



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 29 OF 2017

JOSHUA MUTHINJA BUNDI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment of Chief Magistrate Hon. M. GICHERU,

delivered on 20/7/2017 in Embu Court Traffic Case No. 169 of 2016)

JUDGMENT

The appellant was charged with two counts of causing death by dangerous driving Contrary to Section 46 of the Traffic Act, cap 403 laws of Kenya. The particulars of offence on the first count are that the appellant on 24th December, 2015 at around 12.30 pm along Embu – Meru road in Embu County, being the driver of motor vehicle registration number KBX 005X drove the said motor vehicle on a public road in manner which is dangerous to other road users having regard to all circumstances of the case including the nature, condition and amount of the traffic on the road or expected to be on the road whereby he caused the death of LETISHIA MWENDIA MUGO who was a passenger in motor vehicle registration number KBY 284D Nissan Wing road. The particulars of offence for the second count are similar to those in count one save that the victim was **Roseline Njoki**. The trial court convicted the appellant and fined him ksh. 50,000 for each count and in default to serve 9 months imprisonment. The grounds of appeal are that:-

- 1. The learned trial Magistrate erred in fact and law in making and finding that the two counts in the charge sheet were not defective even after finding that the first count related to motor vehicle KBX 005S instead of KBX 005X and the second count did not at all mention the vehicle that the appellant was driving at the material time of the accident.**
- 2. The learned trial Magistrate further erred in law in making a finding that the defence should have pointed out the defects in the charge sheet to enable the prosecutor make appropriate amendments and not raise the same in the submissions. In effect therefore, the Honourable trial magistrate shifted the burden of proving the prosecution's case to the defence.**
- 3. The learned trial Magistrate further erred in law in making a finding that the omissions in both counts of the charge sheet was curable by employing the provisions of Article 159 of the constitution while in fact they were fatally defective.**
- 4. The learned trial Magistrate further erred in law in fact in finding that there was fault in the manner of driving by the appellant even on the face of PW3's (Motor vehicle inspector) evidence and that of the appellant's that motor vehicle KBX 005X that the appellant was driving suddenly developed sudden brakes failure on descent or arrival at the entrance to the Police Headquarter, (Embu) as the appellant began the descent to Embu Town.**
- 5. The learned trial Magistrate further erred in law and fact in finding that motor vehicle KBX 005X could not have gained too high a velocity with which it rammed onto motor vehicle KBY 284D because there were speed bumps and it was in the Embu Town centre where there are Banks and Supermarkets as though these would have restored the failed brakes.**
- 6. The learned trial Magistrate completely erred in law and fact in deliberately ignoring the fact that with the kind of vehicle and human traffic on the Embu – Nairobi highway at the material time and with sudden failure of brakes, the appellant did what any reasonable man would have done to maintain the vehicle on the highway and which act in fact led to the complete safety of all the fourteen (14) passengers on board and that the ramming onto the rear of motor vehicle KBY 284D was completely unavoidable.**
- 7. The learned trial Magistrate erred in law and fact in failing to find that there was absolutely no fault on the appellant's part.**

8. The sentence of nine (9) months or Kshs. 50,000/= on each count and cancellation of the appellants license for three (3) years was excessively harsh and unconscionable.

9. The judgment was against the weight of evidence.

Counsel for the appellant submit that the charge sheet was defective. Count one did not properly indicate the specific motor vehicle which caused the accident while in count two no motor vehicle was identified. Those anomalies are incurable defects which cannot be cured by section 214 (1) of the Criminal Procedure Code. The anomalies affected the appellant's rights to a fair trial under Article 50(1) (2) of the constitution. The appellant also contends that the finding of the trial court in the manner in which the appellant was driving is against the evidence. Pw4 testified that there were leakages in the breaking system which reduced braking efficiency. This explained the circumstances within which the accident occurred. The findings of the trial court that there were bumps, rumble series and speed limits on the highway was contrary to the evidence of PW4. The accident was unavoidable in the circumstances. The trial court went ahead to make a finding on the speed of the motor vehicle yet there was no evidence to fault the appellant.

