



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL NO. 139 OF 2009**  
**LESIIT, J**

**JOSEPH MALUKI KAIBIRU.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**(From the original conviction and sentence in Meru CM'S Traffic No. 1519 of 2008 – W.K.KORIR  
(PRINCIPAL MAGISTRATE))**

**JUDGMENT**

The appellant was convicted of one count of causing death by dangerous driving contrary to Section 46 of the Traffic Act. He was sentenced to a fine of Kshs. 20,000/= in default 6 months imprisonment. He was also suspended from holding a driving license for a period of 3 years.

Being aggrieved by the conviction and sentence he filed this appeal. He relies on four grounds of appeal in his petition filed on his behalf by Messers Murango Mwenda and co advocates. The grounds are as follows:

- 1. The trial magistrate erred and grossly misdirected himself by convicting the Appellant without any evidence to sustain the charges and when the prosecution's case was not proved beyond reasonable doubt.**
- 2.The trial magistrate erred in convicting the Appellant on prosecution evidence that was clearly (and in his own admission) contradictory, discredited and very weak.**
- 3.The trial magistrate grossly misdirected himself in law by shifting the burden of proof to the Appellant, and in particular by requiring the Appellant to adduce evidence to proof his innocence.**
- 4.The trial magistrate erred in law by failing to consider and adequately analyze the defence of the Appellant, or the law applicant in the circumstances.**

The facts of the case were that the appellant was driving a motor vehicle registration No. KAP 835R on the 23<sup>rd</sup> April, 2007 at around 12 pm along Meru-Mikinduri road. The vehicle reversed backwards and the deceased was one of the is passengers jumped out and was ran over by the vehicle. He died on the spot.

The appellant gave a sworn defence. He told the court that before the accident he had driven for 9 years. He told the court that on the material day he was driving he vehicle in question a land rover when

he reached a place called Mulanthakari. The accused said that it had rained and the road was slippery because was an earth road. He said that as he was driving up hill on gear 2 the vehicle slowed and therefore he engaged gear 1 so that the vehicle could gain power the appellant stated that the gear failed to engage and that the vehicle began going downhill. He applied brakes but the brakes could not hold because the road was slippery. He said that then felt the rear wheel of the vehicle climb over something. He then heard his passengers shouting. The vehicle finally stopped at a pot hole. That is when he realized that he had ran over the deceased. The accused stated that he never realized that the deceased had opened the rear door of the vehicle and had jumped out until after the event.

I have carefully considered the evidence adduced before the lower court and have analyzed and evaluated it a fresh while bearing in mind that I never saw nor heard any of the witnesses, and giving due allowance.

In the case of **OKENO V. REPUBLIC [1972] EA 32**, the role of a first appellate Court is given as follows:

**“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”**

The burden lay with the prosecution to prove its case against the accused person beyond any reasonable doubt.

Mr. Mwenda for the appellant urged that the prosecution did not prove that the manner of driving by the appellant created a dangerous situation and was a departure from normal driving practice. Counsel urged that evidence both by the prosecution and defence clearly shows that the motor vehicle started rolling down hill in the reverse after the gear failed to engage. Mr. Mwenda submitted that the evidence in record shows that the deceased opened the door of the motor vehicle and jumped out, and as a consequent he was ran over by the same motor vehicle as it rolled down. Counsel urged that the appellant did not create a dangerous situation.

The State conceded this the appeal Mr. Kimathi learned counsel for the state submitted that there were material contradictions in the evidence before the court, and that the learned trial magistrate had noted them. The counsel urged that instead of giving the appellant the benefit of doubt the learned trial magistrate shifted the burden of proof by finding that the appellant had to prove that the vehicle had pre-accident defence.

