



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL APPEAL NO. 14 OF 2018**

**ROUBEN BARASA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From the original conviction and sentence in Traffic case No.124 of 2015 of the

Chief Magistrate's Court at Busia by Hon. M.A Nanzushi–Senior Resident Magistrate)

**JUDGMENT**

**1. Rouben Barasa**, the appellant herein, was convicted for the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act CAP.403 Laws of Kenya.

2. The particulars were that on the 1<sup>st</sup> January 2015 at about 7.20 p.m. at Nambale Magnate School area along Busia-Mumias road in Busia County, being the driver of motor vehicle registration number KAW 262 C Toyota saloon drove the said motor vehicle on the said road at a speed and in a manner which was dangerous to the public, and caused the death of a rider called **Jairos Shikuku Sikolia**.

3. The appellant was sentenced to pay a fine of Kshs. 40,000/= in default to serve twelve months' imprisonment. He appeals against both conviction and sentence.

4. The appellant was represented by Gabriel Fwaya esquire, learned counsel. He raised eight grounds of appeal that can be summarised as follows:

- a. The learned trial magistrate erred in law and in fact by convicting him on hearsay evidence.
- b. The learned trial magistrate erred in law and in fact by convicting him on insufficient evidence.
- c. The learned trial magistrate erred in law and in fact by disregarding the defence evidence.

5. The appeal was opposed by the state through Mr. Gacharia, learned counsel who contended that there was sufficient evidence that connected the appellant to the offence.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

7. Section 46 of the Traffic Act provides as follows:

**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 whether or not the requirements of section 50 have been satisfied as regards that offence and be liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by Part VIII of cancelling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or**

**obtaining a driving licence for a period of three years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later.**

In the instant case, the prosecution had the onus of proving beyond any reasonable doubt that the death was as a result of the manner in which the appellant drove his motor vehicle.

8. No eyewitnesses testified and so the learned trial magistrate relied on the evidence of P.C. Gwara, the investigating officer who was not called to testify. Given the explanation by the appellant of how the accident occurred, I find that his explanation was plausible and the court ought to have made a finding that the prosecution did not prove its case to the required standards. Instead, she proceeded as if the offence was an absolute one.

9. From the foregoing analysis of the evidence, I find that the appeal is merited. I quash the conviction and set aside the sentence imposed by the learned trial magistrate. The fine paid by the appellant to be refunded.

**DELIVERED and SIGNED at BUSIA this 18<sup>th</sup> Day of December, 2019.**

**KIARIE WAWERU KIARIE**

**JUDGE**