



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Criminal Appeal 11 of 2008

JOSEPHAT DOE OKIRIA.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Josphat Doe Okiria was charged before Bungoma Senior Principal Magistrate with ten (10) offences under the Traffic Act. He was acquitted of nine (9) counts and convicted of the offence of reckless driving contrary to section 47 of the same Act and fined Ksh.5,000/= in default five (5) months imprisonment.

The appeal is against the conviction and sentence. Mr. Kraido represented the Appellant. The State did not oppose the appeal. Mr. Ogoti conceded on the ground that the charge in which the Appellant was convicted was a lesser charge having been reduced from count 1 which was an offence of causing death by dangerous driving contrary to section 46 (1) of the Act. The accident involved two vehicles, a trailer and a pick up. The state submitted that the evidence brings it out that the wrong driver was charged in court. The driver of the trailer was not called as a witness despite being the key witness.

The prosecution called five (5) witnesses. PW1 was walking along Bungoma/Malaba road at the material time. She testified that she saw a pick-up and a trailer behind her. The pick-up driven by the accused was overtaking the trailer. The trailer was overspeeding at the same time. She saw the pick-up hit itself against the truck. According to her, it is the trailer that killed the child after diverting to a rural road. PW2 was an identifying witness. PW3 was the officer who visited the scene. It was his testimony that he made an observation that the pick-up matatu driver was the one that caused the accident because he decided to overtake the lorry. PW4 and PW5 were also identifying witnesses. The magistrate relied on the evidence of PW1 and PW3 to convict the Appellant. PW1 was the only eye witness. She observed that it was the Appellant who caused the collision with the truck, As a result, his pick-up hit the trailer forcing it to veer off the road and hit the deceased. The court was hasty to reach its finding of guilt before evaluating the evidence on record and addressing the contradictions. PW1 said she was heading to Malaba just as the two vehicles were doing. She looked back and saw the two vehicles about 100 metres away. After the collision, she said the pick-up overturned and the trailer veered of the road to the rural road away from the tarmac. It was not clear how the impact of the pick-up made a truck pulling a trailer to veer off the road. The impact of the pick-up would be very minimal compared to a big commercial vehicle. PW1 was categorical that it was the trailer which hit the deceased. The driver of the trailer ought to have testified in order to explain to the court how the accident occurred and what caused his vehicle to veer off the road. In the absence of his testimony, it was not possible for the prosecution to establish guilt on part of the Appellant. The Appellant opted to keep quiet but his silence did not give any advantage to the prosecution's case. There was no evidence on how long PW1 observed the incident. She was going to the same direction with the two vehicles and only looked back. It raises doubt whether, PW1 had adequate time to observe the incident. The mere act of overtaking does not constitute reckless driving. The prosecution are duty bound to prove that the Appellant drove in a reckless manner taking into regard all the circumstances and the condition of the road.

PW3's observation that the lorry truck veered off the road due to the impact of the pick-up matatu is not convincing. During cross-examination, PW3 said he recorded statements from passengers in the two vehicles yet, he did not call any of them to testify in court. Their testimony would have placed the court at an advantage of getting independent evidence. PW3 did very shoddy investigations and failed to call crucial witnesses. This may have been as a result of keeping away from the court evidence which would have been adverse to the prosecution.

The magistrate reduced the charge of causing dangerous driving to one of reckless driving because the prosecution did not produce the post mortem form. The conviction of a lesser charge was wrong.

The court ought to have acquitted the Appellant if the charge of causing death by dangerous driving was not proved. It was a misdirection to convict on a lesser charge.

The entire proceedings are evident that the prosecution were not straight forward, particularly PW3. It is like he was hiding something or shielding the driver of the truck from blame.

It is my finding that the Appellant's conviction was not based on sound evidence. The prosecution did not prove the case beyond reasonable doubt. Conviction of a lesser charge caused miscarriage of justice which prejudiced the Appellant. This appeal must therefore succeed. I hereby quash the conviction and set aside the sentence. The fine of Ksh.5000/= paid to be refunded to the Appellant.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 13th day of July 2010 in the presence of the State Counsel Mrs. Leting and Mr. Omukunda holding brief for Mr. Kraido for the Appellant.

F. N. MUCHEMI
JUDGE