



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.73 OF 2012

(An Appeal arising out of the conviction and sentence of D.G. Karani- PM delivered on 1st March 2012 in Gatundu PM. CR. Case No.51 of 2010)

SAMUEL KARANJA

KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Samuel Karanja Kimani, was charged with two counts of **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act**. The particulars of the offence were that on 23rd April 2010 along Kenyatta Road in Gatundu District, the Appellant, being the driver of motor vehicle registration No.KAJ 100E BMW saloon, dangerously drove the said motor vehicle, and having regard to the circumstance of the case including the nature and the condition of the road veered off the road and thereby causing the deaths of Emily Nyathara and Stephen Kariuki Mufu. When the Appellant was arraigned before the trial magistrate’s court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on both counts. He was sentenced to serve four (4) years imprisonment on each count. The sentences were ordered to run concurrently. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court challenging both the conviction and sentence.

In his petition of appeal, the Appellant raised several grounds in support of his appeal. He faulted the trial magistrate for convicting him on the basis of contradictory, uncorroborated and unreliable evidence. He took issue with the fact that he had been convicted on the basis of a defective charge sheet. He was aggrieved that the trial magistrate had failed to accord him his right to fair trial by having the evidence that the prosecution relied on during trial availed to him. He was of the view that his constitutional right was infringed in that regard. He was aggrieved that the evidence that he had adduced in his defence was not considered before the trial court convicted him. He faulted the trial magistrate for shifting the burden of proof which resulted in his erroneous conviction. On sentence, the Appellant was of the view that the sentence imposed on him was harsh and excessive taking into consideration that he, at the time, had a clean driving record for a period of ten years. He stated that he should have, in the circumstances, been given an option of a fine. For the above reasons, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentences that were imposed on him or in the alternative make such orders as may be fair and just.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Waweru for the Appellant and by Ms. Kule for the State. Whereas Mr. Waweru urged the court to allow the appeal, especially on the grounds that the prosecution had failed to prove its case to the required standard of proof, Ms. Kule for the State submitted that the evidence on record established that the Appellant caused the death of the deceased persons on account of his dangerous driving. She urged the court to dismiss the appeal.

Before giving reasons for its determination, it is imperative that the facts of this case be set out, albeit briefly. According to the prosecution, on 22nd April 2010, the Appellant borrowed motor vehicle registration No.KAJ 100E BMW saloon from PW1 Evans Nyaga Kimani. The Appellant borrowed the said motor vehicle to attend a funeral. On 23rd April 2010 at about 5.00 p.m., while PW2 James Ngige Chege, then aged 13 years and PW3 Cecilia Ruguru Muthoni were walking along Kenyatta Road near Mutomo Shopping Centre, they saw a motor vehicle being driven behind a Nissan matatu. This was the motor vehicle the Appellant was driving. According to the two witnesses, the Appellant was attempting to overtake the Nissan matatu. There was however an oncoming vehicle. To avoid colliding with the oncoming motor vehicle, the Appellant swerved the motor vehicle to the left side of the road. The motor vehicle veered off the road and knocked down the deceased persons fatally injuring them. According to the investigating officer, PW6 PC Dominic Mutinda (then based at Gatundu Police Station), the deceased persons did not die on the scene of the accident, but rather, while being attended to at Gatundu District Hospital and Thika District Hospital respectively.

PW6 visited the scene of the accident. He drew a sketch plan. He found the motor vehicle at the scene. According to the skid marks, he formed the view that the motor vehicle was being driven at a high speed. He saw a bump on the road just before the point of impact. The weather was dry. The road is tarmacked. Visibility was clear. There were no potholes at that section of the road. In his view, a driver could see a reasonable distance ahead of him to enable him take evasive action to avoid the accident. PW4 Atanasio Kabaire inspected the motor vehicle on 27th April 2010. He was of the opinion that the motor vehicle had no pre-accident defects. The post mortem reports in respect of the two deceased persons were produced in evidence by Dr. Francis Ngugi of Gatundu District Hospital on behalf of Dr. Mukabana. According to the said reports, the injuries sustained by the deceased persons were consistent with being hit by a motor vehicle. All the reports referred to by the prosecution witnesses were produced into evidence.

When the Appellant was put on his defence, he denied causing the death of the deceased persons by negligent or dangerous driving. Whereas he admitted that he had crashed the deceased persons with the motor vehicle he was driving, he told the court that he did so to avoid colliding with a Nissan matatu which had suddenly stopped in front of him. He took evasive action by veering to his left. Unfortunately, he crashed into the deceased persons. He denied that he was speeding at the time. He estimated his speed at the time of the accident to be between 70 – 100 kph. He told the court that he took evasive action to avoid ramming into the Nissan matatu. He was of the view that he made all effort that he could to avoid the accident but the distance was too short to enable him effectively control the motor vehicle. The Appellant's testimony was corroborated by that of the DW2 Peter Malewa, DW3 Peter Mutua and DW4 Geoffrey Mwangi who were in the motor vehicle with the Appellant at the time the accident occurred.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the

case against the Appellant on the charge of **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act** to the required standard of proof beyond any reasonable doubt.

