REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 45 OF 2017

KHAMIS NYAWA SHEHI…..……... APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From original conviction and sentence in Criminal Case Number 115 of 2016in the Senior Resident Magistrate's Court at Voi delivered by Hon E. G. Nderitu (SPM) on 27th October 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Khamis Nyawa Shehi was charged with the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 (Laws of Kenya). The particulars of the charge were that on 1st March 2016 at about 0800 hours at Maungu area along Mombasa- Nairobi Road within Taita Taveta County, being the driver of Motor Vehicle Registration Number KCD 659S (hereinafter referred to as "the 1st subject Motor Vehicle") drove the said Motor Vehicle along the said road at a speed and manner that was dangerous to the public and swerved to the opposite lane and collided head on with Motor Vehicle Registration Number KCF 933D (hereinafter referred to as "2nd subject Motor Vehicle") causing the death of the driver namely Martin Asin Otieno (hereinafter referred to as "the deceased").

2. On 27th October 2016, the Learned Trial Magistrate convicted him of the said offence and fined him Kshs 200,000/= or in default to serve four (4) years imprisonment.

3. Being dissatisfied with the said judgment, on 2nd June 2017, the Appellant filed a Notice of Motion application seeking leave to file his Appeal out of time which application was allowed and the Petition of Appeal was deemed to have been duly filed and served. He relied on three (3) Grounds of Appeal. His Written Submissions were dated 20th July 2017 while those of the State were dated 17th October 2017 and filed on 19th October 2017.

LEGAL ANALYSIS

4. On first appeal, the high court is called upon to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial**

afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

5. It did appear from the parties' submissions that the issues that had been placed before this court were as follows:-

a. Whether or not the Prosecution had proved its case beyond reasonable doubt;

b. Whether or not the sentence that was meted upon the Appellant herein was harsh, severe and manifestly excessive in the circumstances of the case.

6. The court dealt with the same under the headings shown hereinbelow. This court did not address the issue of the defectiveness of the Charge Sheet as the same had not be raised as a ground of appeal but only appeared for the first time in the Appellant's Written Submissions.

I. PROOF OF THE PROSECUTION'S CASE

7. Grounds of Appeal Nos (2) and (3) were dealt with under this head.

8. The Appellant contended that the Learned Trial Magistrate failed to consider his sworn evidence and pointed out that in the case of **Oketch Olale vs Republic (1965) EA 555** , it was held that a defence, however weak, had to be considered. He argued that he was very consistent in his evidence and because no eye witness testified during trial, he ought to have been given benefit of doubt.

9. It was his submission that for a conviction to be sustained, viewed objectively, fault on the part of the driver would have to be established. He referred this court to the case of **Republic vs Gosney 1971 ALL ER 220** in this regard.

10. On its part, the State submitted that the Prosecution witnesses adduced evidence that proved the Prosecution's case beyond reasonable doubt. It pointed out that the Appellant's defence was a sham because evidence was adduced that showed that the point of impact was on the lane of the 2nd subject Motor Vehicle.

11. It argued that the test of whether there was fault on the part of a driver causing dangerous driving was considered in the case of **Atito vs Republic (1975) E.A 278**and in the case of **R vs Evans [1962] 3 AII ER 1086** where it was held that statute prohibits careless driving and if the same was proven, then the driver would be found guilty.

12. According to the proceedings, on the said date, time and place, the deceased was driving the 2nd subject motor Vehicle when the Appellant drove, managed and/or controlled the 1st subject Motor Vehicle that he collided head on collision with the 2nd subject Motor Vehicle on its lane.

13. Robert Chirango Ngelenge (hereinafter referred to as "PW 1") was gazetted Motor Vehicle Inspector, Voi in a Kenya Gazette Notice No 874 dated 27th September 2014. He stated that both Motor Vehicles were extensively damaged. Number 235243 IP Peter Kyalo an officer of Forensic Crime Scene Support Services attached to Voi Police Station (hereinafter referred to as "PW 4") adduced in evidence the photographs of the damaged Motor Vehicles.

14. Dr Oduor Johnson, a pathologist, (hereinafter referred to as "PW 6") confirmed that the cause of the deceased's death was multiple fractures and internal bleeding due to blunt trauma consistent with a motor vehicle accident.

15. Number 80120 PC Julius Oketch (hereinafter referred to as "PW 2") testified that the deceased was driving towards Nairobi while the Appellant was driving towards Mombasa but that the impact of the

accident was about a metre off the road facing Nairobi. He blamed the Appellant for the accident.

16. Number 68855 Corporal David Yator (hereinafter referred to as "PW 5") testified that he visited the scene of the accident together with his colleagues and he drew the Sketch plan, measurement and legend which showed that both Motor Vehicles were on the road facing Nairobi. He adduced in evidence the said documents as an exhibit before the Trial Court.

