



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 123 OF 2015

KENNEDY MULANDI MALINDA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

*(An appeal from the original conviction and sentence in the Chief Magistrate's court at Milimani Tr.
Case No. 9775 of 2013 delivered by E, Agade, RM on 20th July, 2015).*

JUDGMENT

Background

Kennedy Mulandi Malinda, the Appellant herein 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 15th May, 2013 at around 7:30 a.m. along Mombasa Road within Nairobi County, the Appellant, being the driver of motor vehicle registration number KBP 688p, Nissan X-Trail, drove the motor vehicle on the public road in a manner which was dangerous to other users in that he failed to keep the proper traffic near side lane and dangerously swerved to the right lane thereby hitting motor vehicle registration number KAN 939U, Toyota double cabin pick up which was on the said traffic lane and as a result caused the death of one Linda Apiyo Aaoma, a pedestrian.

The Appellant was arraigned before a court of law and after the trial the court found him guilty and sentenced him to pay a fine of Kshs. 100,000/= in default serve three years incarceration. Being dissatisfied with the verdict, he preferred the appeal herein. In a Petition of Appeal filed on 4th August, 2015, the Appellant set out ten grounds of appeal which i have narrowed down into four as follows; that the learned trial magistrate failed to find that the evidence adduced was insufficient, inconsistent, unreliable and not credible to sustain the conviction against the Appellant, that the learned magistrate shifted the burden of proof upon the Appellant, that she did not exercise her discretion judiciously in arriving at a guilty verdict and that she failed to take into account the Appellant's defence.

Submissions.

The Appellant's submissions were filed on 18th November, 2016 by P.M Mwangi & Co. Advocates. In brief, the submission was that the prosecution did not prove its case beyond a reasonable doubt. He took issue with the evidence of PW1 and 5 who, it was alleged, testified that the Appellant was not over speeding at the time of the accident. More so, the evidence of PW1 was that after she heard a loud bang, she covered her face and did not therefore see or witness how the deceased died. Counsel further took

issue with the finding in the judgment of the learned trial magistrate that the accident was occasioned by a tyre burst after which the vehicle swerved. In the process, the driver in avoiding to hit other pedestrians knocked down the deceased who died instantly. In that respect, the trial court ought to have found that the accident was not occasioned by the negligence of the Appellant and ought to have acquitted him. Furthermore, no eye witness was called to corroborate the evidence of PW1, 2 and 5 who were the main prosecution witnesses. Learned counsel also submitted that the evidence of PW6, the investigating officer exonerated the Appellant since there was no report that the Appellant at the material time was dangerously driving on the road. Finally, it was the counsel's submission that the Appellant gave a plausible defence which was corroborated by an eye witness thus shattering the prosecution's case. The defence was that the Appellant was hit by another vehicle while trying to avoid hitting other pedestrians and it was therefore not his fault that the deceased was knocked down. Further that given the contradictory evidence of the prosecution witnesses, the learned magistrate ought to have cast doubt in her mind that the Appellant was culpable and accordingly acquitted him. It was urged that the appeal be allowed and Appellant set free.

Submissions for the Respondent were filed on 5th December, 2016 by leaned Prosecution Counsel, Ms. Linda Nyauoncho. She submitted that the prosecution demonstrated that the Appellant's motor vehicle KBP 688P Nissan X-Trail was being dangerously driven as it swerved from its lane to the lane where motor vehicle KAN 939U was being driven. The vehicle then hit the latter as a result of which the deceased was fatally injured. She submitted that the account of what transpired was corroborated by PW1 who was a passenger in Motor vehicle KAN 939U. A similar account was given by PW2 who was the driver of Motor vehicle KAN 939U who in addition testified that motor vehicle KBP 688P hit his vehicle twice, first from the back and again on the front bumper. Counsel also asked the court to find that since there were no skid marks on the road, it implied that the Appellant did not try to avoid the accident. Again, according to PW5 the investigating officer, the fact that motor vehicle KBP 688P only got scratch marks was further evidence that its driver caused the accident. She urged that the appeal be dismissed and the conviction upheld.

