



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 19 OF 2011

JOSHUA SANDO MUSAU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

*(From original conviction and sentence in Traffic case no. 9996 of 2004 in the Chief Magistrate's court
at Nairobi – V. Wakumile (Mr.) on 14/01/2011)*

JUDGMENT

1. The appellant herein, **JOSHUA SANDO MUSAU**, is charged with causing death by dangerous driving on a public road contrary to **Section 46** of the **Traffic Act, Cap 403 Laws of Kenya**.
2. The particulars are that on the 30th day of May, 2004 at about 12.10 a.m. along Mombasa road opposite Reliance Industries Limited within Nairobi area, being the driver of a motor vehicle registration number KXP 860 Toyota Corolla Saloon, drove the said motor vehicle at a speed and in a manner that was 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 was actually at the time or which may be reasonably expected to be on the road, causing the death of one passenger namely Rose Mbinya Mutinda.
3. **PW4** Police Corporal Abdi Kedubo of Industrial Area Police Station testified that he visited the scene of the accident at about 12.30 a.m., on 30th May 2014 and found motor vehicles registration No. KXP 860 Toyota Saloon and KYH 389 a Mercedes lorry respectively. Both drivers were at the scene and he observed that the lorry was headed towards the City centre, whereas the saloon car was headed towards the Athi River general direction. The two vehicles had collided. In the findings of his investigations he blamed the driver of the saloon car who was subsequently charged.
4. In his sworn defence, the Appellant stated that on 30th May 2004 at 9.00 a.m. he was travelling towards Machakos driving motor vehicle registration No. KXP 860 and at Reliance Industries, he noticed a lorry going in the opposite direction and slowed down. The lorry was in his lane and he flashed his head lights as a warning but the other driver did not stop. His vehicle was hit head on before the other driver tried to re-enter his lane. He testified further that he discovered that the lorry driver was avoiding a pot hole when he came into his lane.

5. At the close of the trial the appellant was convicted and fined Kshs.100,000/=, in default to serve 12 months imprisonment. He appealed against both conviction and sentence stating that the prosecution case was not proved to the required standard; and that conviction was against the weight of the evidence.
6. Mr. Mutua, learned counsel for the respondent, submitted that the respondent dispensed with its burden of proving the case against the appellant beyond reasonable doubt; that the inconsistencies and contradictions in the prosecution's case were not material as to prejudice the appellant's case; and that the omission to serve the notice of intention to prosecute upon the appellant before the institution of the case did not prejudice the appellant in the trial.
7. Mr. Mutua further argued that the death of the passenger was ascertained by overwhelming conclusive evidence tendered at the trial, and that a nexus was established between the appellant and the offence of causing death by dangerous driving. He also urged that the mitigation of the appellant was considered by the trial court and the sentence meted upon him was neither harsh nor excessive.
8. I have analysed and re-evaluated the evidence on record afresh to draw my own conclusions. This is because the first appellate court is mandated to carry out such an analysis. I however bore in mind that I did not have the benefit of observing any of the witnesses as they tendered their evidence.
9. The issues for determination are whether the appellant drove dangerously and whether his manner of driving was the cause of the accident that claimed the deceased's life. **PW3** the motor vehicle inspector inspected the lorry registration No. KYH 389 Make Mercedes Prime Mover, along with its trailer registration No. ZA 7219 on 31st May 2004. He noted that its fuel tank cover panel had been damaged.
10. According to **PW4** who visited the scene of the accident; both motor vehicles were travelling along Mombasa road. The lorry was travelling from Athi River direction towards Nairobi while the saloon car registration No. KXP 860 was travelling in the opposite direction. From his observation it was the saloon car which lost control and rammed into the side of the lorry near the rear tyre before it overturned. He produced a road view that he drew on a second visit to the scene, because the original sketch plan was found missing when the investigation file went missing and was later located. He blamed the appellant for the accident.
11. **PW5**, Cpl Simiyu of Nairobi Area traffic conducted investigations in the accident and agreed with the findings of the investigations of **PW4**, that the accident was as a result of the appellant ramming into the rear tyre of the lorry. He charged the appellant. **PW5** testified further that at the time of the accident the deceased was a passenger in the saloon car and she was pronounced dead on arrival at Kenyatta National Hospital.
12. I considered the evidence of the defence in the context of the rest of the evidence on record. The appellant admitted that he was the driver of the saloon car at the material time, but stated that he was not to blame for the accident. He testified that it was the lorry driver who incursed into his lane in a bid to avoid pot holes in his own lane and caused the accident. According to the appellant the impact was a head on collision.
13. The results of the accident however told a different story. There were no frontal damages to the lorry a day later when it was inspected by **PW3** the motor vehicle inspector. This rules out the idea that the two motor vehicles were involved in a head on collision. According to the motor vehicle inspector he only noted damage to the offside fuel tank cover panel. It was curious that neither the prosecution nor the defence called as a witness, the passenger who was in the saloon car and survived the accident, nor sought to have the saloon car inspected after the accident.
14. From the evidence I am satisfied that it was the appellant who drove the saloon car in a manner that caused him to lose control thereof and hit the lorry in the area near the rear tyre and the fuel tank and also cause the car to roll. There was no dispute that at the time of the accident the car had passengers who included Rose Mbinya Mutinda.

15. According to the evidence of **PW6** Dr. Oduor, a post-mortem was done on Rose Mbinya's body on 31st June 2004 by Dr. Njue of Kenyatta National Hospital under the supervision of Dr. Okemwa of University of Nairobi. The findings were that Rose Mbinya Mutinda died as a result of head injuries due to a road traffic accident. She was aged 38 years and was 32 weeks into gestation at the time of death. Her body was identified to the pathologists by **PW1** her brother-in-law and **PW2** her brother.

16. After a careful re-evaluation of the evidence I am satisfied that the prosecution discharged the burden of proof placed upon them by law. They proved that Rose Mbinya Mutinda died as a result of a road traffic accident and that the said accident resulted from the careless manner of driving by the appellant. I agree with the learned trial magistrate that failure to serve the Notice of intended prosecution was a procedural omission that was not fatal to the prosecution's case.

17. For the foregoing reasons I find that the appeal is lacking in merit and dismiss it in its entirety.

SIGNED DATED and **DELIVERED** in open court this **24th** day of **July 2014**.

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L. A. ACHODE

JUDGE