17. A perusal of the photographs and the Sketch plans showed that the Motor Vehicles were on the side of the road facing Nairobi. If as the Appellant had stated that he saw two (2) oncoming vehicles being driven towards Nairobi, the fact that he moved to the right of the incoming vehicle meant that he left his lane when it was not safe to do so. The fact that he collided with the vehicle off the road meant that he did not keep to his lane. In his Cross-examination, he admitted that he moved towards the right. The Learned Trial Magistrate was therefore right when she rejected his defence as the same was a sham, an argument that was successively advanced by the State.

18. Having analysed the evidence that was adduced, this court came to the conclusion that it was not necessary for the Base Commander to have been called as a witness in the case herein as the Sketch plan and the measurements were sufficient to have demonstrated that the Appellant moved onto the lane of the 1st subject Motor Vehicle after failing to exercise due care and attention and that the Prosecution proved its case beyond reasonable doubt. The Learned Trial Magistrate therefore arrived at the correct conclusion.

19. Appreciably, Section 143 of the Evidence Act Cap 80(Laws of Kenya) provides that the prosecution is not mandated to call a particular number of witnesses to prove a fact but that it retains the discretion to decide which witnesses and the number thereof to prove a fact.

20. In this regard, this court was persuaded by the holding in the case of **R vs Evans** (Supra) wherein it was stated as follows:-

> **"…if a man adopts a manner of driving which the jury think was dangerous to other road users in all the circumstances, then in the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best."**

21. In the premises foregoing, this court did not find any merit in Grounds of Appeal Nos (2) and (3) and the same are hereby dismissed.

II. SENTENCING

22. Ground of Appeal No (1) was dealt with under this head.

23. The Appellant argued that while sentencing him, the Learned Trial Magistrate failed to take into account the period he remained in remand while awaiting the hearing and determination of his case. He stated that he took plea on 1st March 2016 and was convicted on 27th October 2016.

24. He also argued that the fine of Kshs 200,000/= or in default to serve four (4) years was manifestly excessive warranting interfering by this court. He referred this court to the case of **Republic vs Guilfayle 1973 2 ALL ER 844** where he stated the principles of sentencing were considered.

25. On its part, the State submitted that the Learned Trial Magistrate exercised her discretion correctly when she sentenced the Appellant to four (4) years imprisonment after taking into consideration his mitigation that he was a first offender. It, however, pointed out that the said Learned Trial Magistrate erred in law when she failed to cancel the Appellant's defence for three (3) years. In this regard, it referred this court to the case of **Wilkinson Mwanjara Mwamburi vs Republic HCCRA 57 of 2016** where the court therein upheld a sentence of three (3) years and fined the appellant therein Kshs 200,000/=.

26. Section 46 of the Traffic Act stipulates as follows:-

> **"Any person who causes the death of another by 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 the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence whether or not the requirements of section 50 have been satisfied as regards that offence and be liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by Part VIII of cancelling any driving licence or provisional driving licence held by the offenderand declaring the offender disqualified for holding or obtaining a driving licence 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.**

27. Although the State persuaded this court to suspend the Appellant's driving license and relied on the case of **Wilkinson Mwanjara Mwaburi vs Republic HCCRA No 57 of 2016**, such cancellation is not mandatory as can be seen in Section 76 of the Traffic Act which uses the word "may". The same provides as follows:-

> **1. Any court before which a person is convicted of any offence in connection with the driving of a motor vehicle may (emphasis court)—**
>
> > **a. if the person convicted holds a driving licence or provisional driving licence, suspend the licence for such time as the court thinks fit, or cancel the licence and declare the person convicted disqualified for obtaining another licence for a stated period;**

28. It was the view of this court that although the Appellant was negligent in his driving, a fine of Kshs 200,000/= or in default to serve four (4) years without cancelling his license was reasonable and fair. A life was lost, leaving Turi Aduor Asini (hereinafter referred to as "PW 3") without a father. At least the Appellant was left with his life intact and will leave prison one day to join his children. It was unfortunate that the Appellant was unwell as he informed the Trial Court. However, the sword of justice must cut both ways. This court was therefore not persuaded to interfere with the said sentence.

29. As it was evident that the Appellant's remained in remand from the day the proceedings against him commenced on 1st March 2016 until 27th October 2016 when he was convicted, the said period ought to be taken into account while computing his sentence.

DISPOSITION

30. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 2nd June 2017 was not merited and the same is hereby dismissed. The conviction and sentence are hereby upheld.

31. However, as the trial was conducted as the Appellant was in remand despite having been given bond, the period between 1st March 2016 and 27th October 2016 when he was convicted ought to be taken into account while computing his sentence. This court left the actual computation of the period the Appellant is to serve in prison to the prison authorities as they are best placed to compute the same.

32 .It is so ordered.

DATED and **DELIVERED** at **VOI** this **20th** day of **December** 2017

J. KAMAU

JUDGE

In the presence of:-

Khamis Nyawa Shehi - Appellant

Miss Anyumba - for State

Susan Sarikoki– Court Clerk