



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA

Criminal Appeal 76 of 2009

KASSIM OCHANJI WAKHANU .....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Kassim Ochanji Wakhanu was convicted of an offence of causing death by dangerous driving and sentenced to serve two (2) years imprisonment by Bungoma Principal Magistrate. Being dissatisfied with the judgment, the Appellant appeals against both conviction and sentence.

Mr. Situma took the court through the grounds of appeal. Firstly, he argued that the charge was defective in that the wrong provisions of the law were cited namely section 46 of the Traffic Rules. The magistrate ought not to have convicted on such a charge. The evidence of PW1 and PW2 was contradictory which fact was not addressed in the judgment. The scene of the crime was visited about four (4) hours later when it had already been disturbed. The defence of the Appellant was not taken into consideration and neither was the mitigation while passing sentence.

The state opposed the appeal on both conviction and sentence. Mr. Onderi, the Senior Principal State Counsel submitted that the defect in the charge was curable under section 382 of the Criminal Procedure Code. No failure of justice was occasioned by the defect according to the state. The evidence of all the witnesses and the defence was considered by the court. PW6 said the brakes were faulty while the Appellant denied it in his defence. The act of the Appellant overtaking the cyclist on a narrow bridge was negligent. The sentence was not excessive in the circumstances.

The Appellant did not raise any issues on the wording of the charge sheet in the lower court. The wording is correct since it contains all the ingredients of the offence as required by section 314 of the Criminal Procedure Code. The section used is 46 but which is indicated as of the Traffic **“Rules”** instead of the Traffic Act. Section 46 (1) of the Traffic Act is the relevant section which describes the offence of causing death by dangerous driving. The only anomaly therefore is the use of the word **“Rules”** instead of **“Act”**. Does such an anomaly make the charge incurably defective?

Section 382 of the Criminal Procedure Code provides:

***“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and have been raised at an earlier state in the proceedings.”***

The provision is very clear that an irregularity which does not occasion failure of justice is excusable. In the case before me, the Appellant was charged, tried, convicted and sentenced of the offence of causing death by dangerous driving. The appeal record is very clear and supports the observation of the state counsel to which I am in total agreement. I take note that in relation to the proviso of section 382 of the Criminal procedure Code, the defence did not raise the matter before the trial court. I find that the irregularity contained in the statement of the offence is curable and did not occasion any failure of justice during the trial.

PW1 testified that on the 18<sup>th</sup> March 2008 at around 1.30 p.m, she was at Nzoia River Bridge inspecting her shamba along the Bungoma Nambacha Road. She saw a young man riding a bicycle on the left side of the road from Bungoma going towards Nambacha. Behind him was vehicle registration number KAA 703 A going towards the same direction. The cyclist was in the middle of the bridge when the vehicle knocked him from behind as it was overtaking him. The cyclist sustained injuries as a result of the impact. The Appellant was the driver of the vehicle. He was the one who took the cyclist to hospital as directed by PW2 and others who gathered at the scene. PW 1 said the bridge is a narrow one and has no guard rails. He further said that should the Appellant been slow, he would have avoided the accident.

PW2 said he was harvesting sand at the river near the bridge when he saw a cyclist riding from Bungoma towards Nambacha followed by a Nissan Matatu Reg. No. KAA 703. He saw the vehicle hit the cyclist from behind and crashed him. The vehicle stopped about 15 metres ahead. According to the witness, the bridge was narrow and if the cyclist had moved off the road to give way to the overtaking matatu, he would have fallen into the river.

PW3, Dr. Alwanga performed the post mortem on the deceased. The deceased's body had fracture of all ribs, fracture of both limbs, bruises on the chest wall and forehead. The injuries were one day old and cause of death was cardio-respiratory failure due to collapse of the lungs and ribs injuries which were consistent with a road traffic accident.

PW4 was the police officer who visited the scene and investigated the accident. He found witnesses at the scene who briefed him on how the accident occurred. He saw blood stains on the bridge about 8 metres from the point of impact. The bridge was 80 metres long and 2.5 metres wide and had no guard rails. There was no adequate space for overtaking. He visited the pedal cyclist in hospital who later died while undergoing treatment. The pillion passenger sustained spinal injuries and her baby was slightly injured. The bicycle was extensively damaged. The Appellant was at a high speed and would have avoided the accident. PW4 served the accused with notice of intended prosecution.

PW5 was the pillion passenger who said she was carrying her baby in her lap and a bible in her hand going to a funeral. At the bridge she turned back and saw the Nissan Matatu coming towards them from behind. She alerted the cyclist who warned her not to jump off the bicycle and assured her that the driver of the vehicle must have seen them. From the impact, PW5 was injured and lost consciousness.

