



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 15 OF 2015

BONFACE BARASA ----- APPELLANT

VERSUS

REPUBLIC -----RESPONDENT

*(Appeal against conviction and sentence in Busia CM Tr. Case No. 394 of 2014 by Hon. M. Wambani
Chief Magistrate)*

JUDGMENT

1. The conviction and sentence imposed on Bonface Barasa (The Appellant) for the offence of causing Death by Dangerous Driving Contrary to Section 46 of The Traffic Act (Cap 403 Laws of Kenya) in under challenge in this Appeal.

2. The particulars of the Offence for which conviction was entered were that:

On the 30th day of November 2013 at about 2.00 p.m. along Nambale-Malanga rough road at Manyore area in Busia County, Boniface Makokha Barasa being the driver of motor vehicle Reg. No. KTCA 333D/ZB 5535 New Holland drove the said Motor vehicle on the said road at a speed and in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the road thereby caused the death of a female juvenile pedestrian namely Florence Aswani Nabuko.

3. Some girls amongst them, Faith Ashley (PW3), Nabalao (PW4) and Florence Aswani Nabalao (The deceased) were on the afternoon of 30th November 2013 out fetching and collecting firewood. But the outside chores did not end well. At Manyore area an accident occurred in which the Deceased was knocked and sustained injuries that eventually proved fatal.

4. It was the evidence of PW3 that she heard the sound of a tractor and moved off the road. The Deceased and others remained near the road. The Tractor reversed backwards and then moved forward again. The tractor then ran over the deceased. The recollection of PW4 was as follows:-

“On 30th November 2013, we had gone to fetch firewood. I was with five others namely Sheila, Christine, the late Florence Nabuko, Risper, Maria. We were near the road of Manyole as you go to Malanga. There came a tractor from Manyole direction. It was going to Nambale town. I was on the right side of the road. My colleagues were on the left side of the road. That tractor stopped. I heard screams from the left side of the road. It was 4 metres distance away from where I was. Sheila was crying shouting Florence’s name. I saw that tractor move in front and also reverse. That tractor knocked down the late Florence. I found

the tractor at the scene of the accident. The late Florence fell facing downwards, she raised her head and fell on her back. Her head fell on a stone. She did not die on the spot. I reported the accident to the deceased's parents. Florence was taken to hospital but she had difficulties in breaching. The accused before court is the one who was the driver of the accident tractor. He is the first one in the dock.

5. Geoffrey Isigi Kigame (PW5) also witnessed the accident. He saw the tractor move forward and backward and then knock a child. There was then Christine Auma Ouma (PW2). The Appellant spoke to her before driving the tractor on a forward and backward motion. He then knocked down the Deceased. The accident happened on the road.

6. PC Collins Otieno (PW7) investigated the accident. A core part of his investigation was visiting the scene of the accident where he drew a sketch. Both the rough and the fair sketch plans were produced in Court. The point of impact appeared to have been on the road.

7. After the Accident, the Deceased was removed from the Scene and taken to hospital at Nambale Hospital. Her father Fred John Wabuko (PW1) visited the hospital and made arrangements for her transfer to Busia Hospital where, sadly, she succumbed to her injuries. Dr. Rabare Nina (PW6) who performed a Post Mortem on the body of the Deceased formed the opinion that the cause of death was Pulmonary Cardiac Arrest following severe injuries consistent with a Road Traffic Accident. The Post Mortem Report was tendered as evidence.

8. In Defence, the Appellant stated that on 30th November 2013 at about 2.00p.m he was driving along Malanga-Nambale murrum road when he was stopped by the driver of another vehicle and told that he had caused an accident. He says that he was surprised as he had not caused any accident.

9. Upon considering the evidence the Trial Court convicted the Appellant and imposed a fine of shs. 500,000/- and in default imprisonment for life. The Appeal which is against both conviction and sentence raises the following grounds.

1) That the Learned Trial Magistrate erred in reading a decision to convict when all the ingredients of the offence had not been established.

