



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.168 OF 2017**

**PETER MOGAKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal arising out of the conviction and sentence of Hon. B. M. Nzakyo SRM*

*delivered on 22<sup>nd</sup> November 2017 in Nairobi CM Tr. Case No. 25472 of 2016)*

**JUDGMENT**

The Appellant, Peter Mogaka was charged with the offence of **causing death by dangerous driving** contrary to Section 46 of the Traffic Act. The particulars of the offence were that on 24<sup>th</sup> day of September 2016 at around 03.30 hours along Uhuru Highway - Haile Selassie roundabout in Nairobi within Nairobi County, the Appellant being the driver of motor vehicle Registration No.KCD 875S Toyota Fielder, drove the said motor vehicle on the said road recklessly or at a speed or in a manner which was dangerous to the public having regard to all circumstances of the case including the nature, the condition and use of the road at the time, thus failing to give way when entering the roundabout and caused an accident to vehicle Registration No.KBM 868K Honda Aria driven by one Hamid Ismael Athman who sustained serious injuries and succumbed to the same on 17<sup>th</sup> October 2016 at Mater Hospital.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to pay a fine of Ksh.300,000/-. In default of the same, the Appellant was to serve a custodial sentence of three (3) years. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition for appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for failing to critically evaluate the evidence adduced by the prosecution. He was aggrieved that the trial court based its decision on hearsay and uncorroborated evidence. He was further aggrieved that the trial magistrate relied on submissions filed by the advocate watching brief for the complainant. He was of the view that the element of negligence had not been established by the prosecution. He took issue with the trial court's finding asserting that it was based on secondary evidence. He was aggrieved that the trial court failed to conduct proceedings in open court hence infringing on his constitutional rights. He faulted the trial court for convicting him on the basis of a defective charge sheet. He was of the view that the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submission made by Mr. Nyangito for the Appellant and by Mr. Momanyi for the State. Mr.Nyangito submitted that the prosecution did not present sufficient evidence to warrant a conviction. He stated that there were no pre-accident defects with respect to the Appellant's motor vehicle. He averred that the police failed to properly investigate the accident. They failed to take photographs of the scene. They did not provide sketch drawings to aid the trial court in determining the culpable party with regard to the accident. They also failed to avail a police abstract. He pointed out that there was no evidence from any eye witness. It was his view that the prosecution failed to prove the case against the Appellant to the required standard of proof beyond any reasonable doubt. He further submitted that the sentence meted by the trial court was harsh in the circumstances. In the premises, he urged the court to allow the Appellant's appeal.

Mr. Momanyi for the State opposed the appeal. He made oral submissions to the effect that the prosecution had discharged its burden of proof to the required standard beyond any reasonable doubt. He asserted that the deceased had a right of way at the roundabout. The Appellant failed to observe that right. He averred that the prosecution witnesses testified to that effect. He submitted that the issue of speed was a non-starter. The Appellant did not have right of way at the roundabout. It was his view that the sentence meted out by the trial court was lenient. The same ought not to be disturbed. He therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Festus Mureje was a motor vehicle inspector. He adduced in evidence

two reports with respect to the condition of the two motor vehicles involved in the accident herein. He stated that both motor vehicles had no pre-accident defects. PW2, Ahmed Ali, is the deceased's uncle. He did not witness the accident. He identified the deceased's body at Mater Hospital on 17<sup>th</sup> October 2016. PW3, Cpl Hassan Noor was on duty with his colleague PC Maina at Central Police Station on 24<sup>th</sup> September 2016. At about 3.00 a.m., they received a report regarding an accident at the Haile Sellasie roundabout. They went to the scene. The accident involved two motor vehicles Registration Numbers KBM 868K driven by the deceased, and KCD 875S driven by the Appellant.

The deceased's car was being driven from Westlands general direction to Embakasi. The Appellant's motor vehicle was being driven from the City Centre direction through Haile Selassie Avenue. The Appellant failed to give way to the deceased's vehicle which was already in the roundabout. The two vehicles collided. As a result of the impact, the deceased's motor vehicle was thrown out of the road and fell into a ditch. The deceased person was thrown out of the car. He lay on the ground unconscious. The Appellant stated that he was also in pain. PW3 requested for an ambulance. The two drivers were rushed to the hospital. The deceased however succumbed to his injuries and died.

From his assessment, PW3 stated that the Appellant must have been driving at a very high speed. This was because the distance from the point of impact up to where the deceased's car landed was about four lanes apart. PW3 blamed the Appellant for failing to give way to the deceased's vehicle. He stated that he came to that conclusion based on the positions he found the two motor vehicles. PW4 was the investigating officer in the present appeal. He stated that he decided to charge the Appellant herein since he was responsible for the accident. He failed to give way to the deceased's vehicle which had a right of way at the roundabout. He stated that he did not take photographs of the motor vehicles. By consent of the parties the deceased's post-mortem report was adduced in evidence.

