REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 153 OF 2018

STANLEY IBIIRI MURIIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

1. The appellant Stanley Ibiiri Muriira appealed against a judgement in the Principal Magistrates court at Tigania Traffic Case Number 68 of 2013 where he was convicted for the offence of causing Death by Dangerous Driving contrary to Section 46 of the Traffic Act on the first count, driving contrary to section 49 (i) of the Traffic Act on the second and on the third count similar to the second save that the injuries are stated to have been inflicted upon Ambrosina Ndume. The application was on the grounds that;

i. The learned trial magistrate erred in law and in fact by meting out a harsh and excessive sentence against the appellant without the option of a fine.

ii. The learned trial magistrate erred in law and in fact in failing to find that the prosecution did not prove their case beyond reasonable doubt.

iii. The learned trial magistrate erred in law and in fact by totally shifting the blame of the accident solely to the appellant.

2. By supplementary petition of appeal dated 19th December 2018 the Appellant added a further 2 grounds to his grounds of appeal by adding the following grounds:-

iv. That the trial was annulity for failure by the magistrate to comply with section 200(3) of the Criminal Procedure Code Cap 75 Laws of Kenya.

v. That the learned trial magistrate erred in law and in fact by failing to recall PW1 for cross examination after being stood down for purposes of cross examination thereby greatly prejudicing the appellant during trial.

3. **Appellants Case**

The learned counsel for the appellant submitted that as per the record of appeal, when P. M. Wechuli and Sogomo G S.R.M took over the matter, no directions were taken under Section 200 (3) of the Criminal Procedure Code that provides;

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."

No directions were taken nor was the accused informed of his right to recall PW1 who had already testified which is fatal. That compliance with the above section is mandatory as the succeeding Judge or magistrate must inform the accused person directly and personally of his right to recall a witness or witnesses and the accused person must personally respond to the same accordingly. The appellant in support relied on **Peter Hinga Ngatho vs Republic [2015] eKLR** and **David Kimani Njuguna vs. Republic [2015] eKLR**

Furthermore, the prosecution sought leave to add two counts to the charge sheet which was allowed but PW1 was not recalled to testify yet the second count involved him. It was also argued that the blame was solely shifted on the appellant. That from the evidence adduced, it is clear that both the driver of the motor vehicle and that of the motor cycle were moving in the same direction. The motor cycle was ahead of

the vehicle and the rider with his passengers were hit from behind. That even though they were both on the wrong side of the road, the driver of the motor vehicle must have moved to the right lane with the intent to overtake when suddenly the rider of the motor cycle moved to the right lane while branching and with no indication form his part causing the appellant to apply emergency brakes which did not work in his favor.

The appellant was sentenced to serve imprisonment for a period of five years in count 1 and two years in count 2 and 3 however, both sentences were to run concurrently. It was the appellants claim that the sentence was harsh and excessive as there was no element of intoxication or a record of bad driving nor reckless driving on the part on the appellant. In support they quoted the cases of **Gilbert Kiptum Ngetich vs. Republic [2015] eKLR** and **Amos Mwengea Mutua vs. Republic [2015] eKLR.**

4. **Respondents Case**

The respondent on the other hand maintained that the appellant was rightfully charged as there was no doubt as to his involvement in the accident. That a keen reading of section 46 of the Traffic Act reveals that the act does not define the term dangerous driving. The provision does however encompass the element constituting the offence. In this case the prosecution adduced evidence in court that was able to demonstrate and fulfill all the conditions provided by the Act to warrant the appellant's conviction.

On sentencing the respondents argued that time and again the superior court records found that they cannot interfere with the exercise of discretion by the trial magistrate's court when sentencing the appellant. In **Bernard Kimani Gacheru vs Republic Criminal Appeal No. 188 of 2000**where it was held that

> **"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."**

On the issue of compliance with Section 200 of the Criminal Procedure Code the respondents argued that the appellant has raised this issue through his supplementary record of appeal and it is their view that failure to comply with the section does not render criminal proceedings a nullity.

The role of this Court as the first appellate Court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Moses vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the record is in compliance with the law and that the ingredients of the offences are proved.

