

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 216 of 2007

DAVID SITENEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

DAVID SITENEI, the Appellant, was in Naivasha PM Traffic Case No. 12 of 2004 charged with three counts of causing death by dangerous driving contrary to Section 46 of the Traffic Act. The particulars of the first two counts are that on 3rd November 2004 at around 8.00 p.m. at Delamere Junction along Nakuru/Nairobi Road within Naivasha Township in Nakuru District of Rift Valley Province being the driver of motor vehicle registration number KAL 547 F Mitsubishi Lorry, he drove it on the said road in a manner that was dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the road and that the amount of traffic which was actually on that road at that time he collided with motor vehicle registration number KAJ 022 J Peugeot 505 Station Wagon and caused the death of Maurice Nangambo and William Osoro Wawire who were passengers in the said motor vehicle registration Number KAJ 022 J. The particulars of count three were that on 3rd November 2004 at around 9.00 p.m. along Kenyatta Avenue within Naivasha Township in Nakuru District of Rift Valley Province being the driver of motor vehicle registration number KAL 547 F Mitsubishi Lorry, he drove it on the said road in a manner that was dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the road and that the amount of traffic which was actually on that road at that time he collided with motor cycle registration number KAS 715 L Jonway and caused the death of Paul Njoroge Njenga the rider of that motor cycle.

The prosecution case was that on 3rd November 2004 at around 8.00 p.m. the Appellant while driving motor vehicle registration number KAL 574 F was stopped by PC Kabongo, a traffic police officer, at the road block near Delamere junction within Naivasha Township. When that officer was through with him he waived him to proceed on. A few metres from that spot the Appellant without first ensuring that the road was clear attempted to turn into Naivasha Township and collided with 504 Peugeot station wagon which was being driven from Nairobi towards Nakuru. The deceased persons who were passengers in the Peugeot were killed instantly. Chief Inspector Roselyne Muniyolimo< PW3, who was with PC Kambogo at the Road block, had the collision bang and rushed to the scene. After ascertaining that the two passengers in the peuguot had died they arranged for its towing to the police station and asked the Appellant to drive his lorry to the police station. Ahead of PW3, on the way to the police station the Appellant reversed his vehicle along Kenyatta Avenue and collided with the motor cycle. PW3 and her colleague rushed the motor cyclist to the hospital but he died on arrival.

The Appellant was thereafter arrested and later charged with the three counts of causing death by dangerous driving. In his defence, the Accused blamed both the accidents on failure of his lorry's brakes. The trial court dismissed that defence, convicted him and sentenced him to ten years imprisonment on each count. The sentences were ordered to run concurrently. The Appellant has now appealed to this court against both that conviction and sentence.

In his submission, Mr. Ogola, counsel for the Appellant contended that the Appellant's conviction cannot be allowed to stand as it is based on contradictory evidence and that the court erred in not making a finding that visibility was poor at the time of the accident. He also contended that it is PC Kabongo who should have been blamed for the accident for waving the Appellant to proceed on before ascertaining that

the coast ahead was clear. He also blamed the traffic police for forcing the Appellant, while still in shock and in a confused state, to drive his lorry to the police station instead of towing it there.

On sentence Mr. Ogola submitted that imposing the maximum sentence for the offence was excessive in the circumstances of this case. Citing several authorities, Mr. Ogola submitted that the Appellant having been a first offender with a clean record he should have been given the option of a fine instead of imprisonment.

On his part Mr. Mugambi for the state submitted that the Accused's conviction was based on sound evidence and urged me to dismiss the appeal against conviction. On sentence he left the matter to me.

I have considered these submissions and carefully read the lower court record. It is not in dispute that the accident occurred near the road block where the Appellant had been stopped. It is also not in dispute that the Appellant was turning into Naivasha when his vehicle collided with the Peugeot. Mr. Ogola's contention that PC Kabongo was to blame for the accident has no basis. Having been cleared by PC Kabongo and waved to proceed on it was the Appellant's duty to ensure that there was no oncoming vehicle before he attempted to turn right into Naivasha. PC Kabongo had no obligation to ensure that the road was clear before he waved the Appellant to drive on. In any case the accident occurred several metres away from the road block. Like the learned trial magistrate I find that the Appellant was to blame for the accident for failing to let the Peugeot which had the right of way to pass before he attempted to turn right into Naivasha. I therefore dismiss the appeal against conviction on the first two counts.

The Appellant's defence that his vehicle rolled back because of the failure of brakes and collided with the motor cyclist cannot hold in view of the fact that the motor vehicle inspection report, Exh. 5, states that the Appellant's lorry had no pre-accident defects. PW3 also said that the Appellant reversed his vehicle thus colliding with the motor cyclist. I therefore dismiss the appeal against the conviction on count three also.

On sentence I do not agree with Mr. Ogolla that an imprisonment term without the option of fine was in the circumstances of this case manifestly excessive. Quoting from the English case of In the case of R.V. Guilfoyle [1973] 2 ALL ER. 844, the Court of Appeal set out the principles of sentencing in traffic in Orwenyo Missiani -v- R [1979] KLR 285 in the following terms:-

“In the judgment of this court an offender who has a good driving record should normally be fined and disqualified from holding or obtaining a driving license for the minimum statutory period or a period not greatly exceeding it, unless of course there are special reasons for not disqualifying. If his driving record is indifferent the period of disqualification should be longer, say two or four years, and if it is bad, he should be put off the road for a long time. For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly a custodial sentence with a long period of disqualification may well be appropriate, and if this kind of driving is coupled with a bad driving record the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed.”

In this case the Appellant caused the death of three people in two accidents within a span of hardly an hour. In the first accident, he attempted to turn right without first ensuring that it was safe so to do. Being at about 8.00 p.m. there is no way he could have missed seeing the lights of the oncoming Peugeot. He saw them but nonetheless thought he could safely make it. I could have excused that as a momentary lapse referred to in the above case and given the Appellant the option of fine. However, taken together with the reversing that caused the second fatal accident, I am satisfied that the Appellant drove recklessly in total disregard of other road users. Consequently I find that a custodial sentence was deserved in this case and I accordingly dismiss the appeal against sentence also.

In the upshot I find no merit in this appeal and I hereby dismiss it in its entirety.

DATED and delivered at Nakuru this 19th day of November, 2008.

D. K. MARAGA

JUDGE