



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

H.C.CR.A 162 OF 2009

BERNARD WAMBUA KISILU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the original Conviction and Sentence of the

Chief Magistrate's Court at Machakos by Hon. S. Mungai (SPM))

in Traffic Case No. 7 of 2009 dated 7th October 2009)

JUDGMENT OF THE COURT

1. The Appellant was charged with the offence of **Causing Death by Dangerous Driving** contrary to **Section 46 (1)** of the **Traffic Act Cap 403**. He was convicted and sentenced to serve 1 year in jail.

2. Not being satisfied with the conviction and sentence (which sentence apparently has now been served), the Appellant filed this appeal, based on the grounds that the learned trial magistrate erred in law in convicting him under Section 46 of the Traffic Act when the prosecution had not proved its case to the required standards; the learned trial magistrate erred in law and facts in convicting him whereas it was abundantly clear to him that he was not at fault given the nature of his duties namely a driver of an ambulance where he was supposed to drive cautiously, carefully in order to save the lives of other human beings; that the learned trial magistrate erred in law in imposing a mandatory custodial sentence against him without any justification whatsoever in particular the fact that he was not drunk nor was he utterly reckless, the compellable features necessary for such as sentence; that the learned trial magistrate erred in law and fact in convicting the Appellant whereas he was a driver and was at the material time in the course of his duties and within the scope of his employment and that the sentence handed to him was excessive in the circumstances.

3. On 22nd April 2015 the Appellant filed a supplementary ground of appeal viz;-

(7) The succeeding trial magistrate erred in law by not strictly complying with the provisions of Section 200 of the Criminal Procedure Code hence rendering the Appellant's trial a mistrial.

4. The appeal is opposed. With the leave of court parties filed submissions which I have carefully

considered. It is the duty of this court at this appellate state to re-examine and re-evaluate the evidence tendered in the trial court, and to reach its own finding on the same.

5. The Appellant has identified the reasons for determination which are contained in the grounds of appeal and so I will address the same in determination herein.

6. The Appellant abandoned grounds 4, 5 and 6 but argued grounds 1, 2 and 3 together. The supplementary ground was argued separately.

7. It is the Appellant's case that the trial court misdirected itself when it relied on inconsistent and contradictory testimonies of PW1 and PW2 to convict the Appellant.

8. Because the testimonies of PW1 and PW2 are alleged to be contradictory, it is the duty of this court to re-examine and re-evaluate what they said. PW1 partly testified that on 10/5/09 at 12:30 p.m, he left his place of work and was walking towards his house. He was on the **Machakos-Kitui Road**. Near **Machakos Girls' School** at the bridge, an ambulance passed by him headed in the same direction as him. After a short distance, it made a U-turn and went to the right side of the road. There were two people both pushing bicycles off the road on the right and it hit the one who was pushing the bicycle and threw him off the road further to the right. The bicycle broke into 2 and one piece remained on the road while the other landed in front of the one who was hit, about 8 – 9 meters from him.

9. The other one was also hit by the vehicle and he fell down with his bicycle landing on him. He woke up dusted himself and continued pushing it and went away. The motor vehicle turned and faced the **Machakos direction** and stopped off the road about 3 inches from the road edge. PW1 rushed there and found the alarm of the ambulance still flashing. He told the driver to contact the police as the one he hit had died.

10. PW2 partly testified that on 10th may 2009 at about 12:30 p.m., he was at his place of duty. He saw an ambulance of **Mbiuni Reg. No. GKA 636 M** make **Land Cruiser** coming from **Machakos Town** direction to **Kitui direction**. There was a cyclist pushing his bicycle towards town and it was uphill for him. The ambulance crossed to its right side when it reached the edge of the tarmac road and off the road and hit the cyclist. It stopped about 100 meters from where it hit the cyclist ahead towards **Kitui direction**. It faced **Kitui direction**. The driver got out and walked back where he hit the cyclist. The cyclist was hit and landed about 5 meters from the road edge.

11. From the testimonies of PW1 and PW2 the issue is whether they were consistent. In determining this issue, it is prudent to find out where the testimonies converge. There were two different people who witnessed the accident from different directions. It is not like they were at the spot of the accident expecting the same to happen. Therefore, nobody could expect that their testimony would be uniform. The most important thing is the convincing thread in their testimony. It is important to note that both witnesses saw the ambulance registration number **GK A 636M**. Both witnesses saw the ambulance hit a cyclist who was pushing a bicycle. Both witnesses also testified that the cyclist who was hit died on the spot. What contradiction is there? This was not a case which involves different motor vehicles so that it would be important to determine who was in the wrong or what contribution to the accident was made by who. The culpability of the appellant in this accident was proved beyond any reasonable doubt by the prosecution's witnesses. This court finds that grounds 1, 2 and 3 of the appeal lack merit and the same are dismissed.

12. As regards the supplementary ground that **Section 200** of the **Criminal Procedure Code** was not strictly complied with, the record is clear at Pg 19 of the Record of Appeal, the proceedings show that the trial magistrate noted that the case was part-heard, and proceeded to explain the importance of **Section 200** aforesaid. If the record itself confirms that the section was complied with, why would this court seek to infer that the section was not strictly complied with? There is no evidence to dismiss what the record states.

13. The upshot of the foregoing is that the appeal herein lacks merit. The same is herewith dismissed.

The conviction and sentence of the trial court is upheld.

That is the judgment of the court.

Dated and delivered at Machakos this 26th day of October 2016.

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E. OGOLA

JUDGE

In the presence of;

Mr. Nthiwa holding brief for Mr. Ngolya for appellant

Mr. Omirera holding brief for M/S Saoli for State

Court Assistant – Mr. Munyao