



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.27 OF 2018

*(An Appeal arising out of the conviction and sentence of Hon. E Riary – SRM delivered on 25<sup>th</sup> January 2016 in Nairobi CMC. TR. Case No.25175 of 2016)*

SAMUEL KURIA THIMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Samuel Kuria Thimba was charged with **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act**. The particulars of the offence were that on 3<sup>rd</sup> December 2016 at around 1700 hours along City Hall Highway in Nairobi within Nairobi County, the Appellant being the driver of motor vehicle registration number KCF 802 Q Isuzu Mini-Bus make 1/M/Bus did drive the said motor vehicle in a manner that was dangerous to the public, having due regard to the circumstances of the case including nature, condition and use of the road and the amount of traffic which was on the road or which was reasonably expected to be on the road, lost control of the said vehicle and hit a pedestrian namely Frankline Mugambi who died on the spot. The Appellant was also charged with the offence of **using un-insured motor vehicle** contrary to **Section 4** of the said **Act**. The particulars of the offence were that on the same day and in the same place, the Appellant did use the said vehicle on a public road without insurance against third party risks. He was in the alternative charged with the offence of **failing to carry or display certificate of insurance** contrary to **Section 9 (1)** of the **Insurance Act**. The particulars of the offence were that on the same day and in the same place, the Appellant did drive the said motor vehicle on a public road and failed to carry or display a certificate of insurance against third party risks. Lastly, the Appellant was charged with the offence of **driving a motor vehicle on a public road with some part equipment not maintained in safe condition** contrary to **Section 55** of the said **Traffic Act**. The particulars of the offence were that on the same day and in the same place, the Appellant drove the said vehicle on a public road while some parts and equipment thereof did not comply with the requirements in such a condition that the driving of the motor vehicle was not safe for road users or to persons travelling in the said motor vehicle.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of all the three (3) main offences. He was sentenced to pay a fine of Kshs.450,000 or serve four (4) years imprisonment in default of payment on the offence of **causing death by dangerous driving**. On the offence of **using un-insured motor vehicle**, the Appellant was sentenced to pay a fine of Kshs.5,000 or serve one (1) month imprisonment in default of payment and on the count of **driving a motor vehicle on a public road with some part equipment not maintained in safe condition**, he was sentenced to pay a fine of Kshs.50,000 or serve eight (8) months imprisonment in default of payment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for not failing to consider his defence. He was aggrieved that his conviction was based on the prosecution's evidence which was tainted with contradictions and inconsistencies. Lastly, the Appellant complained that the trial court failed to consider his mitigation of the sentence and thereby passed a harsh sentence in the circumstances. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentences imposed on him.

During the hearing of the appeal, the Appellant was represented by the Learned Counsel, Mr. Omigo while the Respondent was represented by the Learned State Counsel, Ms. Kimiri. Counsel for the Appellant submitted that there were material contradictions in the prosecution evidence regarding the direction in which the Appellant's motor vehicle was coming from. He pointed out that while PW3 stated that the motor vehicle was coming from the direction of Kenyatta International Conference Center (KICC), PC Robinson stated that the motor vehicle hit the deceased as the Appellant was reversing, and that the motor vehicle was being driven on the wrong side of the road. Counsel for the Appellant also submitted that the trial court failed to evaluate the evidence tendered basing on the conditions that prevailed at the scene at the time. He submitted that the scene was chaotic with an award ceremony taking place at KICC grounds with a huge rowdy crowd and many public service vehicles and therefore the accident was not caused due to the Appellant's negligence. Mr. Omigo contended that the Appellant was not liable for the fittings in the motor vehicle.

On the issue of sentence, learned counsel for the Appellant submitted that the trial court did not consider the Appellant's mitigation when he pleaded for leniency. He argued that the sentences were manifestly harsh considering that the Appellant had a good driving record. Relying on the decisions of this court in cases of Samuel Karanja Kimani –versus- Republic [2016] eKLR and Fredrick Odhiambo Oyugi – versus- Republic [2016] eKLR, he urged this court to quash the sentences of the trial court or in the alternative reduce them.

Ms. Kimiri for the State opposed the Appellant's appeal. She evaluated the evidence tendered during trial and supported the judgment of the trial court. She submitted that the prosecution's case was corroborated by the findings in the postmortem report tendered in evidence. The Learned State Counsel contended that regardless of the circumstances prevailing at the scene, the Appellant owed a duty of care on the road for the safety of other road users. On the offences of **using un-insured motor vehicle** and **driving a motor vehicle on a public road with some part equipment not maintained in safe condition** it was the Learned State Counsel's submission that although the Appellant did not own the motor vehicle he had the responsibility not to drive it when it did not conform to the requirements of law. Ms. Kimiri supported the sentences imposed by the trial court as being sufficient in the circumstances of the case. She submitted that the Appellant had not taken responsibility for his actions or shown any remorse to compel this court to interfere with the sentences imposed by the trial court. She therefore urged the court to disallow the Appellants' appeal.

