



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

**Criminal Appeal 270 of 2008**

**KENNEDY MUSYOKI KITUKU .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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**JUDGEMENT**

The Appellant Kennedy Musyoki Kituku has filed this present appeal against his conviction and sentence before the Honourable Senior Resident Magistrate Mombasa Law Courts, Mr. Magolo advocate appeared and argued the appeal on behalf of the Appellant whilst the learned State Counsel Mr. Ondari appeared and opposed the appeal.

The Appellant had been charged before the Traffic Court vide Traffic Case No. 10901 of 2007 with four traffic offences which included a charge of Causing Death by Dangerous Driving, contrary to Section 46 of the Traffic Act, Cap 403 Laws of Kenya.

The evidence in the lower court is that on the 25<sup>th</sup> day of September 2007 at 5.00 p.m. the Appellant was driving a motor vehicle registration No. KAT 112J Nissan matatu when it is alleged that he knocked over the complainant one Mwanthi Muthoka Kitavi and thereby caused his death. The prosecution called a total of five witnesses in support of their case. At the close of the prosecution case the Appellant was put on his defence. He denied all the charges which he faced. The learned trial magistrate thereafter wrote his judgement in which he convicted the Appellant on all four counts. The Appellant was discharged on counts 2, 3 and 4 but on the first count of Causing Death by Dangerous Driving he was sentenced to a prison term of twenty (20) years. It is against this conviction and sentence that he now appeals.

As an appeal court I am mindful of my obligation to evaluate the evidence adduced in the lower court bearing in mind always that I neither saw nor heard the witnesses [see Ajode –vs- Republic Criminal Appeal No. 87 of 2004].

The charge which faced the Appellant in the lower court was that of Causing Death by Dangerous Driving contrary to Section 46 Traffic Act. In order to prove this charge the prosecution must show that there was an element of the accused manner of driving that looked at objectively could be said to be dangerous given the circumstances. In other words the accused manner of driving must be shown to have so deviated from that expected of a reasonable driver as to be termed negligent. In the case of Atito –vs- Republic [1975] EA page 278 it was held 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”.*

In this case the prosecution have alleged that the death of the deceased victim one Mwanthi Muthoka Kitavi, was caused by his being run over by a vehicle being driven by the Appellant. No eye-witness to the accident was called to testify. Therefore there was nobody to enlighten the court on just how this accident occurred. What is it that could be said to have been “*dangerous*” or reckless in the Appellants manner of driving. No evidence touches on this aspect of the offence. The mere fact that the vehicle hit the deceased is not sufficient proof of this offence. PW3 Inspector Joseph Siso testified before the lower court on 24<sup>th</sup> June 2008 which is at pages 12 – 13 of the record. He only narrates how after receiving a report he went to the scene at Kwea Hola Maongo Mwicho opposite Muranga bar. At the scene he found the deceased dead body inside a kiosk with his relatives there. The officer is totally unable to explain how the accident occurred and he does not describe to court what could be said to have been dangerous in the Appellants manner of driving. PW3 told the court that the sketch plan was drawn by one Sgt. Wairimu. Presumably this Sgt. Wairimu was the first officer to arrive on the scene following the accident. Strangely enough the said Sgt. Wairimu was never called as a prosecution witness to shed light on what she may have found at the scene. The failure to call as a witness the officer who drew the sketch map is in my view a serious omission by the prosecution. I have had a look at the sketch map which is marked at Pexb4. In my view it is of very little assistance. It is basically just a road view. No skid marks, debris of broken glass or other notable findings are marked thereon. The motor vehicle registration No. KAT 112J was inspected but no pre-accident defects were noted. All that was seen on that vehicle was a dent to the front. There is no evidence of how that dent came about or how recent it was. The court cannot just assume that the dent was as a result of hitting the deceased. This fact must be proved by evidence. In his judgement at page 24 of the record the learned trial magistrate found as follows:-

*“Considering that the accident occurred during the day and in the circumstances of this case, I find that the accused person was driving in a dangerous and reckless manner. He failed to keep a proper look out and all together disregarded the body of the deceased who was ran down”.*

With respect I must disagree. The learned trial magistrate has not stated what circumstances led him to conclude that the Appellant drove in a dangerous and reckless manner. His observation that the accident occurred during the day time is neither here nor there. To hit a pedestrian during the day time does not in and of itself amount to negligence. I find that there was no evidence adduced before him to support the trial magistrates conclusion that the Appellant failed to keep a proper look-out whilst driving. This is a mere assumption which cannot form the basis of a conviction. Further down the same page the trial magistrate observes that:-

*“The acts of the accused subsequent to the accident are macabre”.*

Again with respect I find that the actions of the Appellant after the accident have no bearing on whether or not his driving could be deemed dangerous. Finally I find that all the prosecution adduced as evidence in this case was a dead body and a motor vehicle inspection report. In my view the learned trial magistrate erred in convicting the Appellant without any sound basis for so doing. There was no evidence to support a conviction for dangerous driving. As such I find that the present appeal succeeds. I hereby quash the Appellants conviction and I do also set aside the 20 year sentence of imprisonment imposed upon him. The Appellant is to be released forthwith unless he is otherwise lawfully held.

Dated and delivered in Mombasa this 3<sup>rd</sup> day of August 2009.

**M. ODERO**

**JUDGE**

Read in the open court in the presence of:-

Mr. Magolo for Appellant

Mr. Ondari for Respondent

**M. ODERO**

**JUDGE**

**3/8/2009**