



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 488 of 2005**

*(From Original Conviction and Sentence in Criminal Case No. Tr. 15606 of 2003 of the Principal Magistrate's Court at City Court – Mrs. F. Nyakundi SRM)*

**PATRICK MURIITHI GATIMU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

PATRICK MURIITHI GATIMU, the appellant, was charged before the subordinate court with a 1<sup>st</sup> count of careless driving contrary to Section 49(1) of the Traffic Act (Cap. 403). He was charged with a 2<sup>nd</sup> count of failing to stop after an accident contrary to section 73(1) of the Traffic Act (Cap. 403). He was also charged with a 3<sup>rd</sup> count of failing to stop after an accident contrary to section 73(1) of the Traffic Act. The 4<sup>th</sup> count was for driving a motor vehicle on a public road with some parts and equipment thereof not maintained in a safe condition contrary to section 56(1) of the Traffic Act.

After a full trial, the appellant was found guilty of counts 1,2 and 3 and convicted of the same. He was found not guilty of count 4 and was acquitted of the same. The appellant was sentenced to a fine of Kshs.5,000/= or in default 4 months imprisonment in respect of count 1; a fine of Kshs.1,000/= and in default 1 month imprisonment in respect of count 2; and a fine of Kshs.1,000/= and in default to serve 1 month imprisonment in respect of count 3. Being dissatisfied with the decision of the learned trial magistrate the appellant appealed to this court against both the conviction and sentence. The grounds of appeal are that –

- 1. The learned trial magistrate erred in law and fact when she concluded (that) his motor vehicle registration KAJ 696 V was involved in an accident without evidence of the motor vehicle inspector.**
- 2. There was no evidence of an examining doctor to establish that the complaint suffered injuries purportedly caused by motor vehicle registration KAJ 696 V.**
- 3. The learned trial magistrate erred in law and fact in relying on the testimonies of the prosecution witnesses which were conflicting.**
- 4. The learned trial magistrate erred in law and fact in rejecting his defence in absence of**

**reasons for so doing and failing to allow submissions.**

**5. The learned trial magistrate erred in law and fact in putting him on his defence when the prosecution had applied to withdraw the case and no new witness adduced evidence.**

**6. The learned trial magistrate erred in law and fact by finding him guilty without applying any test and principle in criminal law.**

At the hearing of the appeal, the appellant was represented by Ms Obara.

Counsel for the appellant, Ms Obara, submitted that the learned trial magistrate erred by concluding that the appellant's motor vehicle was involved in an accident. That allegation was not proved as the prosecution did not produce a motor vehicle inspection report or call the motor vehicle inspector to testify.

On ground 2 of appeal, counsel submitted that the prosecution failed to produce evidence to prove that the complainant sustained any injuries, as no P3 form was produced.

On the third ground of appeal, counsel submitted that the learned trial magistrate erred in relying on conflicting evidence of prosecution witnesses. It was counsel's contention that though PW1 claimed that PW4 was a colleague, PW4 claimed that he did not know PW1.

On ground 4 counsel submitted that the learned trial magistrate erred in not allowing the appellant to give his submissions.

On ground 6 of appeal counsel submitted that the learned trial magistrate erred in insisting on putting the appellant on his defence, while the prosecution had indicated that they wanted to withdraw the case. Counsel also argued that the appellant was wrongly charged, as he was not the owner of the subject motor vehicle.

Counsel finally submitted that the prosecution did not prove its case beyond any reasonable doubt.

Learned State Counsel, Ms Gateru, opposed the appeal. Counsel contended that the prosecution had proved its case against the appellant on all three counts, as the motor vehicle was proved to have been involved in the accident through the evidence of PW1 the complainant and PW4 who was an eye witness. From the evidence on record, it was proved that PW1 actually sustained injuries, though the case was concluded before the P3 from doctor was called to testify. Counsel contended that the failure to call the doctor to testify was not fatal to the prosecution case. Counsel also submitted that any inconsistencies in the prosecution evidence were minor and should be ignored as they did not shake the prosecution case.

Counsel also submitted that the defence of the appellant was duly considered and found to have no merits. On the issue of the prosecution having tried to withdraw the prosecution case before the appellant was put on his defence, counsel submitted that the prosecution wanted to withdraw the case merely because the P3 doctor was not available to testify. However, it was counsel's view that the evidence tendered was sufficient to sustain the convictions.

Counsel further submitted that though the record showed that the registered owner of the motor vehicle was somebody else, the appellant did, at the time of accident and in his defence, that he left his vehicle which bore the same registration number in the garage.

The facts in brief are as follows. The complainant PW1 WAWERU NGINYA alighted from a vehicle on Kangundo road at Kwachoka on 5.4.2003. He tried to cross the road. A vehicle, which was driven on the wrong side of the road, hit him and did not stop. He was injured on the leg. He neither saw the registration number of the vehicle that hit him nor did he see the driver. He was taken to Kenyatta Hospital by a good Samaritan.