In the present appeal, it was the prosecution's case that the Appellant drove the suit motor vehicle in such a dangerous manner that he caused the death of the deceased persons. From the evidence adduced by the prosecution witnesses, it was established to the required standard of proof beyond any reasonable doubt that it was the Appellant who was driving the suit motor vehicle when it veered off the road and knocked down the deceased persons causing them to sustain fatal injuries. The Appellant admitted as such when he testified in his defence. The issue for determination by this court is whether the prosecution established to the required standard of proof that the Appellant drove the said motor vehicle in a dangerous manner. According to **Section 46** of the **Traffic Act**, a driver is said to have caused death by dangerous driving when he drives recklessly or at a speed or in a manner which is 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”.

In **Gabriel Wambua Kitili –vs- Republic [2006] eKLR**, Makhandia J (as he then was) held that in such cases the onus was on the prosecution to establish that it was the accused's dangerous driving that caused the accident that resulted in the death of the deceased persons. In the present appeal, it was the prosecution's case that the Appellant drove the suit motor vehicle at a high speed near a shopping centre. The Appellant also attempted to overtake another motor vehicle when it was dangerous to do so in view of an oncoming motor vehicle. According to the investigating officer, the condition of the road was dry. Visibility was clear. The road was tarmacked. There were no potholes. There was a bump near where the Appellant veered off the road and hit the deceased pedestrians. In his defence, the Appellant stated that he was forced to veer off the road to avoid ramming into the Nissan matatu which had suddenly stopped ahead of him.

Upon re-evaluation of the evidence adduced by the prosecution witnesses and the defence offered by the Appellant, it was clear to this court that the prosecution indeed established to the required standard of proof that the Appellant drove the suit motor vehicle in such a reckless and dangerous manner that he caused the death of the deceased persons. It was apparent from the evidence adduced that the Appellant was driving the suit motor vehicle at a high speed near or in the vicinity of a shopping centre. The conclusion reached by the trial magistrate to the effect that the fact that the Appellant was driving at an unreasonable speed of between 70 – 100 kph in such an area cannot be faulted. It was evident, as adduced by the prosecution witnesses, that the Appellant was attempting to overtake another motor vehicle when there was an oncoming motor vehicle. This overtaking attempt did not take into account the safety of other road users, particularly the deceased pedestrians, who were using the road at the time. Even if this court were to agree with the Appellant that it was the Nissan matatu that caused him to veer off the road and therefore hit the deceased pedestrians, from the Appellant's own admission, it was clear that he was driving at a high speed too close to another motor vehicle. The Appellant did not drive at a safe distance which would have enabled him to safely bring his motor vehicle to a stop in the event the vehicle ahead of him suddenly stopped. Either way, this court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the manner in which the Appellant drove the suit motor vehicle was reckless and dangerous that it established the essential ingredient of **dangerous driving** under **Section 46** of the **Traffic Act**. The Appellant's appeal against conviction therefore fails. It is dismissed.

On sentence, the Appellant is on firmer ground. It was clear to this court that the trial court erred when it sentenced the Appellant to serve a custodial sentence without an option of fine. In traffic cases, unless the prosecution establishes an element of extreme carelessness or recklessness that clearly shows that the driver of motor vehicle did not have any regard to the safety of other road users, then a person convicted for any traffic offence should be given an option of a fine or other sentence apart from custodial sentence. In **Orwenyo Missiani –vs- Republic [1976 – 80] 1KLR 1446** at page 1453, the court cited the decision of Madan and Chesoni JJ (as they were) in **Govind Shamji –vs- Republic** where it was held thus:

“The offence of causing death by dangerous driving is not an ordinary time of crime. While it cannot be given an aura of protection by putting it in a glass case of its own, the people who commit this offence do not have a propensity for it, neither is it a type of crime committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interest of justice as well as the interest of public. There are of course cases where a custodial sentence is merited, for example, where there is a compelling feature such as an element of intoxication or recklessness.”

In the present appeal, the Appellant stated that he had a clean driving record of ten years at the time of the accident. He pleads with the court to exercise leniency on him in view of the fact that he had spent three months serving the sentence before he was released on bail pending the hearing of this appeal. This court is of the opinion that the circumstances of this case did not warrant the Appellant to be sentenced to serve a custodial sentence without an option of fine. There existed no aggravating circumstances to call for such sentence.

In the premises therefore, the Appellant’s appeal on sentence succeeds as a result of which the custodial sentence imposed on the Appellant by the trial court is hereby set aside and substituted by a sentence of this court sentencing the Appellant to pay a consolidated fine of Kshs.200,000/- or in default the Appellant shall serve two years imprisonment in addition to the three months that he had already served in custody. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JANUARY 2016

L. KIMARU

JUDGE