that PW 1 was indeed injured as a result of the accident. At the end of the day, the appellant clearly understood the elements of the offence facing him and the facts that emerged from the trial.

17. In submissions before the subordinate court, Mr Ondari cited the case of **Mwaniki v Republic** [2001] EA 158 where the Court of Appeal stated as follows;

Where two or more offences were charged in the alternative in one count, the charge was bad for duplicity and a substantial defect was created that must be assumed to be embarrassing or prejudicial to an accused as he would not know what he was charged for and if convicted, of what he was convicted.

18. Counsel was of the view that by naming two injured person in the same count, it was bad for duplicity. In **Dickson Muchino Mahero v Republic (Supra)**, the Court of Appeal while commenting on **Mwaniki v Republic (Supra)** noted that:

We must confess that upon reading the judgment of the Court in David Ngugi Mwaniki, we could not help thinking that the Court expressed itself too broadly, particularly considering the fact that it was dealing with an offence under section 46 of the Traffic Act ...

The Court then went on to hold that the key consideration was whether the charge as framed gave the accused all the necessary information as required under **section 134** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** and whether indeed the accused had proper notice of the offence and could indeed defend himself. In my view and I hold, the offence of careless driving was properly disclosed in the manner Count 2 was framed.

19. Having reached the aforesaid conclusion, I also find and hold the failure by the prosecution to call Margaret Kwamboka as a witness would neither add not subtract to the proof of the offence and was accordingly not fatal to the prosecution case.

20. I do not find any merit in the appeal which I now dismiss.

DATED and DELIVERED at KISII on this 28th day of February 2019.

D.S. MAJANJA

JUDGE

Mr Ondari, Advocate for the appellant.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.