



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 47 OF 2017**

**BETWEEN**

**TARCISION KARIUKI MAINA .....APPEALANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against original conviction and sentence in Othaya SRM Court Traffic Case No. 36 of 2017 dated 19<sup>th</sup> July, 2017 by Hon. Ireri, MD Resident Magistrate)*

**JUDGMENT**

**INTRODUCTION**

1. The appellant herein was charged with the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act, Chapter 403 Laws of Kenya, the particulars being that on the 18<sup>th</sup> day of February, 2017 at around 2.20 p.m. along Chinga-Ngaru road at Kwamunyana area in Nyeri county, being the driver of motor vehicle (registration number) **KBT 325J Toyota Townace**, drove the said motor vehicle along the said road in a manner which was dangerous to the public having regard to all the circumstances of the case including [The] nature, condition and the use of the road plus the amount of traffic which was actually, at the time [on the road] and caused the death of **ZAWERIA GATHONI MUTHENGIA** who was a passenger in the said vehicle and (who) died due to injuries inflicted to her during the accident.

2. The appellant pleaded not guilty to the charge. During the hearing of the case, the prosecution called 5 witnesses, whose evidence was intended to prove the charge against the appellant. When called upon to defend himself, the appellant gave unsworn evidence. He did not call any witnesses.

**Judgment of the Learned Trial Court**

3. Upon careful consideration of all the evidence that was placed before him, the Learned Trial Magistrate found the appellant guilty as charged and convicted him under Section 215 of the Criminal Procedure Code.

4. Before sentencing the appellant, the Court called for and considered an impact assessment report dated 27<sup>th</sup> July, 2017 in which it was noted that the appellant had previously been convicted of a similar offence. The appellant was sentenced to pay a fine of Kshs.120,000/- in default to serve five (5) years imprisonment. The sentence was meted out by Hon. B. M. Ekhumbi, Senior Resident Magistrate. The sentencing Magistrate also revoked the appellant's Driving License.

**The Appeal**

5. Being dissatisfied and aggrieved by the entire Judgment, the appellant filed the present appeal on grounds:-

- i) That the sentence imposed against me is harsh and excessive due to my health status.
- ii) That I kindly urge this Honorable Court to reduce my sentence in considerable term deemed fit since I am so remorseful.
- iii) That I am a layman in Law and I was not represented by a counsel thus I was unable to defend myself.

- iv) That I am the only son in my family married with 5 children and elderly parents being the only bread winner.
- v) That if the same is reduced, with the Courts discretion, it will enable me join my family and society having no threats to my complainant but to keep peace.
- vi) That other further grounds will be adduced at the hearing of this appeal and I wish to be present in [person] prison. The appellant therefore prays that this appeal be allowed in its totality.

6. This is a first appeal and as such this Court is under a duty to reconsider and evaluate the whole of the evidence afresh with a view to determining whether the conclusions reached by the Learned Trial Magistrate can be supported. As appears from the grounds of the appeal, the appellant's appeal is clearly against sentence only. This means that this Court should decide whether there are sufficient reasons placed before it by the appellant to warrant interference with the sentence imposed by the Learned Trial Court.

### **Applicable Principles**

7. The principles on whether an Appellate Court can interfere with sentence have been settled by all the Superior Courts in this Country. In ***Omuse vs Republic [2009] KLR 214***, The Court of Appeal held, inter alia, that an Appellate Court would not alter a sentence on the mere ground that if members of the Court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with discretion exercised by a Trial Judge unless it was evident that the Judge acted upon some wrong principles or overlooked some material facts. The above principle was applied in the earlier case of ***Nilsson vs Republic [1970] EA 599***.

### **The Prosecution Case**

8. The case for the prosecution is straight forward. On 18<sup>th</sup> February, 2017 at about 2.20 p.m. Regina Wanjiku, PW1, Priscila Wanjiku, PW2 and Nancy Wanjiru PW3 as well as Mary Wanjiku Njoroge, PW4 all from Chinga area, boarded motor vehicle KBT 325J at different points along the Chinga-Nyeri road. The appellant was the driver of the said motor vehicle. The 4 witnesses were all headed to Nyeri for a baby shower. After PW3 entered the vehicle, the vehicle started moving at very high speed downhill and then suddenly there was an accident. All the witnesses later found themselves in the hospital at Kiriaini when they regained consciousness. The deceased was killed as a result of the said accident.

