REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 87 OF 2019

BETWEEN

CHARLES OMONDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the sentence in Traffic Case Number 270 OF 2017 in the Principal* Magistrate's Court at Webuye *by Hon. M.Munyekenye (PM) on 28.05.19)

JUDGMENT

The Trial

1. **CHARLES OMONDI** (***hereinafter referred to as the Appellant***) has filed this appeal against conviction and sentence for the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act (hereinafter referred to as ***the Act***). The brief particulars of the charge are that:-

> **On 12.04.17 at about 11.40 am at Seregea area along Turbo Soy murram road within Lugari sub county of Kakamega County being the driver of motor vehicle KBE 571L Toyota Saloon drove the said vehicle on a public road in a manner which dangerous to the public as a result of which he caused the death of ANDREW NYONGESA who was a pillion passenger on motor cycle KMCP 242Y TVS Star ridden from the opposite direction by GEOFFREY RUBANO.**

Prosecution case

2. The prosecution called four (4) witnesses in support of its case. **PW1 GEOFFREY RUBANO** a cyclist stated that he was riding motor cycle **KMCP 242Y** from Soi towards Kilimani direction carrying a 50 kg bag and a pillion passenger **ANDREW NYONGESA** (***hereinafter referred to as the deceased***). He stated that he was bypassing a lorry being driving from the opposite direction whine he heard a loud bang from the front as a result of which he lost consciousness. He stated that he came to later in hospital when he realized he had suffered serious injuries for which he was treated as an inpatient for one month and was informed that the pillion passenger had died. He blamed the collision on the driver of the vehicle that collided with the motor cycle for not keeping to his lane. **PW2 RAPHAEL WEKESA** the deceased's brother identified the deceased's body to the doctor that conducted a postmortem on 15th April, 2017. **PW3 PC GEOFFREY ARADO** the investigating officer visiting the scene of the accident and finding both the motor cycle and the vehicle at the scene drew rough and fair sketch plans **PEXH. 4 (a)** and **(b)** which showed that the point of impact was on the lawful lane of the motorcycle caused the Appellant to be charged. **PW4 DR. EDWARD VITEMBWA** produced PW1's P3 form as **PEXH. 1** and it shows that he suffered severe injuries which were classified as harm. He also produced the deceased's postmortem form as **PEXH. 2** which shows that he died of pulmonary arrest doe to injured liver as a result of a road traffic accident.

3. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. Appellant stated that he was giving way to a lorry that was being driven from behind when he collided with the oncoming motor cycle which he had not seen because the road was dusty.

4. The learned trial magistrate after considering the case in its totality rejected the defence, convicted the appellate and fined him Kshs. 200,000/- in default 12-months imprisonment

The appeal

5. Aggrieved by sentence, the appellant lodged the instant appeal on 02nd July, 2019. From the 8 grounds of appeal and written submissions filed on 02nd July, 2019, the appellant's singular ground states that the rider contributed to the accident for carrying a pillion passenger and a 50kg bag of cement, the deceased for riding on the motor cycle together with the luggage. He further states that the trial court relied on opinion evidence from the investigating officer and that the sentence was harsh.

6. When the appeal came up for hearing on 06th August,2019, Mr. Namatsi for the Appellant chose to wholly rely on the grounds of appeal and also on his written submissions in which he reiterated the grounds of appeal.

7. Mr. Akello, Learned Counsel for the state opposed the appeal and submitted that this is not a civil case where liability is apportioned and further that the sentence is fair in the circumstances of this case.

Analysis and determination

8. On first appeal, the high court is called upon to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

9. Evidence by the motor vehicle and the motor cycle were being driven from opposite directions is not controverted. There is further uncontroverted evidence that there was a lorry being driven on the lane of the vehicle.

10. The cyclist's evidence that he was on his lawful lane when the collision occurred has been corroborated by the investigating officer who visited the scene immediately after the accident and finding both the motor cycle and the vehicle at the scene drew rough and fair sketch plans **PEXH. 4 (a)** and **(b)** which showed that the point of impact was on the lawful lane of the motorcycle.

11. The Appellant indeed conceded that he had moved from his lawful lane to give way to a lorry that was allegedly being driven from behind and that he had collided with the motor cycle which he had not seen before due to the fact that the road was dusty suddenly when he collided with the oncoming motor cycle which he had not seen because the road was dusty.

12. From the foregoing, I find that there exists corroborated evidence that the Appellant drove on the lawful lane of the motor cycle thereby causing the accident.

13. The issue in question is whether the Appellant drove negligently**. This issue was addressed by the Court of Appeal in the case of** ***Atito vs Republic 1975 E.A 278*** where it held as follows:

> ***"To justify a conviction of causing death by dangerous driving there must be a situation which was dangerous, when viewed objectively, and also some fault on the part of the driver causing that situation"***
>
> ***……..And here the word fault is construed to mean a failure, a failure, a falling below the care and skill of a competent and experienced driver in relation to the manner of the driving and to the relevant circumstances of the case…".***

14. From the evidence on record, I am in agreement with the trial court that the Appellant swerved onto the lane of the motor cycle without ascertaining that it was safe to do so which brought up a situation which was dangerous and he was at fault. The Appellant's attempt to blame the cyclist and the pillion passenger who were on their lawful lane therefore fails.

15. The second issue is whether the sentence imposed on the Appellant is harsh. The principles of sentencing in relation to this offence were considered by the **Court of Appeal, Criminal division in Republic vs Guilfayie [1973] 2 All E R 844, Lawton L. J,** delivering the judgment of the court, said: ***"… there are many variations in penalties. Cases of this kind fall into two broad categories, those through inattention or misjudgment and secondly, those which has shown as selfish disregard for safety of other users of the road, with degree of recklessness. A sub-division of this category includes those caused by accused's consumption of alcohol or drugs".***

16. I have considered **KENNEDY MUSYOKI KITUKU V REPUBLIC [2009] eKLR** cited by the Appellant and is distinguishable from the case at hand for the reason that the dangerousness on the part of the Appellant's driving has been demonstrated. I am persuaded that the Appellant drove with a *selfish disregard for safety of other users of the road, with degree of recklessness* and was properly convicted.

17. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No.135 of 2016** (unreported) held at Page 25 of its judgment as follows:

> ***"As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle, ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000 this Court stated thus:***
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> ***"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 the 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. (See also Wanjema v. Republic [1971] E.A.493."

18. The offence of causing death attracts a maximum sentence of 10 years. By handing the Appellant a fine of Kshs. 200,000/- or 1 year imprisonment, the trial magistrate was in my humble view reasonable and fair. The sentence does therefore not meet the test of being harsh and excessive and there is no justification for this court to interfere with the trial court's discretion.

19. In the premises, I find no merit in this appeal. The same is dismissed. The conviction and sentence are upheld.

DELIVERED AND SIGNED AT BUNGOMA THIS *09th* DAY ON *August,* 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Brendah

Appellant - Present

For the Appellant - Mr. Namatsi

For the State - Mr. Akello