REPUBLIC OF KENYA

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IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 57 of 2007

HENRY BARASA WESONGA ……..…….… APPELLANT

V E R S U S

REPUBLIC ……. RESPONDENT

(Appeal arising from the judgment of [MR. E.O. OBAGA, SRM] in Kakamega Traffic Case No.3302 of 2005}

J U D G M E N T

The appellant, **HENRY BARASA WESONGA**, was convicted for the offence of causing death by dangerous driving contrary to ***section 46*** of the Traffic Act. He was then sentenced to a fine of **KShs.20,000/=,** or in default, he was to serve six months imprisonment.

The learned trial magistrate also ordered that the appellant's driving license be cancelled for a period of three years with effect from the date he paid the fine or from the date he completed serving the six months in prison.

It was also ordered that the appellant should not hold any other driving license.

Following his conviction and sentence, the appellant lodged an appeal to the High Court, challenging both the conviction and the sentence. He raised the following seven grounds of appeal;

"***1. That the learned trial magistrate erred in law and in fact in convicting the appellant when the evidence before him clearly pointed the deceased as the author and cause of the accident that led to her death.***

2. THAT the learned trial magistrate erred in law and in fact in failing to consider the evidence of PW1 the prosecution eye witness whose evidence points to negligence on the part of the deceased.

3. THAT the learned trial magistrate erred in law and in fact in convicting the appellant when the charge, the elements and facts thereof against him were not proved to the required standard.

4. THAT the learned trial magistrate erred in law and in fact in shifting the burden of proof to the appellant and lowering the standard of proof thereby causing a miscarriage of justice.

5. THAT the learned trial magistrate erred both in law and in fact in failing to consider the provisions of the Traffic Act and the Highway Code.

6. THAT the learned trial magistrate erred both in law and fact in holding that the appellant was driving dangerously and at high speed when the evidence on record points to the contrary.

7. THAT the sentence handed down by the learned trial magistrate was excessive, unlawful and has resulted in a serious miscarriage of justice."

It was the appellant's submission that in this case it was the deceased who caused the danger which resulted in her death. It is said that she caused the danger by emerging onto the road abruptly.

On the other hand the appellant contended that he took appropriate action by applying emergency brakes, as soon as he saw the deceased, when she appeared suddenly on the road, at a spot which was only about five (5) meters from where the appellant's vehicle was, at the material time.

The appellant pointed out that he was able to stop the vehicle within a span of 10 meters from the moment he first saw the deceased. Therefore, it is the appellant's contention that he could not have been driving at a high speed.

The appellant also drew the court's attention to the fact that the accident occurred in the middle of the road; adding that because of that and because the deceased had abruptly stepped onto the road, she was the author of her own misfortune.

It was the appellant's further contention that the prosecution failed to prove the speed which the appellant had been driving at, or that the area within which the appellant had been driving had a set speed limit.

The learned trial magistrate was faulted for holding that the speed limit in that area was 50 KPH, whereas there had been no evidence to that effect.

Another reason for finding fault with the trial court was said to be the finding that the appellant was the only person who should have taken care. As far as the appellant was concerned, the trial court ought to have held that the actions of the deceased had mitigated the appellant's position.

The duty to observe the Highway Code was invoked by the appellant as a basis for negating or at least mitigating his liability. The said duty was said to be embodied in ***section 68*** of the Traffic Act.

The appellant also submitted that the trial court erred in rejecting his testimony, that he had been driving between 30 and 40 kilometers per hour. His reason for so saying was that it was not only by swerving that the appellant could have avoided the accident. As far as the appellant was concerned, he was perfectly entitled to apply emergency brakes, as he did. He therefore feels that the trial court should not have blamed him for braking.

The appellant cited the authority of **ATITO v. REPUBLIC [1975] E.A. 278 at page 281** to back his contention that if the deceased was blameworthy for the accident which gave rise to her death, the driver of the vehicle involved in the accident should not be to blame.

Finally, on the issue of the sentence, the appellant faulted the trial court for passing an ambiguous sentence, on the issue of the appellant's driving license. In the appellant's understanding it was wrong for the learned trial magistrate to have ordered that the appellant should not hold any other driving license, without specifying the duration for that bar, whereas the court had already cancelled his driving license for three years.

Being the first appellate court, I am obliged to re-evaluate the evidence on record, with a view to drawing therefrom my own conclusions. Of course, in the process of the said re-evaluation I will be guided by the knowledge that I did not have the benefit of observing the witnesses as they gave their evidence. Therefore, in arriving at my conclusions, I will give an allowance in that regard.

It is common ground that **PW1** was the only eye witness to the accident.

As **PW1** is reported to have testified that the appellant was speeding, the learned State Counsel, Mr. Karuri, submitted that the evidence tended to show that the appellant was driving dangerously.

As far as the State was concerned, the fact that the appellant's vehicle hit the deceased, and that it did not stop notwithstanding the emergency brakes applied by the appellant, is corroboration of **PW1's** evidence, that the appellant had been speeding.

