



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 47 OF 2014

DICKSON NDOLO MACKENZIE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence dated 10th March 2014 in Machakos Chief Magistrate's Court Criminal Case No. 172 of 2014 by Hon. P. N. Gesora, Senior Principal Magistrate)

JUDGMENT

0. The appellant was convicted on his own plea of guilty for the offence of causing death by dangerous driving contrary to section 46 of Traffic Act Cap. 403 Laws of Kenya and sentence to an imprisonment term of five (5) years in the Machakos Chief Magistrate's Court Traffic Case No. 172 of 2014.
0. The full record of the proceedings in the trial court is set out below:

"REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MACHAKOS

TRAFFIC CASE NO. 172 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

DICKSON NDOLO MAKENZI.....ACCUSED

10/3/2014

Before P. N. Gesora – SPM

Prosecutor – IP Kavoo

Court clerk – Mueni

Interpretation – Swahili

Accused in person

The substance of the charge and every element thereof has been stated by the court to the accused person in the language that he understands who being asked whether he understands, admits the truth of the charge and replies in Swahili language: Guilty.

Facts: *On 7/6/13 at around 12.30 hours accused herein was the driver of motor vehicle KAM 386W Nissan saloon along Wote Machakos Road and on getting Machakos University he swerved off the road and hit a pedestrian one Augustine Nzioka.*

He was rushed to hospital but unfortunately succumbed to the injuries. He was arrested on 9.6.13 and upon completion of investigations, he was charged with the offence herein.

I wish to produce a postmortem prepared by Dr. Okinyi. Postmortem report – P. Ex.1.

The motor vehicle was inspected and a report is before court. It had no pre-accident dents. Inspection report P. Ex.2.

The area is a built-up area and accused should have exercised responsibility. His driving licence is before court. Driving licence P. Ex. 3 – N.I.P. – P. Ex. 4.

P. N. GESORA

SENIOR PRINCIPAL MAGISTRATE

10/3/2014

Accused: Facts are correct as stated.

P. N. GESORA

SENIOR PRINCIPAL MAGISTRATE

10/3/2014

Court: Accused is guilty of own plea and is convicted.

P. N. GESORA

SENIOR PRINCIPAL MAGISTRATE

10/3/2014

Prosecutor: Accused is a first offender.

Accused: I pray of leniency.

P. N. GESORA

SENIOR PRINCIPAL MAGISTRATE

10/3/2014

Court: I have carefully considered the plea by convict in mitigation and also that he is a first offender. I order that he serves five (5) years imprisonment and his licence is hereby suspended for a period of 3 years after completion of the sentence.

Right of Appeal 14 days explained.

P. N. GESORA

SENIOR PRINCIPAL MAGISTRATE

10/3/2014”

3. The appellant’s Petition of Appeal dated 24th march 2014 was originally filed by his then counsel, M/S Wamwayi & Co. Advocates, challenging the conviction and the sentence and seeking that the appeal be allowed, conviction quashed and sentence set aside.

4. The appellant expressed intention to act in person and subsequently filed amended grounds of appeal and submissions which he presented to court at the hearing on the 23rd November 2015. Counsel for the Respondent, Ms. Njuguna made oral submissions and the appellant replied thereto, judgment was reserved.

5. In his submissions, the appellant challenged only the severity of sentence in his various grounds of the appeal.

6. Counsel for the DPP submitted that the appellant understood the nature of the charge which was read to the appellant in Kiswahili a language that he understood and the facts of the case were also read out to him in Kiswahili language and that therefore the appellant’s plea of guilty was unequivocal. On the sentence, it was submitted that section 46 of the Traffic act prescribed a maximum of 10 years and does not provide for non-custodial sentence.

DETERMINATION

7. An appellant who pleads guilty to a charge is not entitled to appeal against the conviction and is only entitled to challenge the sentence. See section 348 of the Criminal Procedure Code which provides as follows:

“348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

8. However, upon consideration of the evidence presented before the court, the appellant was properly convicted on his plea of guilty after the charge was read and explained to him in Kiswahili and facts read over to him in the same language, which he understood, and his plea was unequivocal. Indeed, the appellant’s challenge on the trial is on the severity of the sentence not the conviction.

9. Section 46 of the Traffic Act provides as follows:

“Causing death by driving or obstruction

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 offender and 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 later.”*

10. As the appellant pleaded guilty and the case did not have to go full trial, the trial court ought to have given credit to the appellant’s conduct of his trial towards expedited determination by the extent of the imprisonment term. For a first offender who pleads guilty to the charge, a third of sentence of imprisonment term prescribed would be sufficient punishment and I consider that the trial court was wrong in imposing a sentence of imprisonment amounting to half the prescribed maximum of 10 years. A jail term for 3 years would have been sufficient in the circumstances.

ORDERS

11. Accordingly, for the reasons set out above, the applicant’s appeal against sentence is allowed. I substitute therefor a sentence of imprisonment for three (3) years. The suspension of the appellant’s driving licence for a period of three (3) years after completion of sentence, which is the only term provided by the law, remains unaltered.

DATED AND DELIVERED THIS 26TH DAY OF JANUARY 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Appellant in person

Mrs. Saoli for the Respondent

Ms. Doreen - Court Assistant.