REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 51 OF 2016

PETER MACHONI GEDANYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon. P. N. Maina Principal Magistrate in Kehancha Principal Magistrate's Court Traffic Case No. 195 of 2016 delivered on 27/10/2016)

JUDGMENT

1. The appeal in this matter arose from the conviction and sentence of the appellant from a plea of guilty. The appellant was arraigned before the traffic court at Kehancha and charged with the offence of **Causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act,** Chapter 403 of the Laws of Kenya. The particulars of the offence were that '*on the 21st day of December 2015 at about 1300hrs along Kehancha - Migori road at Kombe Junction in Kuria West District within Migori County, being the driver of motor vehicle registration number KAL 487U make Isuzu Canter drove the said vehicle dangerously thereby causing death of Leonard Nsato.*'

2. The record indicates that the charge and its particulars were read and explained to the appellant in English/Kiswahili/Kikuria which language the appellant indicated to understand. When called to respond the appellant admitted the charge and the court, so rightly, entered a plea of guilty.

3. The facts of the case followed immediately which briefly disclosed that on the said 21/12/2015 at around 1pm the appellant was driving motor vehicle registration number KAL 487U make Isuzu Canter along Kehancha - Migori. On reaching the Kombe Junction the appellant without exercise of any due diligence got into the junction when it was not safe to do so. The appellant's said motor vehicle then hit and ran over a motor cyclist riding motor cycle registration number KMDL 374U make TVS Star. Members of the public who witnessed the incident rushed to the scene and hurried the rider one Leonard Nsato, his wife and their child to Migori County Referral Hospital for treatment. The rider however succumbed to the injuries during the treatment whereas the rider's wife and the child were admitted and discharged after two days. The appellant however fled the scene after the accident and went into hiding. He was arrested in the very morning he was arraigned in court.

4. Both vehicles were taken for inspection and their respective inspection reports were produced as exhibits. The appellant's vehicle was found to be unroadworthy as it had two worn out tyres among other defects. The motor cycle was extensively damaged. A Post Mortem report for the said rider was also produced as an exhibit which confirmed that the rider had died on 21/12/2015 and that the cause of death was as a result of the injuries he sustained during the accident. A P3 Form for the rider's wife was also

produced as an exhibit.

5. When the appellant was called to respond to the facts, this is what he stated:

> ***"The facts are true and correct."***

6. The court then convicted the appellant own his own plea of guilty and upon taking the appellant's mitigation the court sentenced the appellant to 10 years imprisonment.

7. The appellant felt aggrieved by both the conviction and sentence and lodged a Petition of Appeal in this Court on 28/10/2016 where the appellant contended that he unknowingly pleaded guilty to the charge since the translation was too fast such that he was totally confused and did not fully understand the charge and the facts. The appellant further contended that he was indeed unwell as he had a headache and that he was fearful having been arraigned before court for the first time.

8. The appeal was heard by way of oral submissions where the appellant appeared in person and Learned State Counsel Miss Bosibori appeared for the State. At the hearing of the appeal the appellant generally reiterated the grounds contained in the Petition of Appeal and prayed for a retrial. The appeal was opposed.

9. As this is the Appellants' first appeal the role of this court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that. In this case however since the matter did not proceed on for trial, the court did not have the advantage of observing the demeanor of the witnesses and hearing them give evidence.

10. Due to the centrality of the issue of plea-taking, I will first revisit the law on that subject. **Section 207** of the Criminal Procedure Code states as follows:

> ***'207 (1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement;***
>
> ***(2) If the accused person admits the truth of the charge otherwise than by plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;***
>
> ***Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.'***

11. The above provisions have previously been subjected to Court's interpretation. The procedure and steps to be taken in taking a plea of guilty were clearly laid down in the case of **Adan -vs- R (1973)EA 445** and in the Court of Appeal case of **Kariuki –vs- R (1954) KLR 809** as follows:-

> ***(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***
>
> ***(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.***
>
> ***(iii) the prosecution should then immediately take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.***

(iv) If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.

(v) If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.

12. Further in the case of **Kariuki -vs- R (supra)** the Court went on and stated that:-

"The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading."

And in the case of **Atito -vs- R (1975) EA 278** the Court also held that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence.

13. Upon the promulgation of the Constitution of Kenya in 2010, the people of Kenya gave unto themselves an elaborate Bill of Rights under Chapter Four thereof. **Article 50** thereof deals with the right to a fair hearing and in **sub-article (2)(b)** it states that:-

"(2) Every accused person has the right to a fair trial, which includes the right-

(a)……..

