



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 136 OF 2010

DANCAN ODHIAMBO AOKO APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case number 123 of 2010 of the Senior Resident Magistrate's Court at Maseno)

JUDGMENT

The appellant herein was charged in the lower court with two (2) counts of causing death by dangerous driving, in that **“on the 3rd day of February 2009 at about 8:45 a.m along Kisumu – Busia road near Corner Kayona in Kisumu West District, within Nyanza Province being the driver of motor vehicle registration number KBC 733s, Isuzu Mini Bus, drove the said motor vehicle on the 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 nature of the road and the amount of traffic which was actually at the time or which might reasonably be expected to be on the road, in that you swerved to the offside and collided head-on collision with motor vehicle registration number KBF 232A Nissan Saloon killing the driver one Daniel Kichana on the sport”.**

In respect to count one (1) and the death of a passenger one **Jackline Nyasiamboka** in respect to count two (2).

It is on record that the appellant denied the charges, and he was put to trial. The evidence adduced before the lower court in a summary form is as follows:-

PW1 was a passenger in the appellant's vehicle. His testimony is that the appellant driver was speeding

as he picked passengers along the way. The passengers were complaining and warned him about the speeding but he did not heed. He used to overtake other vehicles and come back to its lane safely. But on the occasion leading to these proceedings, the appellant pulled out to overtake a vehicle or vehicles a head of his but suddenly a saloon car appeared a head with its full lights on. The appellant tried to come back into his lane but it was too late and his motor vehicle collided with the saloon car. PW1 mentioned he had sat behind the driver and he saw the on coming car flashing lights just before the impact.

PW2 was in the saloon car, she saw the mini bus pull out to over take the vehicle(s) a head of it, and then collided with their saloon car. She is not in a position to tell what caused the accident.

PW3 boarded the mini bus and fell asleep, she was woken up by a loud bang and cannot tell the events that led to the accident.

PW4 had boarded the mini bus. His testimony is that when they reached at a place called Chulaimbo, he saw two Nissans a head of them, one stopped to pick passengers and it was overtaken by the Nissan immediately a head of the mini bus. The mini bus followed suit. It sped to overtake the 2nd vehicle, when the saloon car approached from a head, the opposite direction. The saloon car sensed danger and veered off the road. The mini bus also veered to the right towards it and knocked the saloon car. He was seated near the driver. He was not cross examined.

PW6 a police officer attended the scene of the accident and drew up the sketch plan. To her, the mini bus veered into the path of the on coming saloon car. She says she drew the sketch plans rough sketch plan and the legend, wrote a statement but she did not sign it and she did not mention in her statement that she is the one who drew the sketch plan. She conceded that she wrongly marked the sketch plan. The fair as rough and the rough as fair and also wrongly dated them. She was firm she did not see any skid marks on either side. She did not see a trailer at the scene.

PW3 examined the two accident vehicles and produced the reports as exhibits. While PW8 did post mortem on the deceased's of the saloon car.

The appellant gave unsworn statement to the effect that the saloon car hit a pot hole and veered into his path. Since he was carrying 19 passengers, he was unable to apply emergency brakes and the two collided.

Against the afore set out evidence the learned trial magistrate made the following findings:-

- a) The occurrence of the accident and the deaths of the two passengers is not in dispute.**
- b) The point in issue was whether the police had established beyond doubt that the appellant drove the mini bus at a speed and a dangerous manner in the circumstances of the case and hence caused the deaths.**
- c) That the prosecutions' case is that the appellant attempted to dangerously overtake a motor vehicle in front of the mini bus and collided with the on coming saloon.**

- d) The accused persons' explanation is that it was the saloon car that veered to his lane when avoiding a pot hole on the road.**
- e) The court declined to accept the appellant's explanation because PW6 had established the point of impact which was not in dispute. It was on the right side of the road when facing Kisumu**
- f) That if as claimed by the accused, the saloon car veered to his lane then the collision would have occurred on the left side of the road as you face Kisumu.**
- g) The evidence from the prosecution which was confirmed by the accused was that the accident occurred at a corner. The accused was thus obligated to be cautious when driving and more particularly when overtaking other vehicles.**
- h) On that account, the learned trial magistrate was satisfied that the accused dangerously steered the mini bus also demonstrated by various attempts to overtake other vehicles on the road before the fateful collision and found appellant guilty as charged and convicted him accordingly.**

The appellant became aggrieved and filed this appeal citing eight (8) grounds of appeal and in a summary form these are:-

- i) The conviction went beyond the evidence.**
- (ii) The court failed to appreciate the contradictions in the entire prosecution's evidence.**
- (iii) Failed to appreciate the principle that the prosecution has to prove its case beyond reasonable doubt.**
- (iv) His rights to representation were breached.**
- (v) It was an error not to provide for an alternative sentence**
- (vi) The defence was not appreciated.**
- (vii) Mitigation was not considered.**
- (viii) The sentence was harsh**