Evidence

The prosecution's case was that the Appellant was driving motor vehicle KBP 688P along Mombasa Road, a dual carriage road dangerously. He changed lanes thus hit motor vehicle KAN 939U which consequently lost control and hit a pedestrian who was standing on the traffic island separating the roads.

PW1, Jane Mbaka Mutuko was a passenger in Motor vehicle Reg. No. KAN 939N. The vehicle was being driven by PW2, Simon Mwonga Shadrack. She testified that she heard a loud bang from the back of their car and on looking back saw a Nissan X-Trail Reg. No. KBP 688P black in colour. She immediately covered her face with a scurf and within a short time they landed in a ditch. Their vehicle was being driven on the outer lane whereas the X-Trail car was on the inner lane. Her testimony was that Motor vehicle KBP pulled from its lane to their lane as a result of which it hit Motor vehicle KAN 939N. After ten minutes she alighted from the vehicle and noticed that one person had been hit and was lying dead on the road. Thereafter, traffic police officers arrived and took measurements of the road and took away the deceased person.

PW2 on the other hand testified that he heard a bang on the left side of his vehicle and thereafter the vehicle which hit him drove to the front and hit his vehicle again on the front bumper after which he landed on a ditch. It is after he was hit a second time that he swerved causing him to hit a woman who was walking in front of his vehicle. His testimony was that he was driving at between 65 and 70 KPH. After the impact, his vehicle stopped in front of the deceased whereas the X-Trail was behind the deceased in a ditch. Both vehicles were however facing the road. His further testimony was that the Appellant's vehicle was speeding at the time of the accident because after the impact, the Appellant swerved twice, first turning to the front and again to the back. PW2's vehicle got damages to the mud guard, the front bumper and a tyre burst.

PW3 Lydia Nyamboe Zachary testified that the deceased was her niece and was informed of her death by her husband. She rushed to the scene and witnessed the same. On the following day, she witnessed the

postmortem exercise at Chiromo mortuary.

PW4, Samuel Orange Onkware was a gazetted motor vehicle inspector who inspected both vehicles and tabled their reports in court.

PW5, Police Constable Rymond Mutuma was the investigating officer attached to Nairobi Area Traffic. He summed up the evidence of prosecution witnesses and thereafter preferred the charges against the Appellant. According to his testimony, he charged the Appellant because his vehicle pulled from its lane to the lane of motor vehicle KBP 688P which was forced to pull off the road to where the deceased was standing. At the time, the deceased was standing on the right side of the road waiting to cross the road. In cross examination, he concluded that the Appellant was dangerously driving on the road having driven off his lane to the lane of another motor vehicle. He also confirmed that both vehicles on impact veered off the road into a ditch. He also stated that none of the vehicles applied brakes as there were no skid marks at the scene of the accident. He produced the sketch maps which he drew at the scene of the accident as well as the photographs of the vehicles involved in the accident. He also produced the post mortem report that was based on an examination carried out at Chiromo Mortuary. The report concluded that the death was caused by multiple blunt trauma consistent with a motor vehicle accident. The report was dated 16th may, 2013.

The prosecution then closed its case and the trial court ruled that a prima facie case had been established. The Appellant was called to tender a defence.

DW1, the Appellant herein testified that he was driving his vehicle along Mombasa Road at around 0700hrs on the left lane and as he approached the fly over at JKIA he heard a loud sound and immediately a bang on the rear right side of the vehicle. A pick up registration number KAN 939U had hit him. He lost control towards the left and to avoid hitting the pedestrians he tried to come back to the right and there was another collision on the front right side of his vehicle and the left rear of the pick-up. He testified that the cars then all veered off the road and landed in a ditch on the left side. The accident also caused a front flat tyre. In cross examination, he stated that he was driving at around 50 KPH.