9. PW7, Number 72909 Sergeant Martin Kinoti from Othaya Sub-base was on duty when the OCS Chinga Police Station rang him and informed him about the accident which had occurred in Kwamunyana area. He visited the scene in the company of another officer and found the vehicle had landed in a ditch. After drawing a sketch plan of the scene, PW7 visited Kiriaini Hospital where the victims of the accident had been taken. One of the victims Zaweria Gathoni had died. He organized for the body of the deceased to be taken to Kiriaini Hospital Mortuary and for the motor vehicle to be taken to Othaya Police Station. The motor vehicle underwent some inspection. He also issued the accident victims with P3 forms and later arrested the appellant and charged him.

10. PW5, Patrick Karigu Kibaru, an inspector of motor vehicles as per Gazette Notice No. 7084 of 27<sup>th</sup> September, 2014 inspected the motor vehicle at Othaya Police Station. Apart from the dents and damages on the body of the motor vehicle, he found that the offside window glass frame was ripped off, the sliding door was also ripped off and dented. PW5 concluded that the motor vehicle did not have any pre-accident defects. The inspection report was produced as P. Exhibit 5.

11. In cross examination, PW5 told the Court that the brakes were serviceable although he admitted he did not open the brake master cylinder. He confirmed that the brakes were working when he tested them.

12. Pauline Mbachii a clinical officer working at Othaya District Hospital testified as PW6. She produced P3 forms in respect of PW1, PW2, PW3, and PW4 which were all produced and marked P. Exhibits 1, 2, 3 and 4. There is no dispute that all these witnesses suffered varying degrees of injury during the accident.

### **Defence Case**

13. The appellant gave unsworn evidence. He testified that he is a National Youth service (NYS) trained driver and that on the material day he drove down a slope when he noticed some cattle crossing the road ahead of him. His efforts to brake failed. He attributed the accident to brake failure. He also testified that since he was driving on a murrum road, there was no way he could have driven fast. He did not call any witnesses.

### **Issues, Analysis and Determination**

14. The only issue for determination is whether this Court can interfere with the sentence imposed upon the appellant since that is the real ground of appeal. I have already set out above the applicable principles which this Court should consider in determining whether it can interfere with the sentence.

15. Applying the above stated principles, I do not think that there is any good reason why the sentence imposed by the Trial Court should be adjusted downwards. The appellant's major complaint in this appeal is that the brakes failed, and further he was also injured on his left hand and on the left side of the head and thirdly that until this accident occurred he had had a free accident driving record.

16. On whether or not the Court can accept the appellant's contention that the brakes failed, there is the evidence of PW 5 who confirmed to the Court that the motor vehicle did not have any pre-accident defects. He also testified that when he tested the brakes, he found them in working condition. What is therefore clear is that the appellant drove at a dangerously fast speed when he was going downhill. In deed if he

had driven at moderate speed he would have controlled the motor vehicle in such a way that he would have stopped on the road instead of driving the vehicle into a ditch. As a result of the appellant's recklessness Zaweria Gathoni died a needless death and PW1, PW2, PW3, and PW4 all suffered unnecessary injuries. I am also satisfied that the appellant consciously drove the motor vehicle in such a reckless manner that PW1, PW2, PW3, and PW4 had to close their eyes in the face of imminent danger.

17. Secondly, the appellant was not a first offender although he alleged he was. I have also carefully read the provisions of Section 46 of the Traffic Act and as rightly submitted by counsel for the respondent, a conviction under the said Section attracts a sentence of a term of imprisonment not exceeding ten years in addition to the exercise of discretion by the Trial Court under part VIII of cancelling any driving license or provisional driving license of the offender and declaring the offender disqualified for holding or obtaining a driving license 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.

18. In my considered view and as rightly submitted by respondent's counsel, the sentence of five years in my view was not excessive, especially considering the circumstances under which the accident occurred and the disastrous results of that accident. The appeal on sentence is accordingly dismissed.

19. With regard to the revocation of the appellant's driving license, I note that the same is left open ended. In light of the provisions of Section 46 of the Traffic Act (above) the appellant's driving licence shall remain revoked up to the end of five (5) year term of imprisonment.

### **Conclusion**

20. In conclusion, the appellant's appeal on sentence be and is hereby dismissed. Right of appeal to Court of Appeal within fourteen (14) days from the date of this Judgment.

21. Orders accordingly.

Judgment delivered, dated and signed in open Court at Nyeri on this 28<sup>th</sup> day of September, 2018.

**RUTH N. SITATI**

**JUDGE**

**In the presence of:**

Present in person for appellant

Miss Jebet for respondent

Scholastica -Court Assistant