

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 298 of 2009

(From original conviction and sentence in Traffic Case No. 2775 of 2006 of the Chief Magistrate's court at Nakuru – W. K. KORIR – PM)

GEORGE OPONDO ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

GEORGE OPONDO ODHIAMBO, the appellant, was charged with causing death by dangerous driving contrary to **Section 46** of the **Traffic Act Cap 403 Laws of Kenya**. He was also charged in count two with driving an unroad worthy motor vehicle contrary to **Section 55(1)** as read with **Section 58(1)** of the **Traffic Act**. He pleaded not guilty to both charges but after trial before the Principal Magistrate at Nakuru he was acquitted of the first count of causing death by dangerous driving but convicted of the second count of driving an unroad worthy motor vehicle and sentenced to three months imprisonment. He has appealed against both the conviction and sentence.

At the hearing of the appeal his advocate Mr. Ogola abandoned the appeal against conviction and pleaded for the reduction of sentence or for the substitution of the custodial sentence with a fine. Mr. Njogu for the state left the matter of sentence to me.

I have considered the matter. I must say Mr. Ogola was wise in abandoning the appeal against conviction. In view of the inspection report produced in the lower court the appeal against conviction had absolutely no chance of success.

On sentence I quite understand the trial court's reason for imposing the custodial sentence. As a result of failure of brakes the appellant was unable to control the vehicle and in trying to get it out of the main road he knocked down and killed a poor pedestrian who was on the side of the road. However, traffic cases even those of causing death by dangerous driving are not ordinary types of crime. To paraphrase the words of the Court of Appeal in **Orwenyo Missiani vs Republic [1979] KLR 285 at page 290**, the people who commit traffic offences do not have the propensity for committing them neither are they crimes that are committed for gain, revenge, lust or to emulate other criminals. In such cases except where the accused has been reckless in his driving or has had a selfish disregard for the safety of other road users, a custodial sentence does not necessarily serve the interest of justice as well as the interest of the public.

There is nothing on record to show that the appellant was reckless or had no regard for other road users. In the circumstances I think he should have been given a fine. Consequently I set aside the sentence of three months imprisonment and as the offence was committed before the amendment of the Traffic Act in 2007 substitute therefor a fine of Kshs.10,000/-. Upon payment of this fine the appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 11th day of November, 2009.

D. K. MARAGA

JUDGE.