DW2, Charles Mwangi Kangethe testified that on 15th May, 2013 he was driving along Mombasa at around 0700hrs when he witnessed an accident involving the vehicles ahead. They were a black X-Trail registration number KBP 688P which was on the left lane and a Toyota double cabin registration number KAN 939U that was on the right. He testified that the X-Trail was driving slowly and the pick-up was attempting to overtake it. He wanted to overtake after the pick-up. He then noticed one of the tyres of the pick-up burst which led the vehicle to swerve to the left and hit the X-Trail on the right rear side. He noticed the X-Trail lose control and swirl around and both vehicles swerved and stopped on the right side of the road. He stopped his vehicle and noticed the pedestrian who had been hit. He would later get a call informing him that the Appellant had been charged. He testified that the burst tyre of the pick-up caused the accident. In cross examination he stated that the Appellant's vehicle was travelling at a slower speed than his or PW2's.

DW3, Barbara Nthoki received a phone call at around 0730 from her husband who informed her that he was involved in an accident along Mombasa Road. She drove to the scene where she took photographs of the vehicles involved in the accident and which she produced in court.

Determination.

Before I consider the issues arising for determination it is important that I first deal with a matter that was not interrogated at the lower court or in the submissions of the parties. This is with regard to the offence charged. The Appellant was charged with causing the death of a pedestrian by dangerous driving. It is clear however that his motor vehicle did not hit the pedestrian but the pedestrian was actually hit by another car that was involved in the accident. In light of this it would appear that the reason why the Appellant was charged with the offence relates to causation. That is to say that his act or omission indirectly caused the death of the deceased. Causation was set out in **Environmental Agency(formerly National River Authority) v. Express Car Co(Abertillery) Ltd[1992] 2 AC 22** as follows:

“the courts have repeatedly said that the notion of ‘causing’ is one of common sense. So in *Alphacell Ltd v Woodward*[1972] AC 824, 847 Lord Salmon said:

‘what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense than by abstract metaphysical theory.’

I doubt whether the use of abstract metaphysical theory has ever had much serious support and I certainly agree that the notion of causation should not be overcomplicated. Neither, however, should it be oversimplified. In the *Alphacell* case, at p 834, Lord Wilberforce said in similar vein:

‘in my opinion, ‘causing’ here must be given a common sense meaning and I deprecate the introduction of refinements, such as *causa causans*, *effective cause* or *novus actus*. There may be difficulties where acts of third persons or natural forces are concerned...’

The last concession was prudently made, because it is of course the causal significance of acts of third parties (as in this case) or natural forces that gives rise to almost all the problems about the notion of “causing” and drives judges to take refuge in metaphor or Latin.

.....

..common sense answers to questions of causation will differ according to the purpose for which the question was asked. Questions of causation often arise for the purpose of attributing responsibility to someone, for example, so as to blame him for something that has happened.”

Hence, when determining liability with regard to causation the common sense test is used but the test is not perfect when a third party is involved. That is the scenario represented in the instant case since although the Appellant did not directly cause the death of the deceased, the prosecution advanced the case that it was by the manner he drove his car that the deceased met her death. And again a theory that was contrasted by witnesses.

The standard of proof being beyond a reasonable doubt though, the prosecution was charged with the duty of proving that the Appellant’s act of dangerous driving substantially caused the death of the deceased. A good example represented by the instant case is found in a decision of the Court of Appeal of England, Criminal Division in ***R V Hennigan*[1971] 3 All ER 133**. In the case, the appellant was charged with dangerous driving. The court observed that **‘it is only necessary for the prosecution to show that the accused’s dangerous driving was a cause of the accident and was something more than *de minimis*; it is not necessary to show that it was a substantial cause in the sense that on an apportionment of liability on a civil action the accused would, for example, be held at least on one-fifth to blame for the accident’**. The court went on to expound that **‘the word “substantial” must be taken as indicating no more than the dangerous driving as the cause of the accident, was something more than *de minimis*.’**

No doubt the Appellant was substantially involved in the accident that led to the death of the deceased. This satisfies the court that the Appellant was rightfully charged. What the court must now decide is whether the offence was proved. Two issues arise; first, to determine whether he was shown to be driving dangerously and second, whether in light of the varied accounts of how the accident occurred, it was safe to convict him.

