



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL APPEAL NO. 236 OF 2010

JOSPAT MWANGI WANDEREAPPELLANT
VERSUS
REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 23773 of 2004 in the Chief Magistrate's court at Nairobi – Mrs. Nderitu (SRM) on 9/4/2010)

JUDGMENT

1. Accused person herein, **JOSEPHAT MWANGI WANDERE**, is charged with causing death by dangerous driving contrary to **Section 46** of the **Traffic Act, Cap 403 laws of Kenya**.
2. The particulars are that on the 19th day of December 2004 at about 11.00 a.m. along Thika road near Clay Works within Nairobi area being the driver of a motor vehicle registration number KPG 719 Volkswagen Saloon, drove the said motor vehicle along the said road at a speed or manner that was dangerous to the public having regard to all the circumstances of the case including the nature 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 as a result hit motor vehicle KAM 815 D Toyota Corolla Saloon and KAM 444 N Toyota Corolla causing damages to these vehicles and the death of his passenger James Mwaura Mungai.
3. At the close of the trial the appellant was convicted and sentenced to three years imprisonment. In his appeal against both conviction and sentence he stated that:
 - 1) *The sentence against him was harsh since he is a first offender and a sole bread winner.*
 - 2) *That the driver KAM 444 N did not testify.*
 - 3) *That the charge was tailored to implicate him.*
 - 4) *That the evidence did not tally.*
 - 5) *That given the circumstances and the situation at the scene what happened was unavoidable.*
4. Mr. Mulati learned counsel for the Respondent, submitted that the sentence provided by law upon conviction is a term not exceeding ten (10) years. Further that the driver of KAM 444 N did testify contrary to what the appellant advanced in his grounds of appeal. He submitted that the evidence in defence did not discount the prosecution case which had proved the guilt of the appellant beyond reasonable doubt.
5. 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.

6. Five witnesses testified for the prosecution and the sum total of the evidence of **PW1** and **PW3** is that three motor vehicles were driving towards Nairobi along Thika road, coming from Thika direction on the morning of 19th December 2004 at about 11 a.m. At Clay Works area motor vehicle registration number KPG 719 which was the last in line rammed into the rear of motor vehicle registration number KAM 444 N, which was in the middle. In turn, the impact caused motor vehicle registration number KAM 444 N to hit motor vehicle registration number KAM 815 D which was in front of it.

7. The impact caused damage in varying degrees to the three motor vehicles' and injuries to the occupants of motor vehicle registration number KPG 719 and motor vehicle registration number KAM 444 N, resulting in the death of James Mwangi Mungai.

8. Peris Nduta, the sister to the deceased testified as **PW2** and identified the body of James Mwaura Mungai for post mortem purposes. **PW4**, the Pathologist Jane Simiyu, produced the post mortem report and confirmed that the deceased died due to head injuries as a result of a road traffic accident.

9. **PW5** Mr. Gichuru, the motor vehicle Inspector examined motor vehicle registration number KPG 719 after the accident and established that it had no pre accident defects.

10. **PW3** P.C. Mutuku who visited the scene and drew the road view after the accident, blamed the appellant for the accident in view of the fact that he rammed into the motor vehicle ahead of him from the rear.

11. The appellant in his unsworn testimony and without calling witnesses, admitted that the accident occurred as stated in the prosecution case but attributed the cause of the accident to some unidentified recovery motor vehicle.

12. I find that there is no evidence on record to support the appellant's version of the events that motor vehicle KAM 444 N overtook him and cut in, ahead of him to avoid a head on collision with an on-coming recovery truck. It is a matter of common knowledge of which this court takes Judicial notice that Thika road was at the time of the accident, and had been for a long period prior to the date of the accident, a dual carriage way. It is highly unlikely that there was an on-coming vehicle in the path of motor vehicle registration number KAM 444 N.

13. Secondly, the presence of an on-coming motor vehicle was never put to any of the witnesses in cross-examination. The appellant raised it in his defence. I bore in mind that this is a quasi-criminal case and the appellant was under no obligation to explain himself or to prove his innocence. Having raised his defence as above however, the court was under duty to evaluate the evidence alongside the rest of the evidence on record. The record shows that the learned trial magistrate directed herself to his evidence and concluded that it was a made up story. Further that had events occurred as stated by the appellant, the motor vehicle registration number KAM 444 N would have been damaged on the left rear and not the right rear as was the case herein.

14. Lastly, the evidence shows that there were two lanes for motor vehicles headed towards Nairobi, and that all the three vehicles in question were following each other in the inner lane. There was no vehicle in the next lane and I therefore respectfully agree with the learned trial magistrate that there would have been no reason for PW1 to overtake using the lane of the on-coming traffic.

15. I am therefore satisfied that the learned trial magistrate directed herself properly to the facts on record and the law applicable. The conviction was based on sound evidence and in the circumstances of the case the sentence was lawful and fitting.

16. All in all, having evaluated the evidence on record in totality, I find that the appeal filed by the appellant has no merit and is hereby dismissed. I uphold the conviction and the sentence.

SIGNED DATED and **DELIVERED** in open court this 15th day of *February* 2012.

L. A. ACHODE
JUDGE