(b) to be informed of the charge, with sufficient detail to answer it.

14. I have perused the record before the subordinate court. The plea was taken in English/Kiswahili/Kikuria languages. That means the proceedings were conducted in English, Kiswahili and in the local language Kikuria. The appellant does not dispute that. He only contends that the translation was very fast that he did not understand the charge and the facts. However from the record the appellant did not raise any objection or did not request the court for what would amount to an appropriate translation to him in terms of the speed. Instead the appellant fully participated in the proceedings to the very end. Likewise the appellant did not inform the court that he was unwell or that he was fearful. I am quite sure that had the appellant brought such to the attention of the court the court would have definitely acted appropriately.

15. I therefore find that the contentions that the appellant did not understand the charge and the facts, that he was unwell and so fearful to be unsustainable and are hereby dismissed as afterthoughts.

16. I will now deal with the facts as presented and recorded. I start by reiterating that in cases where an accused person pleads guilty to an offence and facts are taken, the court is duty bound to scrutinize the facts and to ensure that the facts disclose the ingredients of the offence in issue. That is the only time when a court, in the further guidance of the law aforesaid, can proceed to convict the accused person.

17. The appellant was charged with the offence of **Causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act,** Chapter 403 of the Laws of Kenya. The particulars have been reiterated before. **Section 46** of the **Traffic Act,** Chapter 403 of the Laws of Kenya provides as follows:

"***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 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.'

18. I have carefully scrutinized the facts in this matter. The same were clear and straight forward and exhibits were produced. From the provisions of the above Section 46, the facts demonstrated the ingredients of the charge. I say so because the facts have it that the appellant who was driving the offending vehicle did not exercise due diligence and got into the junction without first ascertaining that it was safe to do so. That conduct is tantamount to endangering the lives of other people who were lawfully at the said point of the road. As a result of that uncalled for conduct an innocent life was *inter alia* lost. I therefore find that the plea was rightly taken and was unequivocal and the conviction remains merited. The appeal on conviction therefore fails.

19. I will now deal with the issue of the sentence. **Section 46** of the Traffic Act prescribes the sentence to be a maximum of 10 years imprisonment further to other penalties. The appellant was hence sentenced to the maximum term of imprisonment provided in law. There is no doubt that offence that the appellant faced was such a serious one and that the court exercised its discretion in the sentencing.

20. It is well settled in law that sentencing is an exercise of discretion on the part of a court and that such exercise of discretion is rarely interfered with unless in the clearest of instances. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

21. The appellant was a first offender and he pleaded guilty to the charge. He was further remorseful in mitigation. The court took into account the nature and the circumstances of the case and also the fact that the appellant had been on the run for over 10 months. It also stated that the appellant was not remorseful despite having caused the death of the rider and injured the rest of the family members. With greatest respect to the learned magistrate, the record shows that the appellant was indeed remorseful. However I am of the view that the fact that a convict is not remorseful ought not to be a consideration in sentencing as that may affect that person's position on appeal.

22. Be that as it may, **Section 46** of the **Traffic Act** imposes further penalties to the imprisonment. In such a situation a sentencing court has to balance the imprisonment term and the other penalties. I highly believe that had the court approached the matter that way it would have come to a different conclusion. This was also a case where the court would have called for a Pre-Sentence report to know more about the parties. It is therefore on that background that I find that the sentence was harsh and excessive. The appeal on the sentence is hereby allowed and the sentence of 10 years imprisonment set-aside accordingly.

23. I would have easily referred back this matter to the lower court for appropriate sentencing, but since the conviction is upheld and an appeal on the sentence will definitely lie before this Court, it will be prudent to deal with the sentencing as well. Further if the matter is to be referred for sentencing and may be the appellant would wish to exercise his right to appeal against the findings of this Court then that may cause some logistical challenges. The current era of expeditious dispensation of justice calls for this Court to deal with a matter fully unless legally restrained.

24. As I now come to the end of this judgment I will make the following orders:

a) The appeal on conviction is hereby dismissed and the appeal against sentence is hereby

allowed and the sentence of 10 years imprisonment set-aside.

b) The Probation Officer shall file a Report within 10 days of this judgment.

c) Matter shall be fixed for a Mention for sentencing on 21/12/2016.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of November 2016.

A. C. MRIMA

JUDGE