The prosecution had to adduce evidence to show that the appellant had adopted a manner of driving which created a dangerous situation to other road users. In the case of **R –VS-Evans, (1962) 3 All E.R.1086**, it was held:-

**“If a man adopted an 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 circumstances, then on the issue of guilt it matters not whether he was deliberately reckless careless, momentarily inattentive or even doing his incompetent best.”**

The evidence before the court was by PW1,5 and 6 who were among the passengers in the appellant’s vehicle at the time of the accident. PW1’s evidence was that the appellant started reversing the vehicle at a high speed because he saw police officers. According to PW1, when the appellant started reversing the vehicle, the deceased alighted and fell down as a result of which he was ran over. The evidence of PW5

and 6 gave corroborated each others evidence that before to the accident they were moving up hill. That suddenly the vehicle started reversing and as it did the deceased person who was seated near the back of the vehicle opened the door and jumped out and fell down as result of which he was ran over by the vehicle.

The prosecution's case was contradictory because the evidence of PW1 contradicted the evidence of PW 5 and 6. It is however not in dispute that at the time of the accident it had rained and the road was an earth road which was slippery and it was muddy. PW4 a police officer who visited the scene after the accident, told the court that the scene where the accident, occurred was a flat road. In cross examination the police officer told the court that the vehicle was not going uphill as there was no slope around the scene.

The learned trial magistrate had the following to say in his judgment

**"Even assuming that the accused person told the truth as to how the accident occurred, there is no way he can get away with the accident. There is no evidence on record that motor vehicle was defective. If the accused person's defence was premised on the claim that the motor vehicle was defective prior to the accident, he ought to have placed evidence before court?"**

**Accused should have stopped before engaging gears from 2<sup>nd</sup> to 1<sup>st</sup>. This was not prudent to him. That amounts to dangerous driving."**

With due respect to the learned trial magistrate the evidential burden in this case was not upon the appellant to prove his innocence but it was upon the prosecution to prove its case against him beyond any reasonable doubt. If there was any doubt on any issue in the case, the benefit of doubt should have been given to the appellant. In this case it was the duty of the prosecution to prove that the vehicle the appellant was driving at the time of the accident had or had no mechanical defects. The vehicle should have been taken to a Motor Vehicle Inspector to examine and prepare a report. In the absence of such a report the appellant defence that the vehicle was defective and that the gears and brakes failed at the time of the accident is uncontroverted.

The issue is whether the appellant adopted a manner of driving which was dangerous to other road users and to the passengers. The evidence before the court that the motor vehicle started moving backwards. According to PW1 the appellant suddenly reversed the vehicle. According to PW 5 and 6 the appellant was driving up hill when the vehicle slowed down and started rolling down hill. PW 5 and 6 did not tell the court whether he was a driver. He was however candid that he could not tell whether the gears of the vehicle refused to engage and whether that was the cause of the vehicle moving backwards.

It is clear from the evidence before the court that the deceased suddenly opened the door of the vehicle and jumped out, and that as a result he fell down. He was ran over by the car. Can the appellant be said to have driven dangerously just before the deceased was run over? Did the appellant take a deliberate risk? The evidence of whether the appellant reversed the vehicle or whether the vehicle, started going downhill is controversial within the prosecution case as the eye witnesses could not agree on that point. In my view whether the appellant reverse the vehicle or the vehicle rolled down the prosecution did not prove that the erratic movement of the vehicle backward was due to causes other than mechanical defects. The prosecution did not prove the appellant was driving dangerously in irrespective of the defect, and that the death of the deceased was caused by reason of dangerous driving. The appellant could not have reasonably expected that one of his passenger could suddenly open the door of the vehicle and jump out as the appellant was engaged in the driving. Whether moving forward or reversing, I find that the prosecution did not prove that the appellant adopted a manner of driving which was dangerous, either to the public or his passengers at the time of the accident.

Having come to the conclusion I have to this case I find merit in the appellant appeal. Accordingly I quash the conviction, set aside the sentence and suspension order invoked against him. If the appellant paid any fine the same should be refunded.

**Dated signed and delivered this 28<sup>th</sup> day of July 2011.**

**LESIT, J**  
**JUDGE**