The facts leading to the charges against the Appellant as presented by the prosecution are as follows. On 3<sup>rd</sup> December 2016, the late Frankline Mugambi (herein after called the *deceased*) was knocked down by a public service motor vehicle registration number KCF 802Q along City Hall Way in Nairobi. The Appellant was driving the vehicle at the time which was christened "*Catalyst*". On the material day, the vehicle had been presented as a participant in an award ceremony dubbed "**Nganya Awards**" at the Kenyatta International Conference Centre (KICC) grounds. PW3 Vivian Makena Gatobu and PW4 Mildred Karimi testified that on the said day, they left Kariakor Methodist Church at about 4.30 p.m together with the deceased who was their brother, Victor, their young brother and two of their friends. They boarded a vehicle from Kariakor to town. They escorted one of their friends to Railways Bus Station and parted ways with the other at Kencom House. They testified that they decided to take Victor for face painting at Uhuru Park and therefore walked there through City Hall highway. They walked on the sidewalk. They testified that when they passed the Supreme Court Building, the deceased crossed the road towards the side of City Hall. PW3 saw that there were many vehicles around. She testified that she saw a vehicle coming from behind them on the left hand side of the road from the direction of Kencom House heading towards the direction of KICC. She testified that she saw the said vehicle make a U-turn towards the direction it had come from. PW3 testified that the vehicle knocked down the deceased as it made the U-turn. She saw its rear wheels running over him. This evidence was confirmed by PW4. According to PW4, the vehicle came from the direction of Kencom House and that it was trying to '*align itself*' when its right hand side knocked the deceased down. On cross examination, PW3 explained that it was reversing when it knocked down the deceased.

A crowd gathered after the deceased was knocked down by the vehicle and the police used teargas to disperse them. PW3 and PW4 together with Victor went and waited outside the Supreme Court building for things to calm down before they could go back to look for the deceased. They got information that the deceased was taken to Kenyatta National Hospital. They took a taxi ride there. At the hospital, they made inquiries about the deceased but they did not find him. They contacted their parents to inform them about the incident and returned home. Their parents returned home that evening and informed them that the deceased had passed on. PW5 Mohammed Hassan Galgalo was standing outside City Hall when the accident occurred at around 5.00 p.m. He testified that he saw the vehicle called "**Catalyst**" being driven through the roundabout to KICC's entrance severally on the wrong lane. He testified that there were people hanging on its rooftop and its sides. His evidence was also that the vehicle was being driven in a "**bouncing motion**". PW5 testified that at one point the vehicle which was on the wrong side wanted to access KICC grounds. He testified that it made a U-turn. He heard people screaming. He went to where the screams were emanating from. He saw that a boy had been run down. He testified that the driver of the vehicle did not stop the vehicle to find out what had happened.

PW6 Dr. Timothy Onyuma, a pathologist based at Kenyatta National Hospital testified that he conducted a postmortem on the deceased on 6<sup>th</sup> December 2016. He testified that he examined the body of the deceased and found that he had sustained multiple injuries on the head, face, chest and abdomen. His evidence was that the cause of death was established to be multiple traumatic injuries secondary to a blunt force. PW6 filled his findings in a postmortem report which he produced into evidence as **Prosecution's Exhibit No.2**. The motor vehicle registration KCF 802 Q Isuzu Mini-Bus make 1/M/Bus was inspected by Mr. Chinagu at Central Police Station. He prepared and signed an inspection report in respect of the vehicle which was produced into evidence by PW1 Mr. Fredrick Omondi Owala as **Prosecution's Exhibit No.1**. In his report, Mr. Chinagu that the vehicle did not bear its Sacco name. It was also fitted with loud music systems, blinking lights, a modified exhaust pipe, wrong chevrons and modified rims. Consequently, he found it to be a non-compliant public service vehicle.

PW7 PC Robinson Nyauki was assigned to investigate the case. He testified that he reviewed the CCTV footage of the scene and saw that the vehicle was being "bang driven" when it knocked down the deceased who was a pedestrian. He testified that he observed from the CCTV footage that the vehicle knocked down the deceased as it was reversing. After concluding his investigations, PW7 formed the view that a case had been made against the Appellant and charged him with the present offences.

When the Appellant was put on his defence, he denied committing the offence. He confirmed that he attended the event at KICC and was driving the motor vehicle in question. He stated that the vehicle had been fielded to contest the competitions held on KICC grounds on that day. The Appellant testified that there were many vehicles parked at the venue playing loud music, matatus hooting and people hanging on the vehicles. The Appellant testified that while at the City Hall roundabout, the organizers of the event removed everyone from the vehicles leaving the drivers alone with the vehicles. He testified that the vehicles queued to enter KICC and when the gates were opened, people started hanging on the vehicles again. He testified that he managed to enter the KICC grounds. He testified that he was at the venue for about 20-30 minutes when police officers came looking for him. They told him that his vehicle had run over someone. The Appellant denied being involved in the said accident.