Furthermore, the extent of the damage to the vehicle, as described by the motor vehicle inspector; as well as the degree of injuries sustained by the deceased, were all factors which pointed to the fact that the appellant was driving at high speed, submitted the State.

The State asked this court to take note of the fact that the appellant did not say that he had switched on his headlights as at the time of the accident.

The learned State Counsel invited the court to take judicial notice of the fact that at about 7.30 p.m., it would ordinarily not yet be dark.

If at that hour it would not ordinarily be dark, then I fail to comprehend why the appellant ought to have mentioned to the trial court whether he had or had not put on the headlights of the vehicle he was driving.

But in any event, I do not think that the court could take judicial notice of the "*fact*" that as at 7.30 p.m., it would not ordinarily be dark. That is not a matter of common notoriety, about which the court could take judicial notice.

The State submitted that as the appellant had talked of a small corner just before the scene of the accident, the appellant must have been driving dangerously.

Finally, as regards the sentence, the learned State Counsel conceded that the ban on the appellant holding any other driving license was ambiguous, as it was for an unspecified duration. However, the State was otherwise of the view that the rest of the sentence handed down to the appellant was lawful.

PW1, had testified that the deceased, **Sulumena Likhabi**, suddenly emerged onto the road and tried to cross from right to left. **PW1** also said that the appellant, in whose vehicle he was riding, applied emergency brakes, but the vehicle still hit the deceased, throwing her off the road, on the left side. The vehicle stopped some 5 meters from the point of impact.

During cross examination, **PW1** said that the vehicle was going at a speed of 55 KPH to 60 KPH.

PW1 also said that he blamed the deceased for the accident, as she failed to look right, left, and right again, before crossing.

PW2 PC.JANE BII was the investigating officer. She received a report of the accident. Later, when PW6 and PC Omuge had visited the scene of the accident, **PW2** was assigned duties to investigate the case.

PW2 charged the appellant with the offence of causing death by dangerous driving; that was after **PW2** had completed her investigation.

However, **PW2** did concede, during cross examination, that she did not visit the scene nor interrogate any witness except the appellant.

PW3, DR. GEOFFREY WACHULI, conducted the post mortem on the deceased. He found that the deceased had 3 external lacerations on her head, and that each of the said lacerations extended deep

into the skull. He also found that the deceased had a bruise to her left shoulder, and another bruise to her knee joint.

Internally, **PW3** found that the deceased had a fractured skull, with visible internal hemorrhage. There was also a depressed bone of skull and brain contusion.

In the doctor's opinion, the deceased died due to cardiac arrest which was caused by severe head injury.

PW4, ERNEST SHILOYA, is a son to the deceased. He identified his mother's body to the doctor who then carried out the post mortem.

PW5, SGT. CHARLES MAINA GITAHI, was on accident standby duty on the night of the accident in issue. According to PW6, the appellant is the person who reported the accident to the traffic office, Kakamega Traffic Department.

By the time **PW6** got to the scene, the deceased had already been taken to hospital. And when **PW6** reached the Kakamega Provincial General Hospital, he found that the deceased was in a coma.

Later, **PW6** drew, first a rough sketch plan, then a fair sketch plan of the scene. In his view, the accident had occurred almost in the middle of the road. However, **PW6** was not able to tell whereabouts the victim lay after she had been knocked down, as by the time he got to the scene, the deceased was not there.

According to **PW6**, the accident occurred along a straight road and the weather was clear and the road was dry.

Although **PW6** visited the scene, he did not interview any witnesses. His reason for not interviewing any witness was that no eye witness volunteered to record a statement.

PW7, GEORGE ODHIAMBO, was a motor vehicle inspector. He produced an inspection report which showed that the vehicle which was involved in the accident did not have any pre-accident defect.

When the appellant was put on his defence, he said that the deceased had emerged from the right hand side of the road, trying to cross the road.

The appellant said that he tried to avoid hitting the deceased, but that she knocked herself against the vehicle. He also said that he had been doing a speed of 40-50 KPH.

It was his evidence that he first saw the deceased as she emerged suddenly, 5 meters ahead of the vehicle. He also said that he did swerve left to try and avoid hitting the deceased.

First, as the learned State Counsel has said, there is no doubt that the death of the deceased was caused by the accident involving the vehicle KAT 913, which the appellant was driving at the material time.

The prosecution's case appears to be that the appellant was driving too fast in the circumstances, and that he did not take appropriate action to avoid hitting the deceased.

The learned State Counsel placed emphasis on the evidence of PW1, in which he said that the appellant was speeding. On the other hand, the appellant's learned advocate did submit that the word "speeding" as used by PW1 should be understood to mean that the vehicle was in a state of motion, as a vehicle requires speed so as to move.