5. I have carefully reevaluated the evidence adduce before the trial court, considered the grounds of appeal presented by the appellant and the submissions made on behalf of the appellant and the state. The issues for determination by this court is:-

> **a) Whether the appellants appeal has merit warranting the setting aside of the judgement of the learned trial magistrate delivered on 9th November 2018 and quashing the conviction and sentence thereof.**

6. The brief history of this matter is that the appellant was initially charged with the offence of causing death by dangerous driving and arraigned in court on 19th July 2013. The 1st prosecution witnessed testified before Honourable Gichimu JW acting PM on 23rd June 2014. On 6th January 2016 Honourable Wechuli RM mentioned the matter in the presence of the prosecuting counsel and Mr Mbaabu Advocate for the Appellant. It was indicated that the matter was supposed to be in court no. 1 but it was agreed that it could proceed in Honourable Wechuli's court save that it was to start de novo. The prosecuting counsel confirmed that PW1 could be recalled for cross-examination having been stood down. The reason why PW1 was stood down was because the defence counsel had just been supplied with the Witness' statements but had not been supplied with documentary exhibits. On 30th May 2016 Honourable Sogomo SRM took over the proceedings and ordered that they be typed. This matter did not proceed to hearing until on 29th December 2019 when the charge sheet was amended and two additional counts added to the charge against the appellant. The amended charge was read to the appellant and he pleaded not guilty. At this point Mr Laaria Advocate came on record for the appellant on 15th May 2015. PW2 testified on 31st August 2018 and he was cross-examined by Ms Muna advocate who was holding brief for Mr Laaria. On 18th September 2018 PW3 and PW4 testified but it appears that the accused was not represented as the coram does not show that defendant counsel was on record on that material day. The trial court does not also seem to have inquired from the appellant where his advocate was and whether he would proceed in person or wait for his advocate. PW3 and 4 were cross-examined by the accused person. PW5 testified on 16th October 2018 and it is not shown that he was cross-examined by the appellant or his advocate. On the same day the prosecution closed their case, the appellant was placed on his defence and he gave a sworn statement in his defence. Although he had initially indicated that he had one witness he decided to dispense with the testimony of that witness.

7. Based on the evidence on record of the prosecution and the defence, the trial magistrate found that from the evidence of the investigating officer exhibited in rough and fair sketch it is the appellants vehicle that veered off its lane and crushed into the rear of the 2nd Complainants motorcycle. The appellant was convicted and sentenced as shown in the records of Appeal.

8. On the point of law of whether failure to comply with section 200 if the Criminal Procedure Code renders the trial a nullity? Section 200

of the Criminal Procedure Code deals with instances where a criminal trial is handled by more than one magistrate. For ease of reference the said provision states as follows: -

> **'(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –**
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> **(a) Deliver a judgment that has been written and signed but not delivered by his predecessor; or**
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> **(b) Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummons the witnesses and recommence the trial.**
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> **(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercise that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.**
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> **(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right**
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> **(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."**

9. Directions having been taken that the trial was to start de novo or that PW1 who had testified was to be recalled for crossexamination by the appellants counsel it was incumbent upon the succeeding magistrate to ensure that these directions were complied with. Failure to recall PW1particularly when the charge sheet had been amended and additional counts added against the appellant it was fatal for the trial magistrate to rely on the untested evidence of PW1to convict the appellant.

10. On the importance of compliance with the said procedural requirement, in the case of **Office of Director of Public Prosecutions vs. Peter Onyango Odongo & 2 others High Court at Siaya Constitutional and Judicial Review Division Petition No. 2 of 2015 (2015) eKLR** Makau J, rightly so expressed himself while considering whether Section 200 (3) of the Criminal Procedure Code was unconstitutional. The learned Judge delivered himself thus: -