It is further submitted that the trial court imposed a harsh and excessive sentence. The appellant has children and a disabled wife who depend on him. The appellant's license was suspended and this is inconveniencing the appellant. Counsel relies on the cases of **REPUBLIC VERSUS DILESH SONCHAND BID; NAIROBI CRIMINAL REVISION NO. 521 OF 2013 and that of HENRY BARASA WESONGA VERSUS REPUBLIC KAKAMEGA CRIMINAL APPEAL NO 57 OF 2007.**

The state did not file any submissions.

Being a first appeal this court is required to evaluate the evidence afresh and make its own conclusions. **PW1 MICHAEL MURIUKI** is a teacher. On the 24th of December 2015 he was driving his motor vehicle Registration no **KBY 284D NISSAN WING ROAD** along the Embu - Meru road. He was carrying his wife, his child and two ladies. The two ladies were seated at the back. They were just within Embu town and there was heavy traffic. There were bumps on the road. He suddenly heard a big bang and the vehicle was thrown off the road. He later learnt that his vehicle was hit by motor vehicle registration Number **KBX 005X NISSAN MATATU**. His vehicle hit two other vehicles and also hit a tree. The two ladies who were seated at the back of his vehicle died out of the accident. He was driving at a speed of between 10 to 20 kilo meter per hour. He was heading to Naivas Supermarket. He was taken to hospital and his vehicle was badly damaged. **PW2, JOYCE WAKUTHI NGARE** is also a Secondary School teacher and she is PW1's wife. On the 24th of December 2015 they were going home for Christmas. They were passing through town to buy items before heading home. She was with PW1 and their four months old daughter. On the way two ladies asked for a lift and they said they were also going to town for shopping. When they reached near Equity Bank where there are speed bumps, she heard a loud bang. The vehicle veered off the road and crashed into vehicles which had been parked off the road and it also hit a tree and stopped. She sustained bruises on the face and in the abdomen. They were taken to Embu provincial hospital where she was treated and discharged together with her child. She later learnt that the two ladies perished due to the accident.

PW3 CHIEF INSPECTOR JOHN KHAMANGALA was the base commander, Embu County. He was called and informed about the accident and together with PW5 went to the scene. He saw the accident had affected several vehicles. Some victims had been taken to Embu provincial general hospital. He rushed to the hospital to check on their conditions. One of the victims died at Embu provincial hospital while the other victim died at Kenyatta national hospital. He met the appellant at the police station. The appellant told him that his brakes had failed. **PW4 BONIFACE OJWANG** is a motor vehicle inspector. He examined motor vehicle registration no. **KCC 433A TOYOTA MATATU** and did not get any pre accident defects. He also examined motor vehicle registration number **KBT 271H TOYOTA FIELDER** which also did not have pre accident defects. The two vehicles were badly damaged as a result of the accident. PW4 also examined motor vehicle registration no **KBX 005X TOYOTA HIACE**. He observed that the braking system was leaking and this reduced the brakes efficiency. The leakage could have been caused by wear and tear, abrupt bending and many other mechanical causes.

PW5 PC DUNCAN WACHIRA was based at Embu police station. He went to the scene with PW3. It is his evidence that Roseline Njoki and Letishia Mwendia died out of the accident. He drew a sketch plan of the accident scene. The appellant was charged with the offence of dangerous driving.

