



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 203 of 2004**

**PETER KINYANJUI NGANGA.....APPELLANT**

*Versus*

**REPUBLIC.....RESPONDENT**

***(Being appeal against the conviction and sentence by G. K. Mwaura Principal Magistrate in the Senior Principal Magistrate's Traffic Case No. 683 of 2003 at Murang'a)***

**JUDGMENT**

The Appellant was charged with causing death by dangerous driving contrary to *Section 46* of the Traffic Act Cap 403. The Appellant pleaded not guilty and after trial was convicted and was sentenced to five years imprisonment. He was aggrieved by conviction and sentence and has therefore petitioned for an appeal against the same.

Since this is the first appeal it is essential to re-evaluate the evidence tendered during the trial. P. W. 1 was a vehicle inspector attached to Thika Vehicle Inspection Centre. He inspected motor vehicle KAP 382D Toyota Matatu. He had been informed that the vehicle had been involved in an accident with a cyclist. He stated that he found the following damage to the vehicle. The vehicle was damaged on the front body pedal, offside dented windscreen glass offside had been smashed. He confirmed that the vehicle had no pre accident damage. P.W. 2 said that he was a conductor in the subject motor vehicle which operated between Muranga and Nairobi. He confirmed that the driver was the accused. On the 25<sup>th</sup> November 2002 at about 4.20 p.m. as they were on their way to Nairobi and the vehicle was being driven by the accused a man on a bicycle came from the right side across the road . The accused tried to stop but hit him on the right side. The vehicle stopped and because members of public wanted to beat him, he together with the accused ran to the police station. P.W.3 was the father of the deceased cyclist and he confirmed that he identified the body. P.W.4 said that he is a driver of a motor vehicle Registration Number KSX 985. This vehicle operates between Makuyu and Kambirwa. He was on his way to Kambirwa when he saw a Nissan Matatu pass them and that there was a young man with a bicycle in front of him. The cyclist was on the left side facing towards Nairobi. Thereafter he said that he found the matatu having stopped in the middle of the road. It was him who stopped and took the cyclist to hospital. He confirmed that the cyclist was his brother. P.W. 5 was a Police Constable attached to traffic highway base Muranga. On the 26<sup>th</sup> November 2002 ,on receiving a telephone call which reported an accident at Makuyu, he went to the scene and found the subject motor vehicle. He found the vehicle on the left lane as one faces towards Nairobi. He said that the point of impact was near the middle of the road where there was blood stain. That the vehicle was 2.5 metres away from where the blood was. The bicycle was besides the road on the left side. The evidence of P.W.1 was given by Dr. Waiganjo who confirmed that the cause of death of the cyclist was as a result of a road accident. He filled the P3 form in that regard. The Appellant in an unsworn statement stated that he on that day had left for Nairobi. At Makuyu area a cyclist crossed the road suddenly. He attempted to avoid hitting him but he was too near and he was hit by the vehicle.

It is important to remind oneself the charge that the Appellant faced before the trial court. The charge was one of causing death by dangerous driving. The elements of that charge are that one has to be found guilty of driving a vehicle in a dangerous manner, that is, being dangerous to the public. The court in

considering the charge has to have regard to all the circumstances of the case. I am of the view that the most essential evidence of the prosecution was that given by P.W.2. He was in the motor vehicle and he stated that a cyclist crossed over the road from the right side and although the driver tried to avoid hitting him he could not stop. P. W. 2 was the only eye witness that was called by the prosecution. P.W.4 did not witness the accident but he said that he saw the Nissan pass his vehicle. He later found that matatu in the middle of the road. P.W.5 placed the scene of impact at somewhere near the middle of the road but on the left hand side of the road facing Nairobi.

I find that the evidence that was adduced by prosecution witnesses did not prove that the Appellant in any way drove the subject motor vehicle dangerously. The trial court placed a lot of reliance on P.W.4. P.W.4 in stating that the subject vehicle passed his vehicle did not state whether his vehicle was stationary or in motion. He did not also state that the manner in which the subject vehicle passed him was dangerous. The evidence of P. W. 4 and P.W.5 was inconsistent in respect of the place of impact. P.W.4 placed the vehicle in the middle of the road. P. W. 5 placed the vehicle near the middle of the road on the left side. In considering the entirety of the prosecution evidence, I find that it failed to meet the required criminal standard of proof. There is doubt whether indeed the Appellant drove the vehicle dangerously. It was essential for the prosecution to prove that. A case in point is **Ngure v Republic [2003] E.A.** In this case the Court of Appeal had the following to say in respect of *Section 46* of the Traffic Act.

***“The mere occurrence of an accident alone is not enough to prove a charge of causing death by dangerous driving under section 46 of the Traffic Act. Evidence must disclose a dangerous situation and the driver must be shown to be guilty of a departure from the normal standard of driving which would be expected of a reasonably prudent driver. Atito v Republic [1975] E.A. 278 followed. Evidence showed that there was a situation which was dangerous when viewed objectively and that there was fault on the part of the Appellant which caused that situation.”***

The prosecution evidence failed to prove the charge which the Appellant was facing. That is prosecution failed to prove the Appellant drove the vehicle in a dangerous manner or that it was the fault of the Appellant that caused the accident. The court therefore finds that the Appellant is entitled to the prayers sought in his appeal and more particularly in the following grounds:

- 1. The learned trial magistrate erred in law and fact in finding that the prosecution had proved its case to the required standard and thereby failed to give the benefit of doubt to the Appellant.***
- 2. The learned trial magistrate erred in law and fact in convicting the Appellant against the weights of the evidence.***
- 3. The learned trial magistrate erred in law and fact in dismissing the Appellant’s plausible defence and thereby shifting the burden of proof to the Appellant.***
- 4. That the learned trial magistrate erred in law and fact in convicting the Appellant when there existed no sufficient or any evidence at all to support the charges preferred.***
- 5. The learned trial magistrate failed to take into account the contradictions in the prosecution witnesses’ evidence which in any event did not support the charge and equally was uncorroborated and thereby arrived at a wrong decision.***

In respect of ground No. 8 the Appellant in his ground stated that prosecution was conducted by unqualified person. Indeed looking at the proceedings the court recorded that prosecution was led by Mr. Ndetto. That person prosecuted the case. It is not stated whether the person was an inspector of police as required by *Section 85(2)* of the Criminal Procedure Act. Since there is doubt that the person was so qualified, that doubt must be exercised in favour of the Appellant. The failure to give a police rank next to the name of Mr. Ndetto leads to nullifying the trial against the Appellant. Accordingly in addition to finding that the conviction cannot be supported by the evidence, the court also finds that the trial was a nullity. The end result therefore is that the conviction is hereby quashed and the sentence against the Appellant is hereby set aside. In finding that the trial was a nullity no retrial will be ordered in view of

the court's finding herein before.

***Dated and delivered this 23<sup>rd</sup> March 2007.***

MARY KASANGO

JUDGE