The court visited the scene and observed that the bridge was a narrow one about 3 metres wide. There is a warning sign before the bridge alerting motorists on the narrowness of the bridge. PW1 showed the court the place where she stood as she watched the accident occur. It was on a raised ground as observed by the court. PW2 was also on a higher ground where he could see the bridge clearly. There was a slight bend before the bridge and this was the point with a warning sign.

PW6 inspected the motor vehicle Reg. No. KAA 703 A, Toyota Matatu. It had worn out tyres, worn out hinges, foot brakes unserviceable and a defective hand brake. He formed an opinion that the vehicle was defective and could not hold brakes effectively.

The accused testified in his defence that he saw the cyclist carrying a female pillion passenger about six (6) metres ahead of him as he approached the bridge. He hooted so that the cyclist could let him pass but the cyclist rode on. The woman passenger jumped off the bicycle

and was injured. He says he braked across the river and that his vehicle had effective brakes. He then took the injured to hospital.

On the evidence on record, the Appellant takes issue with the evidence of the eye witnesses regarding the distances they stood and the view of the scene. PW1 and PW2 were both near the bridge. PW1 said she was about ten (10) metres from the bridge inspecting her shamba. She had gone to dig but had finished digging at the time she saw the cyclist followed by the matatu. PW2 said he was about ten (10) metres away from the bridge. The two witnesses were not standing at the same point and each could have been on either side of the bridge. The lower court which had the opportunity to visit the scene and observe the extent of visibility by PW1 and PW2, believed the two witnesses. From the way they described the accident in vivid details, it leaves no doubt that they witnessed the accident. It came out clearly from the two witnesses that the bridge was a narrow one where it was expected that a cautious driver would have allowed the cyclist ahead of him to cross as he followed him at a safe distance. Overtaking at the narrow bridge was dangerous. PW5 the pillion passenger who survived the accident with serious injuries corroborated their evidence. She said she looked behind and saw the vehicle following them. When she alerted the deceased, he told her not to worry because the driver of the vehicle behind them must have seen the cyclist and his passenger ahead. The cyclist confirmed the narrowness of the bridge when he warned PW5 not to jump off the bicycle. Both PW1 and PW2 said the vehicle was moving at a high speed although none of them could give an estimate of the speed. PW4 visited the scene and said he found witnesses. Although the witness did not name them, this is not fatal to his evidence. He was however briefed about accident, observed the scene and took measurements. He drew the sketch plan which he produced in evidence. He confirmed that the bridge has no allowance for overtaking. All the eye witnesses testified that the deceased was on his left side of the road. The point of impact was 1.5 metres from the edge of the bridge. Given that the bridge had no guard rails and was only 2.5 metres wide, the cyclist cannot be faulted on the distance he maintained from the edge of the bridge. The Appellant who followed the cyclist behind had a very good view of the bridge and the cyclist. It could not have escaped his attention that there was no adequate overtaking space. He however decided to overtake thereby exposing himself, his passengers and the cyclist to great risk. This was nothing but recklessness on the Appellant's part. It was dangerous to overtake on a bridge measuring 2.5 metres wide according to the sketch plan. The normal width of most roads which are one way is 20 ft (6.6 metres). One would overtake on such a road provided that one ensures that there is no oncoming vehicle and that it is safe to overtake having regard to all the circumstances of the road. PW6, found the vehicle defective. The defects included unserviceable brakes. The accused denied in his sworn statement on oath that his vehicle had defective brakes. PW6 did not make a finding in his report whether the defects contributed to the accident. This could be the reason why the trial court did not bother analyzing the evidence of that witness.

The trial court correctly made a finding that the accused who had seen the cyclist ahead of him at safe distance had the opportunity to avoid the accident. He would have waited for the cyclist to cross the bridge first as he followed him. The accused admitted in cross-examination that he knew that the bridge was long and narrow. He admitted that the accident occurred right on the bridge as shown by the sketch plan. He had seen the warning sign of a narrow bridge ahead.

I find that the accused was rightly convicted by the trial court on the charge of causing death by dangerous driving.

On the sentence of two (2) years imprisonment imposed, I find it not excessive. The law provides for a maximum imprisonment sentence of ten years.

The appeal must fail for the foregoing reasons. I uphold the conviction and sentence accordingly.

**F. N. MUCHEMI  
JUDGE**

*Dated, Delivered and Signed at Bungoma*

*This 24th day of November 2009 in the presence of Mr. kakoi for Situma for appellant and mr onderi state counsel.*