At the time of the accident, which was around 10.00 a.m., PW4 WASHINGTON GATHANU THUTHU left his home at Ruai heading to Njiru. He was on the Nairobi/Kangundo road. At Chokaa stage he witnessed a motor vehicle KAJ 696 V Nissan hit an old man (the complainant). The vehicle slowed down but did not stop. The victim sustained a left broken ankle and was bleeding. He however did not see the driver who was driving the vehicle that hit the complainant. He and a good Samaritan, who had a vehicle, took the complainant to Kenyatta National hospital for treatment. On the way, they met traffic police and gave them the registration number of the motor vehicle that allegedly court the complainant.

The driver of the accident vehicle did not report the accident to the police. On 14.4.2003, a son of the complainant went and made a report of the accident to the Embakasi divisional police office. The police enquired from the Registrar of Motor Vehicles on the particulars of ownership of the subject motor vehicle. The registered owner of the motor vehicle was found to be the appellant. The police sent him a letter through the address which was with the Registrar of motor vehicles. He did not go to the police in response to the letter. Thereafter, the police called the owner on the telephone number that was provided by the Registrar. They told him to come to the police station. He did not do so.

On 18.9.2003 at 6.15 p.m., the subject motor vehicle was spotted on Dar-es-Salaam/Dunga road Nairobi. The vehicle was stopped and later inspected. The driver, who is the appellant, was later charged with the offences.

In his defence, the appellant gave unsworn testimony. It was his evidence that on 5.4.2003 he left his vehicle KAJ 696 V Nissan Sunny in a garage and went and collected it about 5.00 p.m. Later, he was called by the police who informed him that he had been involved in an accident. He stated that he knew nothing about the accident. He contended that his mechanic would have informed him, if anything had happened to the vehicle that day.

This being a first appeal, I am duty bound to evaluate the evidence on record a fresh and come to my own conclusion and inferences – see **OKENO – vs – REPUBLIC [1972] EA 32**.

The burden is always on the prosecution to prove the case against an accused person beyond any reasonable doubt. In **AJWANG – vs – REPUBLIC [1983] KLR 337**, the Court of Appeal held, inter alia, that –

**“2. The burden of proving the ingredients of the offence are entirely on the prosecution and the accused cannot be called to prove his innocence. The evidence showed, in the court’s opinion, that the appellant knew that the goods were uncustomed, hence the offence was proved as required by law”.**

The appellant was convicted of three counts. All the convictions on two were related to an accident which occurred on 5.4.2003. Indeed, it is apparent that an accident did occur in which the subject motor vehicle was involved. The complainant was injured as a consequence of that accident. The driver of the motor vehicle did not stop. He also did not report the accident to the police. The appellant, in his defence, stated that he had left the vehicle in the garage on the material day. He initially stated that he would call the mechanic as a defence witness, but later, did not call him. At page 7 of the judgment, the learned trial magistrate stated –

**“Having found that this is the same vehicle that caused the accident. Then it was imperative for the accused to have called evidence to stop that allegation. He was given sufficient time to call his witness but he eventually dispensed with him. He did indicate the mechanic he left the car with was one Njue; whom as I having indicated, was not called to testify”.**

With due respect, the above was a clear misdirection by the learned trial magistrate. The appellant did not have a burden to prove his innocence. The learned trial magistrate erred in shifting the burden of proof to the appellant which prejudiced the appellant.

The above shifting of the burden of proof affected the findings of the learned trial magistrate. In my view, had the learned trial magistrate directed herself properly on the evidence, she would not have convicted the appellant on the evidence on record. All the three offences on which the appellant was convicted related to the accident and to the person who was driving the motor vehicle at that time. The evidence shows that the appellant was the registered owner of the motor vehicle at that time, however, the three offences had nothing to do with ownership. The offences related to the actual driver who drove the vehicle at the time of accident. PW1, the complainant, did not see or identify the driver or the motor vehicle. PW4, the eye witness also did not see or identify the accident driver. There is no evidence adduced by the prosecution to prove that the appellant was the driver of the motor vehicle at the time of accident. The fact that he was the driver of the motor vehicle on 18.9.2003, when the vehicle was traced at Dunga/Dare-es-Salaam road did not prove that he was the driver of the motor vehicle on 5.4.2003. In my view, the prosecution failed to prove that the appellant was the driver of the subject vehicle on the date of accident. The conviction cannot therefore be sustained on the basis of the evidence on record. I will therefore have to allow the appeal on that account.

Consequently, I allow the appeal quash the conviction and set aside the sentence. I order that any fine paid by the appellant be refunded to him.

Dated at Nairobi this 26<sup>th</sup> day of September, 2007.

**George Dulu**

**Judge**

**In the presence of –**

Appellant - absent

Ms Obara for appellant - absent

Ms. Gateru for State absent

Eric – Court Clerk