The state opened the submissions and stated that it does not support the conviction because of the following:-

- (a) None of the witnesses could state what caused the accident.**
- (b) It is not easy to blame the appellant for the accident.**
- (c) The defence of the appellant was not considered.**
- (d) The sketch plans were not clearly marked a fact the court did not appreciate.**
- (e) The appellants defence was not considered and as such the conviction is not safe. For this reason the appellant did not make any submissions.**

This court's mandate as an appellate court is to re-evaluate the evidence that was adduced before the lower court, and arrive at its own conclusions either agreeing or disagreeing with the state's counsel on their conceding the appeal and then give reason. In doing so the court will proceed to frame own questions for determination as hereunder:-

- (1) What charge(s) were laid against the appellant in the lower court?.**
- (2) What are the ingredients required to be established before such a charge(s) can be considered to have been proved?**
- (3) What is the standard of proof applicable to these proceedings?**
- (4) Which party is required to bear the said standard of proof?**
- (5) Was that standard of proof discharged in the circumstances of this case and if so why?**
- (6) What principles of law are applicable to these proceedings?**
- (7) What final orders are to be granted herein?**

The said own framed questions will be dealt with globally. The same have been considered in the light of the entire evidence tendered before the lower court and the concession of the state, and the court proceeds to make the following findings on the same:-

- (a) There is no dispute that the appellant faced two counts of causing death by dangerous driving contrary to Section 469 of the Traffic Act Cap 403 of the laws of Kenya. The appellant concedes to**

have been a driver of the said accident vehicle which was being driven by him along the Busia - Kisumu road and on reaching at a corner at a place called Chulaimbo is when the accident happened.

(b) The crucial thing to be determined herein is that it has to be established that the motor vehicle was being driven at a speed and in a dangerous manner. Herein we have evidence assessed earlier on the record that two witnesses namely PW1, PW4 stated that they were among the passengers who boarded the mini bus at various spots on its way to Kisumu from Busia. Their testimony is that they were seated behind the driver. According to their opinion, the driver was speeding. They were among the passengers who warned him to stop speeding but he did not heed. They contend he was also overtaking dangerously. They do not however mention the speed at which the vehicle was going. None of those who were in the mini bus cabin with the driver came to testify to shed light as regards at what speed the vehicle was going. The appellant simply said he was not speeding as he had 19 passengers on board. As such it is not possible to establish the speed at which the vehicle was being driven and / or state conclusively that the appellant was speeding.

(c) The blame worthiness has to take into consideration the condition and nature of the road and the amount of traffic on the road. According to the evidence on the record, there was some amount of traffic on the road but not heavy. That the appellant had been overtaking vehicles on the road successfully. The place where the accident, took place was near a corner. Three vehicles besides one the appellant was driving are demonstrated to have been there. Two Nissans were a head of the appellant's vehicle. The first one stopped to pick passengers and was overtaken by the one which was immediately in front of that driven by the appellant. Then the appellant pulled out to the left to overtake the Nissan a head of him, and that is when the two witnesses saw an on coming saloon car with full lights on and the two had a head on collision.

According to the occupant of the saloon car namely PW2, she said; **"I saw an on coming motor vehicle trying to overtake another moving in the same direction. It got on to our lane and our motor vehicle collided with that motor vehicle"**.

There is no mention by PW2 that their driver took any action to swerve off the road as claimed by PW4. There is also no mention about the speed at which the saloon car was going at considering that the saloon car too was approaching a corner.

The foregoing being the position, it means that PW4 is the only witness whose testimony is to the effect that when the saloon car suddenly saw the vehicle driven by the appellant pull out of its lane to overtake the vehicle a head of it, the saloon car swerved to its left as you face Busia which was the right of the appellants' vehicle as you face Kisumu. That the appellant also swerved to the right for unknown reasons. This means that the act of the appellant swerving to the right in the wake of an on coming vehicle which has also swerved onto the same right lane though it's left was a dangerous act. But it has to be borne in mind the fact that PW4 would be a single witness on this aspect of the case and for this reason the learned trial magistrate ought to have warned himself against the dangers of acting on such evidence and then go ahead to justify by way of reasons as to why he thought PW4 is a reliable witness considering the fact that the evidence was of something which happened suddenly and had not been anticipated.

The other condition of the road were also to be considered namely the fact of presence of a corner which required vehicles approaching it from both sides to approach it with caution. There was also a mention of presence of a pot hole on the side of the saloon car which the saloon car hit and then veered into the path of the appellant's vehicle. The witness who could have assisted the court much on the condition of the road was PW6. Although the learned trial magistrate relied on her evidence, I tend to agree with the state's submissions that her admission that the sketches were poorly made and wrongly dated and the officer never even signed and dated her statement renders that evidence to be unworthy of any reliance on

the same, and once discounted, then what is left on the record is the opinion evidence of PW1 and PW4 as to the speeding which was not confirmed and the single testimony of PW4 that it is appellant who veered into the path of the on coming saloon car. PW4 therefore becomes a single witness. The general rule is that such evidence though admissible, the trial magistrate was duty bound to warn himself /herself against the dangers of acting on such evidence in the absence of other corroborative or supportive evidence.