> **"Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanor of the witnesses to enable Court make a just decision.**
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> **It should be noted Section 200 (3) of C. P. C. gives an accused person an opportunity to demand to have any witnesses recalled. Section makes it mandatory for succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross – examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross – examination or to give evidence as far as this section is concerned with but it is mandatory to explain the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.**
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> **Section 200 (3) of C. P. C. entrenches the accused rights to a fair trial as constituted under Article 50 (1) of the Constitution of Kenya 2010.**
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> **In the case of R V. Wellington Lusiri [2014] e KLR the Court emphasized the need for succeeding Magistrate to continue with the proceedings under Section 200 by informing the accused of his rights.**
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> **In my view Section 200 (3) of the Criminal Procedure Code protects the rights of the accused to a fair trial as guaranteed by the constitution under Article 50. (2) Of the constitution which state every accused person has the right to a fair trial, which includes other rights as set out thereunder. Section 200 (3) of CPC as couched or framed do not have any provision to protect the rights of the complainant. It is silent on the rights of the complainant.**
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> **The question therefore is do the silence on the rights of the complainant under Section 200 (3) CPC mean the complainant's rights are not protected? The succeeding Magistrate before determining the accused demand for retrial or recalling or re-summoning of any of the witnesses, in my view, as Section 200 (3) is not mandatory for the accused demand to be granted or to be allowed, the succeeding Magistrate is not supposed to deal with Section 200 (3) of CPC in an isolation of several articles of the constitution dealing with the Bill of rights as section 200 (3) of CPC is not exhaustive in itself. The succeeding Magistrate is supposed to be guided by Article 27 (1) of the constitution, which states every person is equal before the law and has rights to equal protection and equal benefit of the law. This means the protection to fair trial is automatically granted to both the complainant and the accused. This means as I understand the said article, before final order is made on the accused demand in terms of Section 200 (3) CPC the complainant should be afforded an opportunity to be heard on the application. A blatant granting of the application without hearing the complainant would in my view not only be against the rules of natural justice but would amount to a violation of the letter and the spirit of our constitution and would not be**

in the best interest of achieving a fair trial, If the complaint is completely overlooked on the issue.

In considering Section 200 (3) CPC as regards the information given to the accused, the same information should be extended to the complainant in equal measure, Article 159 (2) (a) (b) and (d) of the constitution deals with justice to all irrespective of status, justice not being delayed and being administered without undue regard to procedural technicalities. That the accused and the complainant should get justice without delay and should be administered without undue regard to procedural technicalities. That the accused and the complainant are entitled to justice without procedural technicalities and discrimination.

The court in determining an application under Section 200 (3) of CPC should comply with Article 28 of the constitution which provides every person has inherent dignity and the right to have that dignity respected and protected."

11. The learned Judge further rightly concluded **that '……Section 200 (3) of the Criminal Procedure Code was constitutional and valid as it protects the rights of an accused person to a fair trial in terms of Article 50 of the Constitution of Kenya, 2010……..'**

12. The appellant's right to a fair hearing under Article 50 of the Constitution was therefore infringed by the failure by the succeeding magistrate to fully comply with Section 200(3) of the Criminal Procedure Code. In essence all the subsequent proceedings were veiled with that unconstitutionality and cannot stand in law.

13. The maximum Penalty for the offences of causing death by dangerous driving under section 46 is imprisonment for a term not exceeding 10 years whereas the penalty for the offence of careless driving in the first instance the accused is liable to a term of imprisonment not exceeding 1 year or to a fine not exceeding Ksh. 100,000/= . the appellant was sentenced to serve 5 years imprisonment in the first count and 2 years imprisonment for the 2nd and 3rd count which were to run concurrently. The evidence upon which these sentence is based is obviously sketchy and fatally defective considering the views of the court stated above. It was not shown that the appellant was a repeat offender in respective to the 2nd and 3rd counts to justify the sentence of 2 years without an option of a fine when the law provides that in the 1st instance the penalty is not exceeding one year or to a fine of Ksh. 100,000/-.

14. This court finds that the appeal by the appellant has merit and is hereby allowed. The conviction in all the counts is quashed and the sentences set aside. The appellant shall be released forthwith unless otherwise detained.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 30TH DAY OF MAY 2019.

IN THE PRESENCE OF:-

CA:- Kinoti

Republic:-Ms Mbithe for state

Ms Muna Advocate for Appellant

Appellant:- Present in person

HON A. ONG'INJO

JUDGE

Ms Mbithe

I pray for copies of the judgement.

Order: The state/Respondent and the appellants counsel to be supplied with copies of judgment. 3/o0