



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 60 OF 2014

REPUBLIC.....APPELLANT

VERSUS

PAUL OTIENO OMBOK.....RESPONDENT

(Being an appeal against the conviction and Judgment of the Senior Principal

Magistrate's Court at Maseno (Hon. J. M. Nyangea PM) dated the

30th January 2012 in Maseno SRMTRC No. 1231 of 2010)

JUDGMENT

This is an appeal which was brought by the State, to challenge the acquittal of the Respondent, **PAUL OTIENO OMBOK**.

1. The Respondent had been charged for the offence of **Causing Death by Dangerous Driving**, Contrary to Section **46** of the **Traffic Act**.
2. The Appellant has raised seven grounds of appeal, which can be summarized as follows;

1) The trial court erred by holding that the final resting

positions was not indicated in the sketch plan, whereas

the converse is true.

2) The trial court erred by holding that no eye-witness

testified, yet PW4 was an eye-witness.

3) The trial court held that the point of impact was not

clearly marked in the sketch plan, but the same

was shown.

4) There was clear evidence of the skid marks made by

the Respondent's vehicle, so the trial court erred by

making a contrary holding.

5) The prosecution had proved the case beyond any

reasonable doubt, so the Respondent should have been

convicted.

6) The trial court erred by compelling the Complainant to

testify whilst he was still painfully ill.

7) The trial court failed to analyze the evidence of PW4, leading to an erroneous judgment.

3. When canvassing the appeal, Miss Barasa, Learned State Counsel submitted that **PW3** had clearly indicated that there were skid marks and pieces of glass at the point of impact. Therefore, although the sketch plan did not show the point of impact, the appellant submitted that that was not fatal.

4. The appellant also made the point that **PW4** was an eye-witness to the accident, as he was the driver of the saloon vehicle, which collided with the Respondent's pick-up vehicle.

5. As the Investigating Officer concluded that the Respondent was careless, by failing to keep to his lane, and also because he was over-speeding, the appellant submitted that there was sufficient evidence to warrant a conviction.

6. Being a first appellate court, I am obliged to re-evaluate all the evidence on record, and to come up with my own conclusions. However, I am also enjoined to bear in mind the fact that I did not have the benefit of watching the witnesses when they testified.

7. It is common ground that **PW4, WILLIAM NYANGERE**, was driving the Motor Vehicle Registration Number **KAG 871E**, which was involved in an accident, with the Vehicle Registration Number **KAZ 855B**.

8. Consequently, he was definitely an eye-witness to the accident.

9. When the Learned trial magistrate held that no eye-witness testified, that was an error.

10. The fact that the witness may possibly have given evidence which could protect himself, does not imply that he was not an eye-witness.

11. An eye-witness who was involved in the accident may give evidence that was self-serving, therefore, his evidence should be treated with a lot of caution.

12. **PW2, SAMUEL MUTIA KANUKU**, was a gazetted Motor Vehicle Inspector. He inspected the 2 cars which had been involved in the accident, and concluded that they did not have any pre-accident defects.

13. He produced his reports in court, and it is clear from his testimony that the vehicles were extensively damaged.

14. The extent of the damage to the vehicles, coupled with the fact that one person suffered fatal injuries, whilst the other two occupants of the vehicles, also suffered serious injuries, corroborates the testimony of both **PW3** and **PW4**, concerning the speed at which one or both vehicles were moving at the time of the collision.

15. **PW3, CPL JANE ORIE**, was a police officer who was based at the Maseno Police Station.

16. She visited the scene on the day after the accident. By that time, the two vehicles had already been towed to the police station.

17. Therefore, when the witness testified about the exact spots where each of the vehicles were, immediately after the accident, she was not talking about something which she saw. As she told the trial court, it is PC Sang who knew the scene, and who had marked it appropriately. Therefore, it was the said PC Sang who guided **PW3** when she was preparing the sketch plans of the accident scene.

18. It is not clear why PC Sang did not testify, instead of limiting his role to guiding **PW3** in the preparation of the sketch plan.

19. In my considered view, the failure to indicate the point of impact on the sketch plan is not necessarily fatal. However, it would have made the case clearer, because it would provide a precise point of reference.

20. As it is now, **PW3** first testified that;

“The point of impact was on the left side of the road as one faces Bondo. I determined this from the presence of glasses at this point.”

21. However, towards the tail-end of his examination-in-chief, the witness said;

“The impact occurred on the right side.”

22. If taken in isolation, that piece of evidence appears to be a complete negation of the earlier evidence.

23. But a closer look at the evidence shows that **PW3** had, just before talking about the impact occurring on the right side, said that the Respondent had;

***“..... failed to keep to his lane, the left side when
facing Kisumu*”**

24. Of course, the position to the right when one was facing Kisumu, would be to the left when facing the opposite direction.

25. In effect, there was neither inconsistency nor contradictions in the evidence concerning the general side of the road where the two vehicles collided.

26. The presence of one set of skid marks suggests that it was only one of the two cars whose driver braked.

27. **PW4** testified that he did apply brakes. His said evidence was not challenged through cross-examination.

28. On the other hand, the Respondent did not say that he applied brakes. Although to be fair, he said that he slowed down.

29. The appellant suggested that the evidence of **PW4** was shallow. His reason for so saying was that the only;

***“relevant piece of evidence was that he saw the
pick-up moving on his lane and he suddenly heard
a loud bang, after which he lost consciousness.”***

30. In my considered opinion, the appellant was very unkind to **PW4**, by suggesting that it is only what is cited above that constituted relevant information tendered by the witness. I say so because the said witness made it clear that the Respondent, who was driving in the direction that is opposite to the one **PW4** was driving in, was driving on the wrong lane.

31. **PW4** also said that the Respondent appeared to be speeding.

32. According to **PW4**, he moved towards the left and he also applied brakes.

33. All those pieces of evidence were relevant, as a person who was driving on the wrong lane, if he was driving fast, could be said to have been driving dangerously, if there was another vehicle on the same road, at the material time.

34. In this case, the Respondent testified that he was driving carefully, on his lane.

35. Obviously, if both **PW4** and the Respondent had been driving on their respective lanes, the collision ought not to have occurred.

36. As I did not have the advantage of observing the witnesses as they testified, I have no basis for determining who, between the Respondent and **PW4**, was a more credible witness.

37. There is a possibility that the Respondent was speeding on the wrong lane. However, from the evidence tendered by the prosecution I am unable to say that it had been proved beyond any reasonable doubt that the Respondent drove dangerously.

38. In the result, the Learned trial magistrate arrived at the correct decision: Therefore, the appeal fails.

DATED, SIGNED and DELIVERED at KISUMU this 27th day of November 2018

FRED A. OCHIENG

JUDGE