The last portion to be dealt with is the applicable principles of law. It is undisputed that the proceedings are criminal in nature and for this reason the standard of proof required to be established is one of proof beyond reasonable doubt. It is therefore necessary to revisit case law on the subject for guidance. The first to be considered is the case of **Patel versus Republic [1968] EA 97** decided by the Court of Appeal for Eastern Africa where it was held inter alia that:-

“No reason had been given by the accused for the car skidding or swerving into the on coming vehicle and unless some explanation was given there was patent of evidence of dangerous driving”.

The case of **Musulu versus Republic [1969] EA 20** decided by the High Court of Kenya at Mombassa. At page 21 paragraph e – g the learned Judge as he then was quoted with approval the decision in the case of **R versus Evans [1962] 3 AER 1086** where it had been held thus:-

“If a man adopted a manner of driving which at his trial on a charge of causing death by dangerous driving, the jury think was dangerous to other road users, in all the circumstance then on the issue of guilt it matters not whether he was deliberately reckless, careless manner momentarily inattentive or even doing his incompetent best”. Applying that holding to the facts of the case before him, the learned judge as he then was went on to hold inter alia that:-

“It was clear that if the appellant had not been driving dangerously, there would have been no death. It therefore followed that the dangerous driving of the appellant was a substantial cause of the death of the deceased”

The case of **Pyaraii versus Republic [1971] EA 169** decided by the High Court of Tanzania, at page **171 paragraph c-d** the learned Judge as he then was quoted with approval the case of **Patel versus Republic (supra)** and **R. Evans (supra)** and then went on to hold this:-

“ (i) The test of whether a piece of driving is dangerous is objective and if the maneuver itself is dangerous, the degree of negligence or care of the driver is irrelevant.

(ii) The prosecution does not have to prove that the dangerous driving was the sole cause of death if was the substantial cause”

The case of **Khalit versus Republic [1973] E. A. 360** decided by the High Court of Kenya. At page 366 paragraph C – D the learned Judges as they were then quoted with approval the decision in the case of **R versus Goskey [1971] 3 AER 220** clear that **“dangerous driving is not an absolute offence, and that to justify a conviction, there must not only have been a situation which viewed objectively was dangerous but also some fault on the part of the driver causing that situation”.** **When applying that reasoning the learned judges held inter alia that:-** which had made it

(i) Dangerous driving is not an absolute offence. There must be some fault on the part of the driver.

(ii) What happens shortly before and after an accident is admissible if relevant to the charges”

This court has made due consideration of the afore set out principles and applied them to the facts of this case, that were before the learned trial magistrate, and the findings made by the said learned trial magistrate on the same and this court proceeds to make the following findings on the said evidence.

(a) The appellant herein faced a charge of dangerous driving.

(b) Principles of case law set out above show clearly thereby that the offence is not absolute. There must be some fault on the part of the driver

(c) The test to be applied is not subjective but objective.

When these principles are applied to the facts herein, it's clear that the evidence of PW6 who visited the scene and drew up the sketches was crucial in telling the court the condition of the road, the position of the vehicles on the road, after the accident the presence of pot holes etc in order for any ordinary person assessing the surrounding circumstances objectively say that on the facts, the appellant was driving dangerously. Crucial to this is failure to establish the presence of a pot hole allegedly avoided by the driver of the saloon car resulting the said driver swerving to the side of the appellants' car. Also failure to establish any skid marks by either vehicle was fatal in that it left the court with only the evidence of PW4 to the effect that the saloon car swerved to its extreme left. While the appellant swerved to the extreme right into the path of the on coming saloon thereby colliding with it had this act been established on the part of the appellant, then any ordinary person would have stated that it was dangerous. In the absence of such establishment, the appellants' assertion that he applied no brakes because he was heavily laden with 19 passengers alone cannot support the conviction fully. It creates a doubt which like all other doubts have to be resolved in favour of the appellant.

The court appreciates the fact that life was lost and others injured but being a criminal trial the standard of proof has to be met before a conviction can be sustained. The victims are however not left remediless as there is another avenue namely the civil process whose standard of proof is on a balance of probability. The issue of blame worthiness can be revisited therein if the parties so wish therein and a ruling made appropriately.

For now the court has no alternative but to agree with the concurrence of the state that the conviction has been faulted. Since the conviction has been faulted, there will be no pronouncement on the sentence. The appeal is therefore allowed, conviction quashed and the appellant ordered to be set at liberty forthwith in connection with the conviction which led to this appeal.

Dated, signed and delivered at Kisumu this 16th day of March 2011.

R. N. NAMBUYE

JUDGE

RNN/aao