

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL CASE NO. 138 OF 2014

[Arising from judgment of C.L. Yalwala in Bungoma CMCR no. 74 of 2014 delivered on 31st October 2014]

GUNSFLACK KASSIM MAKOKHA APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein **Gunsflack Kassim Makokha**, having been dissatisfied with the judgment of the acting Principal Magistrate C.L. Yalwala in Bungoma CMCR case No. 74 of 2014 where having been charged with the offence of causing death by dangerous driving and careless driving he was found guilty on both counts, convicted and sentenced to 2 years imprisonment on the 1st count and 6 months on the 2nd count. The sentences were to run concurrently, preferred this appeal.
2. The appeal is based on grounds that, the trial magistrate erred in law and fact by conducting the proceedings in a manner that violated the Constitution; put into consideration contradictory evidence; the rider of the motor cycle was not licensed, not insured and the motor cycle was not presented in court; the trial court did not consider the evidence of the defence, there was no interpreter, and the sentence was harsh and excessive.

At the hearing the appellant reiterated the above adding that he was not given an opportunity to call his witness.

3. The state opposed the appeal for lack of merit; it argued that the vehicle in question was inspected on the 5th of April, 2012 after the accident, the cyclist was hit from behind; that the appellant did not ask to bring witnesses at the trial, and lastly the appellant was convicted on both counts.
4. Having considered the grounds of appeal and the submissions before court the issues for consideration is whether the appellant on the material day drove dangerously and carelessly thus hitting motor cycle no. **KMCR 693**, causing the death of **Mark Wamalwa Wekesa** and injuring **Isaac Wanyama Wasike** and whether the sentence imposed was harsh and excessive.
5. The evidence of the prosecution is that on the 5th April, 2014 along Bungoma-Malaba road an accident occurred involving motor vehicle registration **No. KAV 570U make Toyota matatu** and motor cycle registration **No. KMCR 693 R** where one passenger on the motorcycle died while another was injured. Further that the motor cycle was hit from behind. **PW1 Isaac Wanyama** was one of the passengers, he stated that the motor bike was hit from behind and he fell off, did the vehicles head lamp was shattered. **PW2 the Investigating Officer** who arrived at the scene after investigations formed the opinion that the motor cycle was hit from behind. He stated further that the motor vehicle was examined and found to have had pre-accident defect on the other hand on examination the motor cycle was found to be defective. On cross examination he stated that the appellant failed to keep distance. **PW6 Godfrey Mukhebi** an eye witness who was walking along the Kanduyi – Malaba road on the material day witnessed the motor vehicle hit the motor bike from behind. He blamed the driver of the motor vehicle for over speeding.
6. When put on his defence the appellant stated that on the material day the 5th of April, 2012 at about 4.00 a.m. he arrived at Bungoma stage and boarded a vehicle to Malakisi where he had

parked his vehicle for the night. He took his vehicle, worked for the whole day in Bungoma and in the evening he filled his vehicle with passengers headed to Malaba. He drove slowly and on reaching Malulo corner near Siritanyi there was a motor cycle ahead of him on the left side. That the cyclist suddenly turned right without indicating and hit his vehicle whose side parking light was damaged and upon hitting the vehicle the passengers fell on the left side of the vehicle. His passengers were apprehensive and asked him to drive on, he drove off to Kimaiti police station. Much later he was charged. The motor cycle was not damaged.

7. In his judgment the trial magistrate did not believe the defence. He agreed with the prosecution that the appellant drove dangerously and carelessly and hit the motor cyclist from behind, he also formed the opinion that the impact was much from the damage on both the motor vehicle and the motor cycle and hence this was an indication of the speed. The court also noted that the cyclist was hit from behind.
8. I do concur entirely with the sentiments of the trial court and I am therefore not inclined to interfere with the same. I find grounds of appeal attacking the conviction to be wanting and the appeal on this score fails.
9. As of the sentence the same was reasonable in the circumstance and this court affirms the same.
10. The appeal is therefore dismissed.

Dated at Bungoma this 26th day of May 2016.

ALI-ARONI

JUDGE