



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU**

Criminal Appeal 142 of 2004

CAROLINE KAGENDO NJERU.....APPLICANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant was charged with a traffic offence of causing death by dangerous driving contrary to section 46 of the Traffic Act Cap 403 Laws of Kenya

and count was failing to stop contrary to section 73(1) of the Act aforesaid. She was found guilty on both counts and sentenced to fine of 10,000/= in count 1 and 2000/= in count II.

At the hearing of this appeal the appellant was represented by Mr. J. Kathungu advocate who argued the appeal. The grounds of appeal are stated in the petition being nine (9) in all. The prosecution evidence is that on 18.2.2003 at 6.00pm PW1 driving from Muranga a lorry KAE 834A with one Kabungi. At Sagana stage 49 another vehicle was trying to overtake his lorry. He had seen children fetching firewood on the right side of the road. Suddenly he saw a child who was off the road flying in the air. He heard a bang as the child landed on the road in the middle near the rear tyre on the right lane. PW1 stopped on the right side too. He testified that the vehicle that hit the child was KAE 143K. There were two occupants, ladies. He saw the child was dead. The two ladies came out of the vehicle and began to scream. They said the child had already crossed the road. The appellant was driving KAE 143K. They entered into the motor vehicle and drove off. PW1 called police who came from Makuyu Police Station. They marked the scene and the vehicle was taken to police station for inspection. He said he was driving at 60 KPH. He was ascending a slope. He had a bang and saw the child flying in the air. The motor vehicle stopped ahead of him. He saw the motor vehicle after the bang. He did not see the child being hit by vehicle KAE. He told the police that one child suddenly started to cross the road. At the trial he said he did not see the child running across the road. He denied having hit the child with his vehicle. The appellant's vehicle was examined by PW2 motor vehicle examiner and no pre accident damage was found however at the time of examination on 24.2.2003, the rear side bar was slightly dented. The front bumper was plastic.

Evidence of PW3 shows that on 18.2.03 he was traveling towards Nairobi in a tanker driven by Mr Mukuria. At area 49 the road was smooth and clear.

The vehicle was climbing the slope a white car started overtaking them. They were on left side of the road. A child was crossing from the right side to the left side. 'Motor vehicle hit the child'. The child fell off the road. The white vehicle stopped, and three ladies alighted. They said they did not hit the child. PW3 said he saw the child being hit by vehicle KAE 145K. She was overtaking on a hill. There was no on coming car. He saw children on the roadside. He did not see what they were doing but they were on roadside. The father of the child who was hit gave the same evidence and said his son was only 4

years. There was also evidence of the minor child of the deceased who was standing by the roadside. There was also the evidence of an independent witness who was not in the vehicle. PW3 John Macharia was walking along the road heading towards Sagana (the opposite direction). He saw white car KAE 143K overtaking a lorry then it hit the child. He saw there was a tanker (third vehicle). He saw the child dead and later he made a statement to police station. He saw that the child was walking crossing the road. The lorry stopped behind the body of the child.

I have perused the judgment. The trial magistrate did not notice that at the scene there were three vehicles all traveling towards the same side. The appellant in her statement of defence said '**Before I could finish overtaking the lorry a small child crossed the road.**' So she had seen the child crossing the road. But she was told by her passenger to stop as the child had been hit by the lorry. She stopped on the right side of the road. She had not finished overtaking the lorry she was then behind the lorry and she could see in front of her vehicle the child crossing the road and then her passenger told her to stop as the lorry had hit the child. There is evidence that the lorry stopped behind the body of the child PW1 having seen the child flying in the air. There is no evidence that any of the driver's saw the child actually being hit they saw the body on the ground. The trial magistrate found that there were children off the road on right side of road as vehicles faced towards Nairobi considering that the rule of the road is 'keep to the left' the vehicles were traveling on the left side of the road. An overtaking vehicle would move towards the right of the road then the vehicle overtaking would meet the child somewhere in the middle of the road. The trial magistrate found that the appellant was overtaking the lorry. That was not disputed but her finding that appellant did it carelessly and without taking proper care of other road users is not supported by evidence. There is no evidence of overspeeding. There is evidence that the road was smooth and clear.

Looking at authorities relied on by the appellant counsel I have the decision of court of Appeal in Criminal Appeal No.35/2002 (copy provided) Silas Thuo Ngure versus Republic where the charge) was under section 46 of the Traffic Act. The court said 'The mere occurrence of an accident alone is not enough to prove a charge under section 46 of The Traffic Act. Evidence must disclose a dangerous situation and a fault on the part of the driver. The driver must be shown by evidence to be guilty of a departure from the normal standard of doing which would be expected of a reasonable prudent driver. In the present case there is evidence that a child was seen walking crossing the road. The driver saw it as she was about to finish overtaking the other vehicle. Witness saw the child flying in the air and the body falling in the middle of the road. The road was clear and it was not dangerous for appellant to overtake. There was no traffic approaching from the other direction of the road. There was no evidence that the appellant's vehicle left the road and moved to the other side. There were no skid marks.

The other authority cited is the decision of *High Court in Khalif versus Republic 1973 E.A. 364*. It was held dangerous driving is not an absolute offence. There must be some fault on the part of the driver. The facts of that case show that the appellant was driving on the wrong side of the road and had committed other traffic offences and the court found that the driver was guilty. In this case there were two vehicles at that point none saw which vehicle hit the child. But there was evidence that the vehicles stopped and the appellant believing it was PW1 who was guilty of causing the accident she drove off. She did report the accident to traffic officers manning a road block who were able to report the accident to the area police station.

The trial magistrate posed the question 'how come she had not seen the child before the accident?' Actually she did admit having seen a small child crossing the road. But when passenger asked her to stop because PW1 had hit the child she did stop and she got out of the vehicle to see the accident. Again the trial magistrate asked herself 'why did she not report at police station and go to the scene with police officers so that the issue of who caused the accident could be solved after scene has been visited by police? She proceeded to make the finding that Appellant was overtaking and she did it carelessly and without taking proper care of other road users such as the deceased child. The trial magistrate did not address whether the appellant was blameworthy or not. She did not look for evidence of careless driving or failure to take proper care of other road users. She believed evidence of PW1 who was an interested party. And his evidence was not supported by any other witnesses. PW3 was a passenger in the vehicle driven by PW1. None of them gave evidence to show the appellant was guilty or careless in anyway.

There was contradictory evidence as to which vehicle hit the child and why the deceased was in the middle of the road. The evidence of PW6 the small child was valueless it was unsworn and therefore not tested by cross examination. After considering all the circumstances before and after the accident I do not find evidence to attach guilty or fault on the part of the appellant involving the accident. On count II it is not true that she did not report the accident she did report to the police at the road block who were able to pass the report to the police station immediately. In the circumstances, I find that the conviction of the appellant on both counts was not supported by safe evidence. I allow appeal and squash the conviction and set aside the sentence.

Dated this 4th July, 2007.

J. N. KHAMINWA - JUDGE

Mr Kathungu; I apply that the fine paid be refunded to the appellant.

Court; order accordingly.

4/7/2007

Khaminwa – Judge

Read in presence of Mr Omwega for State

Mr Kathungu for appellant

Appellant present in open court.

J. N. KHAMINWA - JUDGE