To my mind, both parties before me were engaged in no more than speculation as to what PW1 may have meant when he used the word "speeding." The arguments were not necessary because PW1

specifically said that in his estimation the appellant was "***going at a speed of about 55 KPH and 60 KPH".***

That therefore constitutes what PW1 described as "*speeding*". In other words, the appellant was not simply in motion.

Indeed, the appellant himself said that he was driving at a speed between **40 KPH and 50 KPH**. He was not simply moving at a snails pace, so to speak.

The investigating officer did not visit the scene nor interview any witnesses apart from the appellant. One is therefore left wondering about the basis of her decision to prefer charges against the appellant. I say so because the only eye witness placed blame squarely upon the deceased, for her having entered the road abruptly.

The learned State Counsel has reasoned that the extent of the damage to the vehicle, the fact that the deceased was thrown off the road, and the degree of injury sustained by the deceased can only point at the high speed at which the appellant was driving.

Whereas that appears to be sound reasoning, it cannot displace the evidence of both the appellant and PW4. I say so because PW4 testified that the appellant was driving within the speed limit, if he was driving at 50 KPH. He also said that the appellant was on his correct lane.

The appellant also said that he was driving at between 40 KPH and 50 KPH. In my re-evaluation of the evidence on record I find that the prosecution did not adduce such evidence as could destroy that line of defence. Such evidence could have been produced by the inspector of motor vehicles, who might have been able to explain to the court what the probable speed was, if the vehicle stopped within 10 meters from the spot from which the driver first applied emergency brakes.

Furthermore, the prosecution witnesses did not challenge the appellant's contention that he tried to avoid the accident by applying emergency brakes. If anything, PW1 confirmed that the appellant applied emergency brakes.

In the result, the appellant appears to have taken appropriate action to try and avoid the accident. And that the speed that he was traveling at was not proved by the evidence adduced by the prosecution.

Furthermore, the prosecution did not seek to rule out the possibility that the deceased landed on the left hand side of the road because she was hurrying towards that direction when the vehicle struck her, so that the vehicle merely added momentum to the victim.

In the case of **ATITO vs. REPUBLIC [1975] EA 278**, the Court of Appeal dealt with a case in which the appellant had been convicted for the offence of dangerous driving resulting in the death of two persons. At page 280 the court said;

"***The question in this case is whether the appellant took avoiding action at all, or in good time, and whether by not taking this action, or delaying taking it unduly, he caused a dangerous situation to arise for whose consequences he is criminally liable."***

The Court of appeal went on to re-state the standard of proof and the test, as was laid down in:

"***Kitsao vs. Republic MSA H.C.Cr. A. 75 of 1975 (unreported) that to justify a conviction of the offence of causing death by dangerous driving there must not only be a situation which, viewed objectively, was dangerous, but there must also be some fault on the part of the driver causing that situation."***

The question therefore is not just whether or not there was a dangerous situation, but if the appellant also played a part in causing the situation to be dangerous.

The Court of appeal went on to make the following observation;

"***In <u>Kitsao's</u> case the appeal was allowed, as the most the prosecution could show was an error of judgment on the part of the driver."***

In similar vein, the prosecution in this case sought to prove that the appellant did not swerve. However, bearing in mind the fact that the appellant applied emergency brakes immediately, even though he may not have swerved, that would, at most, amount to an error of judgment on his part.

In the case of **<u>ATITO vs. REPUBLIC</u>** (above cited), at page 281, the court said;

"***The fact that the motor –cyclist may have been at fault in not passing safely in the three or four feet of tarmac available to him is, in our opinion, immaterial. It would not cancel out the appellant's fault, in not taking avoiding action in time, which fault, whether it should properly be described as careless or dangerous driving, was clearly more, in the circumstances of this case, then a mere error of judgment."***

In effect, even though the deceased in this case may have been at fault by abruptly emerging onto the road would not, by itself, cancel the fault, if any, on the part of the appellant. Therefore, if the appellant was driving dangerously, he would still have been criminally liable for the death of the deceased, even if the deceased was also at fault for having got onto the road in the manner she did.

So, was the appellant driving dangerously?

After a careful re-evaluation of the evidence on record, I hold that the evidence did not prove beyond reasonable doubt that the appellant drove dangerously. I therefore find that it would be unsafe to uphold his conviction.

As regards the sentence, the learned State Counsel conceded, rightly in my view, that it contained an element of ambiguity. However, in overall terms, the sentence was neither harsh nor excessive. Therefore, had I upheld the conviction, I would only have vacated the following words from the sentence that was handed down to him;

"He should not hold any other driving license."

Alternatively, I would have made it clear that for as long as the appellant's driving license remained cancelled, he should not obtain any other driving license.

In the result, having held that the conviction was unsafe, the same is quashed and the sentence is set aside. If the appellant paid the fine, the same should be refunded to him. Furthermore, the cancellation of his driving license is hereby revoked forthwith.

It is so ordered.

Delivered, dated and signed at Kakamega this …5th……day of …March…….2008

FRED A. OCHIENG

<u>J U D G E</u>