



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Criminal Appeal 139 of 2009**

**DAVIT KIARIE KIRUTU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal from original conviction and sentence in Nakuru**

**C.M.TR.C.NO.2634/2006 by Hon W. Juma, Chief**

**Magistrate, dated 8<sup>th</sup> May, 2009)**

**JUDGMENT**

The appellant in this appeal, who was charged and convicted of the offence of causing death by dangerous driving under **section 46(1)** of the **Traffic Act**, has challenged his conviction and sentence in this appeal relying on seven (7) grounds which may be summarized as follows:

- 1 that the charge was not proved to the required standard
- 2 that the trial magistrate shifted the burden of proof to the appellant
- 3 that the learned magistrate did not see the demeanour of the witnesses
- 4 that the learned magistrate failed to consider the defence of the appellant
- 5 that the sentence was excessive

Before I consider these grounds, I must re-evaluate the evidence on record in order to arrive at an independent decision bearing in mind that I did not see the witnesses as they testified.

It was the prosecution case that on 6<sup>th</sup> September, 2006 along Nakuru/Njoro road at Soilo junction, the appellant drove motor vehicle No.KWZ 860 at a high speed and in a dangerous manner bearing in mind that it was drizzling and in the process lost control knocking down to death one John Ndiru Waithera (the deceased). **George Otieno Richard (Otieno) (P.W.1)** was driving on the same road motor vehicle registration No.KAS 208T pick up towards the opposite direction as the said motor vehicle by the appellant. In his pick up Otieno had two passengers – **P.W.2 Gilbert Kamau Waweru (Waweru)** and **P.W.3 Michael Owino Otieno (Michael)**.

The three gave evidence that they saw the lorry approaching at high speed in a zig zag way. In the process, it left its lane and collided with the pick up driven by Otieno. It also hit a kiosk belonging to **P.W.4 Jane Wanjiku Wachira (Wanjiku)** which was located some ten (10) meters from the road. Wanjiku sustained injuries as a result. Wanjiku's customer, the deceased who was taking tea nearby was also hit and died instantly. **Dr. Daniel Wainaina** who produced the post mortem report on behalf of **Dr. Kamau** testified that the cause of the deceased person's death was acute haemorrhage secondary to the accident.

A visit to the scene by **P.W.6, Cpl. Patrick Cheboi** revealed that the accident occurred on the lane of the pick up, leading to the conclusion that the lorry had left its lane. On inspection by **P.W.7, Elijah Gitonga Murage**, a motor vehicle inspector, the lorry was found to be in sound condition without pre-accident defects.

In his unsworn defence, the appellant attributed the accident to a cyclist who caused him to swerve to the right to avoid colliding with him. In the process, he lost control of the motor vehicle after it skidded hitting a tree near the kiosk. After the lorry stopped, he learnt he had hit the deceased. His two passengers supported this evidence.

The learned magistrate found that the appellant drove dangerously and caused the fatal accident. She sentenced him to eighteen (18) months imprisonment and disqualified him from driving for two (2) years.

Submitting on behalf of the appellant, counsel argued that the appellant was not expected to have foreseen that the accident would involve a person not within the proximity of the road. That the prosecution has not proved that the appellant drove dangerously; that the

appellant did what was reasonable to avoid hitting a cyclist; that the sentence was excessive bearing in mind the appellant's mitigation.

In support of these submissions learned counsel referred the court to the following authorities:

**Ahmed** Vs. **Republic**, H.C. (Msa) Criminal Appeal No.702 of 1992, **Peter Kagwima Daudi** Vs.

**Republic**, Criminal Application

(Nbi) No.477 of 1998 and **Atito** Vs. **Republic**, (1975) EA 278 **Section 46** of the **Traffic Act** provides as follows:

**“46. Any person who causes death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any motor vehicle on a road in such a position or manner or in such a condition as to be 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 is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence whether or not the requirements of section 50 have been satisfied as regard that offence and liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by part VIII of canceling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of three years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later”**

I find as a fact that the death of the deceased was caused by the lorry driven by the appellant. It was a wet afternoon (at about 5.30p.m.); visibility was clear; the deceased was seated under a tree taking tea from a nearby kiosk, some 10m from the road; the pickup was being driven to the opposite direction as the lorry; the lorry was approaching a junction to the main road.

The sole question is whether the appellant was wholly responsible for the accident. It was held in the case of **Atito** Vs. **Republic** (supra) that 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.

All the prosecution witnesses attributed the accident to high speed on the part of the appellant. That he drove in a zigzag manner. The appellant as well as his witnesses attributed the accident to a cyclist. The prosecution witnesses were, however, categorical that there was no cyclist involved. The appellant also appeared to suggest that the lorry was hit at the rear by another lorry.

No doubt from the appellant's own testimony he saw the kiosk before the accident as he avoided hitting the cyclist, if there was a cyclist at all. In view of the weather conditions which made the road wet, and bearing in mind that there was an on-coming motor vehicle, the presence of a nearby kiosk and the fact that he was approaching a junction/main road the appellant ought to have exercised due care and attention.

I am persuaded that he was driving at a high speed considering that he was unable to control the lorry which hit a kiosk located 10m out of the road. The zig zag driving was clearly due to high speed on a wet road since the lorry was found not to have any pre-accident defects.

I find no basis for interfering with the finding of the learned trial magistrate both on conviction and sentence as well as the order for disqualification from driving, being lawful orders.

This appeal is dismissed and the appellant's bond is hereby cancelled. 14 days' right of appeal explained.

Dated, Signed and Delivered at Nakuru this 7th day of May, 2010

**W. OUKO**

**JUDGE**