



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 184 OF 2008

PATRICK LUMUMBA.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

[From Original Conviction and Sentence in Traffic Case No. 1082 of 2007 of Resident Magistrate Court

at Mombasa, T. Nzioka –R.M.

JUDGMENT

The appellant **PATRICK LUMUMBA** has filed this appeal against his conviction and sentence by the learned resident Magistrate sitting at Mombasa Law

Courts. The appellant was arraigned before the lower court on 25/1/06 where he faced three counts of **CAUSING DEATH BY DANGEROUS DRIVING CONTRARY TO SECTION 46 OF THE TRAFFIC ACT CAP 403, LAWS OF KENYA**. In addition the appellant faced a fourth count of **FAILING TO RENEW DRIVING LICENCE CONTRARY TO SECTION 30(4) AS READ WITH SECTION 41 OF THE TRAFFIC ACT**. The appellant entered a plea of ‘not guilty’ to all four counts and his trial commenced on 21/7/2006. The prosecution led by **INSPECTOR KARURI** called a total of seven (7) witnesses in support of their case.

The prosecution case revolves around a road traffic accident which occurred on 21/1/2006 at about 6.30 p.m. at the matatu stage near the SDA church along Nyerere Road. **PW1 LOIS OTENYO** told the court that she together with her siblings **JESSICA OTENYO (PW2)**, as well as other youths were coming from a function at Mbaraki stadium. They all went to the stage and waited for a matatu to take them to Magongo. A matatu Reg KAR 934Q came and stopped at the stage. They began to negotiate the fare with

the conductor-suddenly the driver reversed the vehicle running over **PW1, PW2** and other passengers who were standing at that stage. Three pedestrians namely **RIZIKI SALIM, MOHAMED ABDI,** and **RACHEL KAZUNGU,** as named in count No. 1, 2,3 respectively lost their lives as a result of the accident. The appellant was later arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. He gave a sworn defence in which he denied any and an involvement in the accident. The appellant totally denied that he was the one driving the matatu Reg No. KAR 934Q on that material day.

On 18.7.2007 the learned trial magistrate delivered her judgment in which she convicted the appellant of the offence of causing death by dangerous driving under Count Nos.1,2,and 3. The trial magistrate however acquitted the appellant of the 4th count of failing to renew his driving licence.

After listening to the appellant's mitigation, the court sentenced him to serve seven (7) years imprisonment. It is against this conviction and sentence that the appellant now appeals.

The appellant who acted in person during the hearing of this appeal relied entirely upon his written submissions which with the leave of court had been duly filed. **MR ONSERIO,** learned state counsel appeared for the respondent state and opposed the appeal. On the fact of the accident there can be no dispute. Eyewitness testimony has been given by both **PW1** and **PW2** who were victims of the accident. Likewise **PW3 MOHAMMED AHMED HUSSEIN** and **PW4 SAMMY MAKAU WAMBUA** testified that they identified the dead bodies of their kin at the mortuary. **PW5 - CORPORAL JULIUS BANDA** is the officer who visited the scene of the accident. He took the measurements and drew the sketch plan which he produced in court as an exhibit **Pexb 4** . **PW5** also confirms that one of the vehicles involved in the accident was a Toyota matatu Reg KAR 934Q which vehicle he found at the scene.

Similarly the fact that the three deceased persons met their untimely deaths as a result of this accident is not in any dispute. As stated earlier three relatives identified the bodies of their loved ones at the mortuary. **PW6 DR. K. W MOHAMMED,** Pathologist attached to Coast General Hospital told the court that he conducted the autopsies on the three bodies. In his opinion all three met their deaths as a result of multiple injuries consistent with a road traffic accident. All three post-mortem forms duly filled and signed were produced in court as exhibits **PExb1, Pexb2,** and **Pexb 3.**

The mere fact that an accident has occurred is not in itself proof of the charge of dangerous Driving. In the case of **ATITO- VS- REPUBLIC [1975] E.A. 278** the Court of Appeal held as follows;