When the Appellant was put to his defence, he stated that he worked as a taxi driver at Kencom Area. On the material night, he was driving to Upper Hill area. He was driving motor vehicle Registration No.KCD 875S. He was driving on Haile Selassie Avenue. As he was approaching Uhuru Highway - Haile Selassie Avenue roundabout, he saw a vehicle approaching the roundabout from Westlands direction. The motor vehicle was being driven at a very high speed. He stopped at the roundabout to give way to the said motor vehicle. The said vehicle hit his car on the front bumper and windscreen. His car was damaged. He was also injured on his left arm. He was taken to Kenyatta National Hospital for treatment.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.*

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act** to the required standard of proof beyond any reasonable doubt.

From the evidence adduced by the prosecution witnesses, it was established to the required standard of proof beyond any reasonable doubt that it was the Appellant who was driving motor vehicle Registration No.KCD 875S when it collided with the deceased's motor vehicle, causing him to sustain fatal injuries. The Appellant admitted as such when he testified in his defence. The post-mortem report adduced in evidence confirmed that the deceased's cause of death was fatal injuries sustained due to the accident. The issue for determination by this court is whether the prosecution established to the required standard of proof that the Appellant drove the said motor vehicle in a dangerous manner. According to **Section 46** of the **Traffic Act**, a driver is said to have caused death by dangerous driving when he drives recklessly or at a speed or in a manner which is 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”.*

In **Gabriel Wambua Kitili -vs- Republic [2006] eKLR**, Makhandia J (as he then was) held that in such cases the onus was on the prosecution to establish that it was the accused's dangerous driving that caused the accident that resulted in the death of the deceased. In the present appeal, it was the prosecution's case that the Appellant failed to give way to the deceased's motor vehicle at the roundabout. Consequently the two vehicles collided. As a result of the impact the deceased's motor vehicle was thrown out of the road and fell into a ditch. The deceased was thrown out of the car and sustained fatal injuries.

PW3 visited the scene of the accident. He stated that the deceased's motor vehicle had right of way at the roundabout. The deceased's car had already negotiated the roundabout hence the Appellant ought to have stopped and let the deceased's motor vehicle pass. He blamed the Appellant for failing to give way to the deceased's vehicle. He added that from his assessment, the Appellant must have been driving at a very high speed. The distance from the point of impact up to where the deceased's car landed was about four lanes apart. He stated that he came to that conclusion based on the positions he found the two motor vehicles. The Appellant on the other hand contends that he stopped his motor vehicle to give way to the deceased's car after he saw it approaching at a high speed.

The Court of Appeal observed as follows in the case of **Orweryo Missiani -vs- Republic [1979] KLR 285**

*“As regards the first question, it is relevant to consider the degree of blameworthiness on 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 [1971] 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 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 be a momentary lapse, even though normally no danger would have arisen from it, is sufficient.”***

This court has no doubt at all in the circumstances of this case that the Appellant was reckless. Even in the absence of a sketch map, the Appellant stated that he saw the deceased’s motor vehicle approach the roundabout. This was before he got to the roundabout himself. He stated that he stopped to give way but the deceased person’s motor vehicle hit him. This shows that the evidence given by PW3 was accurate. PW3 stated that the deceased’s motor vehicle had already negotiated the roundabout when the two vehicles collided. It therefore follows that since the deceased’s vehicle was already inside the roundabout, he had the right of way. For the two vehicles to collide, it meant that the Appellant did not stop his car in good time so as to give way to the deceased’s motor vehicle. He either failed to stop his car or stopped it when it was too late. The Appellant was reckless since he failed to look out for other motorists before entering the roundabout. He failed to give way to the deceased’s motor vehicle thereby causing the two vehicles to collide. The deceased person sustained fatal injuries due to the accident.

This court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the manner in which the Appellant drove his motor vehicle was reckless and dangerous that it established the essential ingredient of dangerous driving under **Section 46** of the **Traffic Act**. The Appellant’s appeal against conviction therefore fails. It is dismissed.

The Appellant’s appeal against sentence is similarly dismissed. The Appellant was sentenced to pay a fine of Ksh.300,000/- or serve a custodial sentence of three (3) years in default of the same. The sentence is legal. This court is of the view that the same is neither harsh or excessive in the circumstances. The upshot of the above reasons is that the conviction and sentence of the trial court is upheld. It is so ordered.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MARCH 2019**

**L. KIMARU**

**JUDGE**