On the first issue, the Appellant was charged under Section 46 of the Traffic Act. The Act itself does not per se define dangerous driving. The provision does however encompass the elements constituting the offence as; **“driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having regard to all circumstances of the case, including the nature, condition and use of the road and amount of traffic which is actually at the**

time or which might reasonably be expected to be on the road.”

On the other hand Section 2 A of the United Kingdom’s Road Traffic Act, 1988 offers a suitable guideline. It provides, inter alia, that dangerous means that the standard of driving falls far below what would be expected of a competent and careful driver and that it would be obvious to a competent and careful driver that driving in that way would be dangerous. And that in determining what is expected or obvious to a competent and careful driver regard should be had not only to the circumstances of which he would be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.

In the present case, it is prudent to first set out the circumstances of the accident before making a finding as to the culpability of the Appellant. The witnesses, PW1 and PW2 testified that the Appellant hit the motor vehicle they were traveling in twice and this led the vehicle off the road where they hit a pedestrian who consequently died. The Appellant on the other hand testified that he was hit by PW2’s motor vehicle after which his vehicle blew a tyre. His theory was supported by DW2 who was driving behind the two cars. These are therefore conflicting accounts of the same event. The trial magistrate concluded that there was indeed a tyre burst from the fact that the witnesses submitted that they heard a bang before the crash.

My analysis of the situation is the possibility that the bang did not evidence the tyre burst given that both witnesses testified to the bang emanating from the back of the vehicle while the tyre that allegedly blew up was the front left tyre. That said, it is clear that the vehicles impacted each other twice; at the back and at the front. It is not clear though which was the first impact given the conflicting statements from the parties involved. In light of the contradiction this court finds itself in a situation where it cannot accurately deduce what occurred at the scene which in turn means that the court is not in a position to establish whether the Appellant was driving dangerously and in so doing led to the death of the deceased pedestrian.

The only evidence at hand, which the parties seem to agree is accurate is the drawings of the scene. The sketch maps set out that motor vehicle registration number KAN 939U, the pick-up, was furthest ahead about 28.1 meters from the deceased. Motor vehicle registration number KBP 688P, X-trail was in between the pick-up and the deceased at 9.4 meters from the deceased. The sketch also showed an area about 2 meters further back from the deceased’s body which appears to be where she was hit given the presence of broken hair pieces. The unfortunate bit, as I observed earlier is that the evidence of both the prosecution and the defence was not in consonance with the drawings. This then drives me to determination the last question; whether in view of the contradicting evidence, it was safe to convict the Appellant.

The evidence of PW1 was that their car, the pick-up, was at the front with the deceased in the middle and the X-trail further back. PW2 testified that the X-Trail hit their vehicle twice before turning and driving towards them which caused him to swerve to avoid it at which point he hit the deceased on the pavement. He went on to testify that after he hit the pedestrian, the X-Trail then drove past him. This testimony that the Appellant’s vehicle turned and faced the oncoming traffic was not alluded to by any of the other witnesses. These contradictions are material and cannot be wished away. The result is that it cast doubt in mind as to whether the Appellant caused the death of the deceased.

Flowing from the above, I must also examine the evidence of PW5 the investigating officer. He testified that the impact was caused by the pick up trying to overtake at close range. He concluded this by the nature of damages on the vehicle. This again casts doubt in my mind that the Appellant may have been driving dangerously. Interestingly, the learned magistrate found both drivers were culpable in view of the absence of skid marks which meant that none tried to avoid the accident. That conclusion alone ought to have cast doubt in her mind as to the guilt of the Appellant. In any event, and in my view, the mere fact of the absence of skid marks did not imply that the drivers did not attempt to avoid the accident as a vehicle can be hit in circumstances that do not warrant the application of brakes. A driver can also apply brakes and not necessarily skid. Therefore, the circumstances of each case must be given regard when arriving at any given conclusion.

In the end, it is my finding that the prosecution did not sufficiently prove their case to the required standard; beyond a reasonable doubt. The appeal must succeed in any event. The same is allowed. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. If he paid any fine the same shall forthwith be refunded. It is so ordered.

Dated and delivered at Nairobi this 27th day of February, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Mwangi For the Appellant.
2. M/s Nyauncho for the respondent.