



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 30 OF 2018**

*(An Appeal arising out of the conviction and sentence of Hon. E. Rianyi – SRM delivered on 14<sup>th</sup> December 2017 in Nairobi CMC. Tr. Case No.6936 of 2017)*

**GERALD MWANIKI MAINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Gerald Mwaniki Maina 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> April 2017 at 2.30 a.m., along Northern Bypass at Githongoro area within Nairobi County, the Appellant, being the driver of motor vehicle registration KAU 320H make Honda drove the said motor vehicle on the said road at a speed and in a manner which was dangerous to other road users and caused the same to hit, from the rear, motor vehicle registration No.KBH 032D make Toyota Gaia as a result of which both motor vehicles were damaged and a passenger Henry Kimata Waruiru (hereinafter referred to as the deceased) suffered fatal injuries. 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 Kshs.350,000/- or in default he was to serve three (3) years imprisonment. The Appellant failed to pay the fine. He is serving the default sentence. He was aggrieved by the said conviction and sentence. He 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 was aggrieved that the trial magistrate had failed to consider the contradictions and inconsistencies apparent in the evidence adduced by the prosecution witnesses, including whether the subject motor vehicle had any pre-accident defects. The Appellant faulted the trial magistrate for failing to evaluate the evidence adduced by the prosecution in light of cogent defence offered by the Appellant. In his view, this failure caused miscarriage of justice. He was finally aggrieved that he had been convicted to a severe and harsh sentence without the trial court taking into consideration the fact that the Appellant was a first offender. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Kihoro for the Appellant and by Ms. Kimiri for the State. Whereas Mr. Kihoro submitted that the prosecution had failed to establish to the required standard of proof beyond any reasonable doubt, that the Appellant bore the blame for causing the death of the deceased, Ms. Kimiri for the State submitted that the prosecution had established its case to the required standard of the law. Both Mr. Kihoro and Ms. Kimiri seem to agree that the sentence imposed by the trial magistrate's court was harsh and excessive. They urged this court to review the sentence and impose an appropriate sentence.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial 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** contrary to **46** of the **Traffic Act** to the required standard of proof beyond any reasonable doubt.

In this appeal, both counsel appreciated the fact that the offence of causing death by dangerous driving is established by the court examining the entire circumstances that the accident occurred. The test to be applied in determining whether the driver dangerously, carelessly or recklessly drove the motor vehicle is the standard of a reasonable person considering all the relevant circumstances prevailing at the time the accident occurred. As was observed by the Court of Appeal in the case of **Orweryo Missiani –vs- Republic [1979] KLR 285** at page 289:

***“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 English decision was followed local in Atito –vs- The Republic [1975] EA 278.*

*The principles of sentencing in relation to this offence were considered by the Court of Appeal, Criminal Division in R –vs- Guilfayle [1973] 2 All ER 844. Lawton L J, delivering the judgment of the court, said (at page 844):*

*The experience of this court has been that there have been many variations in penalties. Some variations are inevitably because no two road accidents are alike, but there are limits to permissible variations and it may be helpful if this court indicates what they are. Cases of this kind fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment, and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or his passengers or with a degree of recklessness. A sub-division of this category is provided by the cases in which an accident has been caused or contributed to by the accused’s consumption of alcohol or drugs.”*

In Gabriel Wambua Kitili –vs- Republic [2006] eKLR Makhandia J (as he then was) held that in cases of causing death by dangerous driving, the onus is on prosecution to establish that it was the accused’s dangerous driving that caused the accident that resulted in the death of the deceased. In Atito –vs- Republic [1975] EA 278, the court held that:

*“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 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...”*

In the present appeal, the following facts were not in dispute:

- I. The Appellant was the driver of motor vehicle registration No.KAU 320H - Honda
- II. The Appellant was driving the said motor vehicle on the material night along the Northern Bypass.
- III. That the Appellant drove into the rear of motor vehicle registration No.KBH 032D - Toyota Gaia.
- IV. Motor vehicle registration No.KBH 032D had slowed down because there was a bump erected on the road.
- V. The Appellant was driving motor vehicle registration No.KAU 320H at a considerable speed. The Appellant conceded that he may have been driving the motor vehicle at a speed of over 20 KPH when he collided with the vehicle that had slowed down on his front.
- VI. As a result of the collision, the deceased sustained injuries that later proved fatal.
- VII. The direct cause of the collision was the Appellant’s inattention and lack of diligence that caused the motor vehicle that he was driving to collide with the vehicle that had slowed down as it was maneuvering over the bump.

From this court’s re-evaluation of the evidence adduced before the trial court, this court cannot fault the finding reached by the trial court to the effect that the Appellant dangerously drove the motor vehicle thereby causing the collision that caused the death of the deceased. The motor vehicle did not have any pre-accidents defects that may have exonerated the Appellant from blame. The Appellant was driving the motor vehicle at night. He knew or ought to have known that when driving at night, he ought to have exercised vigilance that there could be a possibility that there is obstruction on the road. This court also noted that the Appellant must have seen the tail lights of the car in front of him and should have exercised caution when approaching that motor vehicle. The Appellant was therefore at fault for failing to exercise due care and skill expected of a competent driver in such circumstances. Although the offence of causing death by dangerous driving is not one which it can be said that the Appellant set out to cause injury to other road users, nevertheless, it is expected that when a driver is driving a motor vehicle on a public road, he must exercise due care and skill so as not to injure other road users who may be using the same road at the same time. This court finds no merit with the Appellant’s assertion that the prosecution had failed to prove the case against him to the required standard of proof beyond any reasonable doubt. The Appellant’s appeal against conviction lacks merit and is hereby dismissed.

As regard sentence, both the counsel for the Appellant and the State counsel conceded that the sentence imposed upon the Appellant was harsh and excessive in the circumstances. This court agrees. Whereas the Appellant may have caused the death of the deceased by dangerous driving, the punishment imposed by the trial magistrate’s court did not fit the crime. The offence that the Appellant committed was not a deliberate one but one caused by failure to exercise proper judgment in the circumstances. In the premises therefore, the sentence of a fine of Kshs.350,000/- or in default three (3) years imprisonment that was imposed upon the Appellant is set aside and substituted by a sentence of this court commuting the sentence of the Appellant to the period served. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF MAY 2018**

**L. KIMARU**

**JUDGE**