“To justify a conviction of causing death by dangerous driving there must be a situation which was dangerous when viewed objectively and also some fault on the part of the driver causing that situation”

In other words the prosecution has a duty to prove what aspect of the accused's driving could be said to have been reckless or dangerous. **PW1** and **PW2,** told the court that as they were negotiating the fare with the conductor the driver of the matatu suddenly reversed running over several people. The sketch plan produced as an exhibit **Pexb 4** that this matatu KAR 934Q drove off the road onto the side walk where pedestrians were standing waiting for transport. To reverse suddenly into a crowd of pedestrians does in my view amounts to an extremely reckless act on the part of any driver. It is this reckless act which was the direct and proximate cause of the death of the three deceases. I am therefore satisfied that dangerous

driving is proved.

However, in order to secure this conviction the prosecution was obliged to prove beyond a reasonable doubt that it was the accused who was the one driving the offending vehicle. **PW1** and **PW2** both told the court that the accident occurred at about 6.30 p.m. It was therefore dusk heading to night fall. In her evidence under cross-examination **PW1** states

“The accident occurred at about 6.30p.m. I talked with the conductor. I was not able to see the conductor properly because it was dark. I was able to see and identify the driver. There was darkness. I was not able to see the clothes the driver was wearing. I saw the accused (face) when he was driving the motor vehicle”.

The evidence of this witness is self-contradictory. On the one hand she admits it was too dark to see the conductor yet she claims that she was able to see and identify the driver. There is no evidence of any source of light available at the scene. The court is not told whether any street lights were on at that scene. If **PW1** was unable to see the conductor with whom she was talking to negotiate the fare, then it is highly unlikely that she would have been able to see and identify the driver who was seated inside the vehicle. I find this evidence of identification to be unreliable.

PW2 is more honest as she states her evidence in chief.

“I did not see the driver but I only heard his name.....”

PW2 admits that she was not able to identify the appellant as the driver of that vehicle she only saw him after his arrest.

PW5 Corporal Banda who visited the scene told the court that he did not find the driver of the KAR 934Q at the scene. More pertinently he did not find the appellant at the scene. He too is not able to positively identify the appellant as the one who was driving the vehicle at the time of the accident. Further **PW5** states in his evidence

“ I met the accused person at the police station. The accused was arrested by members of the public”.

Here again **PW5** only saw the accused at the police station. After his arrest he claims that members of public arrested accused. None of these ‘members of public’ has been called as a witness to state exactly why they arrested the appellant nor is the court told whether the appellant was arrested at the scene or elsewhere. The sum total is that there exists no clear and/or direct evidence identifying the appellant as the one who was driving the matatu at the time when the accident occurred.

The appellant in his defence totally denies that he was the one driving this matatu KAR 934Q at the time of the accident. He further claims that at the material time he was at the Kobil Petrol Station along Kenyatta Avenue waiting to meet his employer. Of this defence the learned trial magistrate had this to say.

“therefore the accused person defence is based on an alibi. However the accused person could not explain how the police obtained his driving licence and PSV license”

With respect the trial magistrate erred and misdirected herself in making this conclusion. The appellant

had no obligation to explain how the police got possession of his documents. It was rather upon the police to explain how and when they secured the same. The mere fact that police had his documents does not prove that the appellant was the driver of that matatu. The trial magistrate by this finding was effectively shifting the burden of proof to the appellant. This can never be. The burden at all times is placed on the prosecution to prove its case.

Due to the lack of any clear and/or positive evidence, identifying the appellant as the driver of the matatu in question, I find that the prosecution failed to prove this case beyond a reasonable doubt. In my view the conviction of the appellant on the three (3) counts was unsafe and I do hereby quash the appellant's convictions on count Nos. 1, 2, and 3 respectively. The subsequent seven (7) year sentence is also set aside. This appeal therefore succeeds. The appellant is to be set at liberty forthwith unless he otherwise lawfully held.

DATED and delivered in Mombasa this 26th day of August 2011.

M. ODERO

JUDGE

In the presence of

Mr. Onserio- for state counsel

Mutisya – court clerk.

Appellant - in person