In his sworn defence the appellant testified that he has been a driver since 1995. He became a matatu driver in the year 2000. On the 24th December 2015 he was working for Mitunguu Nissan Sacco. He was driving from Meru to Nairobi. He was driving motor vehicle registration number **KBX 005S TOYOTA HIACE**. He left Nkubu at 10.20am. The vehicle was okay as it had been well serviced. The road has hills and valleys. He passed all of them very well. He was doing speed of between 40 – 50kph. He knew the road very well. When he reached the bumps near the traffic headquarters he found that the brakes could not hold. He saw a small vehicle ahead of him. He over took it and went back to his lane but still the brakes could not hold. When he reached the Posta stage the brakes could still not hold. He overtook a vehicle ahead of him. He told his passengers. He put on hazard lights and hooted. The hand brake could also not be engaged. The vehicle is automatic. He tried to brake. There was a lorry on the opposite side. The vehicle ahead of him, a Nissan wing road, did not move out of the way and it was hit. His vehicle remained on the road after hitting the other vehicle. He then engaged the parking gear. The passenger door could not open the door as it was damaged and he went to open for his passengers. None of his passengers was injured. He ran to the wing road vehicle and found that it had hit a tree. Two people were seriously injured. APS from the bank went to the scene. An ambulance was called and took the victims to hospital. When the brakes failed he was doing 30kph. The momentum increased because the vehicle was going downhill.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. There is no dispute that an accident occurred on 24/12/2015 at about 12.30pm within Embu town. The appellant contends that the accident was unavoidable. There is a sketch plan produced by PW5. It shows that motor vehicle KBY 284D was pushed off the road and hit a tree. Although the sketch plan does not give the exact measurement for the shown areas, it is clear that the appellant did not stop immediately after he hit motor vehicle KBY 284D. The sketch shows that the vehicle passed the rumble bumps and also another bump ahead and went to stop after the bump.

According to the appellant the Nissan matatu had been serviced and everything was okay. The incident occurred in Embu town and there are no steep hills in the town. The appellant's contention that he was going downhill is not supported by the evidence on record. The incident

occurred near Equity and Family Banks. There is no stop near those two banks. PW1 testified that he was hit from behind. The appellant in his defence did confirm that he hit PW1's vehicle from behind.

Counsel for the appellant contends that the conviction is against the weight of the evidence. If indeed the appellant was doing 30Kph at the time of the impact, then PW1's vehicle could not have been pushed off the road. The impact was so intense that two passengers who were seated behind PW1's vehicle perished. It was upon the appellant to ensure that the vehicle he was driving was mechanically sound. His contention that it had been serviced is not supported by any tangible evidence. It is true that PW4 inspected the vehicle and found the breaking system leaking. That finding does not make the appellant free from blame. If we were to go by the appellant's evidence, he could have still changed the gears of the vehicle even if it was an automatic vehicle. He would have changed to a higher gear or cause the vehicle to move in between the road so that other vehicles could swerve either to their left or right. His evidence is that he overtook another vehicle and went back to his lane. PW1 and PW2 did not hear any hooting from the appellant. They just heard the loud bang.

Given the circumstances of the case, I do find that the prosecution did prove its case beyond reasonable doubt. The appellant drove motor vehicle registration number KBX 005S dangerously in the circumstances and caused the accident. The charge sheet is not defective. The vehicle the appellant was driving is given as KBX 005X. It collided with motor vehicle number KBY 284D. The same applies to the second count. The names of the victims are given. I do find that the charge sheet is proper. Whether the vehicle was KBX 005X or KBX 005S, the fact remains that the appellant was driving a vehicle which caused the accident. He admits that he hit another vehicle from behind although he blames it to brakes failure.

The sentence is equally proper. The appellant was disqualified from driving for a period of three (3) years. Considering that two people died out of the accident, this part of the sentence cannot be held to be harsh. Two women died out of the accident and they left their families destitute. The appellant cannot allege that his children are suffering. He is still alive and was sentenced to nine months imprisonment only.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

Dated and signed at Marsabit this.....Day of July 2018.

S. J. CHITEMBWE

JUDGE

Dated, signed and delivered at Embu this 21st day of August,2018.

F. MUCHEMI

JUDGE