2) That the Learned Magistrate erred in imposing a sentence of "Kshs. 500,000/- fine in default life imprisonment" which was contrary to the express sentence provide by law for the same.

3) That the learned magistrate erred in imposing a sentence manifested excessive in the circumstances.

4) That the learned magistrate erred in reading a conviction amidst inconsistencies in the prosecution evidence.

5) That the trial magistrate erred in ignoring fully in substantially the evidence of the defense.

6) That the learned magistrate erred in failing to make finding on the read issues at hand which occasioned a miscarriage of justice.

10. At the hearing Mr. Ombito for the Appellant lay emphasis on the Ground against Sentence. He urged this Court to find that the sentence was contrary to the law; arguing that a life imprisonment cannot be an alternative to a fine. He further argued that the sentence imposed impedes the possibility of a remission.

11. On the conviction Counsel urged that there was inconsistency as to the number of person present on the road and that would be crucial to prove mens rea.

12. In opposing the Appeal, Mr. Owiti for the State asked this Court to find, like the Trial Court, that all

the ingredients of the offence had been proved. He pointed out that a Death was caused to the Deceased. The Death was as a result of the impact of a motor vehicle driven by the Accused. The place of the Accident was a residential area and the Accused was reckless by failing to observe the presence of children on the road.

13. From the record at least four people witnessed the Accident. These are PW2, PW3, PW4 and PW5. Their evidence was consistent in some material particulars. The witnesses saw a tractor make forward and backward and then forward movement. In the forward movement it knocked the Deceased. However, the evidence of PW4 was that PW3 and PW4 thought that the accident happened off the road the impact was on the road. The sketch plan drawn by PW7 supported the evidence of PW2 that the Deceased was on the road when knocked. From the evidence available, there was presence of more than four people either on the road or near the place where the accident occurred. Whether this was a residential area as submitted by the State Counsel, was however not clear from the evidence. There was further evidence that just before the accident, the Appellant had stopped to talk to PW2. If he was observant then he would have noticed that presence of the people on or around the road.

14. A critical aspect of the case would be whether the Deceased was on or off the road at the time of the Accident. This important aspect does not seem to have caught the attention of the Learned Trial Magistrate. Whilst the eye witnesses were not consistent on the place of impact, the sketch plan drawn by PW7 soon after the accident supported the theory that the child was on the road when she was knocked. Debris and blood stains were found on the road.

15. There being evidence that the Deceased was on the road then it has to be considered whether her presence on the road was lawful. On this the Prosecution failed to lead any evidence. There was no evidence that the point of impact was a lawful Pedestrian Crossing or that the child was for some other lawful reason on the road. Further, there was no evidence that the Appellant was driving recklessly or at a speed or in a manner that was dangerous to the Public. However his failure to completely notice the presence of the child on the road is evidence that he was inattentive.

16. On the evidence this Court finds that the Appellant, though not driving recklessly or dangerously, drove without due care and attention. This Court finds that the Trial Court erred in Convicting the Appellant for the offence under Section 46 of the Traffic Act for the Offence of Dangerous Driving.

17. Section 179(2) of the criminal Procedure Act provides:-

(2) When Person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

This Court finds that, although a Death resulted from the Accident, the evidence before Court only proved that the Appellant drove without due care and attention contrary to Section 49 of The Traffic Act.

18. The Result is that I do hereby set aside the conviction by the Trial Magistrate. In its place I do hereby find the Appellant guilty of the offence of Driving without due care and attention contrary to Section 49 of the Traffic Act and convict him accordingly.

19. From the Record of The Trial Court, the Appellant is a first offender. I do fine the Appellant the sum of Kshs. 50,000/- or in default to serve a prison term of 6 (six) months.

Dated, signed and delivered at Busia this 25th day of May 2016.

F. TUIYOTT

JUDGE

In the presence of:-

.....C/Assistant

.....for the Appellant

..... for the State