DW1 Bush Muvi Mwegea's evidence was that he attended the event that day. His evidence was that he was at the gate when the Appellant's vehicle entered KICC grounds. He testified that he saw a boy carrying a bag hanging on the vehicle as it entered the KICC. He testified that he saw the said boy falling off the vehicle and land on the grounds. His evidence was that a vehicle that was behind the Appellant's vehicle was the one that ran over the deceased.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial magistrate's court

before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (see Njoroge –vs- Republic [1987] KLR 19). The issue for determination by this court is whether the prosecution proved its case on the charges brought against the Appellant of **causing death by dangerous driving, using un-insured motor vehicle and driving a motor vehicle on a public road with some part equipment not maintained in safe condition** contrary to **Sections 46, 4 and 55** respectively of the **Traffic Act** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal presented by the Appellant and the submissions made on behalf of the Appellant and the State. The prosecution led evidence to show how the Appellant driving motor vehicle registration number KCF 802 Q Isuzu Mini-Bus make 1/M/Bus knocked down the deceased as he was crossing the road at City Hall Highway in Nairobi. The evidence of PW3 and PW4 was to the effect that the vehicle came from the direction of Kencom House and was heading towards the direction of KICC. PW3 testified that the vehicle hit the deceased after it made a U-turn. PW4's evidence was that the vehicle was trying to align itself and that it knocked the deceased down as it was being reversed. Both PW3 and PW4 saw the deceased being run over by the vehicle's rear wheels. PW5 was at the scene when the accident occurred. His evidence was that the vehicle was being driven on the wrong side of the road. He also stated that it was on a 'bouncing' motion. He testified that he saw the vehicle make a U turn and heard people screaming. PW5 testified that he went to find out what had happened and saw that a young boy had been knocked down. He testified that the Appellant did not stop to find out what had happened.

A postmortem of the deceased's body was conducted by PW6. A report on the same was produced into evidence as **prosecution's exhibit no. 2**. The findings of the report corroborated the evidence of PW3, PW4 and PW5. The deceased sustained multiple injuries on the head, face, chest and abdomen. The cause of death was established to be multiple traumatic injuries secondary to a blunt force. PW7, the investigating officer testified that he reviewed the CCTV footage of the accident and confirmed that the deceased who was a pedestrian at the time was knocked down by the vehicle as it was being reversed. He also testified that he observed from the CCTV footage that the vehicle was being "bang" driven. The Appellant did not dispute that he was driving the vehicle that day. His defence was that he was not involved in an accident that day. The evidence of DW1 was that the deceased had been hanging on the Appellant's vehicle when he fell down on the ground. He testified that the deceased was run over by a vehicle that was behind the Appellant's vehicle. This assertion was however not supported by evidence.

From the evidence adduced by the prosecution witnesses, this court is convinced that the deceased was hit by the Appellant's vehicle. The defence case was displaced by the evidence of PW7. The Appellant did not deny that he was driving the vehicle at the time. PW7 testified that the vehicle was being driven in a reckless manner. PW5's evidence was that it was being driven carelessly. The Appellant did not dispute this evidence. It is clear therefore that the vehicle was being driven recklessly in the circumstances especially since the scene was said to be chaotic according to the Appellant's submission. This court finds that the prosecution established, to the required standard of proof, that the Appellant committed the offence of **causing death by dangerous driving**. As regards the offence of **using un-insured motor vehicle**, the prosecution established its case to the required standard of proof. On the offence of **driving a motor vehicle on a public road with some part equipment not maintained in safe condition**, this court finds that the offence was established by the evidence of PW1. The inspection report tendered into evidence confirmed that the motor vehicle driven by the Appellant did not conform to the requirements of law. It did not bear its Sacco name, was fitted with loud music systems, blinking lights, a modified exhaust pipe, wrong chevrons and modified rims. According to the inspection report, the vehicle was "**a non-compliant public service vehicle**". This court agrees with the submission of the Learned State Counsel that although the Appellant did not own the vehicle, he had a responsibility not to drive the same when it did not comply with the law. The prosecution established the offence to the required standard of proof.

As regard sentence, this court is aware that it cannot interfere with the exercise of discretion by the trial magistrate's court when sentencing the Appellant. 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:*

*"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."*

In the present appeal, it was clear to the court that the sentence that was meted by the trial magistrate's court in respect of the 1<sup>st</sup> Count of **causing death by dangerous driving** was harsh and excessive. This court has previously noted that unless in exceptional circumstances, a driver does not set out to cause an accident which leads to death. While there may be an element of carelessness or recklessness, nevertheless, this does not imply that the driver of the motor vehicle set out to kill the deceased. There is an element of fate being at play. The Appellant convinced the court that he did not have the intention of causing the death of the deceased. He has learnt his lesson during trial and during the period that he has been in prison. In the premises therefore, this court sets aside the sentence that was imposed by the trial magistrate's court in respect of the 1<sup>st</sup> Count of **causing death by dangerous driving** and substitutes it by an appropriate sentence of this court. The Appellant is ordered to pay a fine of Kshs.300,000/- or in default he shall serve two (2) years imprisonment. The sentence shall take effect from the date the Appellant was convicted by the trial court. The other sentences imposed by the trial magistrate's court shall remain. This court sees no reason to interfere with the same. It is so ordered.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH 2018**

**L. KIMARU**

**JUDGE**