REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 583 of 2004

ISAAC WAITHAKA NJUGUNA …….…….. APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

(From original conviction and sentence in Criminal Traffic Case Number 273 of 2004 of the Chief Magistrate's Court at Limuru Muthoni Mburu - RM)

JUDGMENT

The Appellant ***ISAAC WAITHAKA NJUGUNA*** was convicted on one count of causing death by dangerous driving contrary to Section 46 of the Traffic Act and was sentenced to a fine of Kshs.20,000/= in default to serve three years imprisonment and his driving Licence was endorsed for the three years as well. The Appellant was aggrieved by the conviction and through Messrs Eboso & Wandago Advocates he lodged the instant Appeal. In his Petition of Appeal dated 2nd December, 2004 and filed in Court on the same date, the Appellant faulted his conviction and sentence on the following grounds that:-

1. The Learned Magistrate erred in law and gravely misdirected herself by convicting the Appellant by failing to take into account that the Prosecution had not called the motor vehicle inspector.

2. The Learned Magistrate erred in law and fact in failing to grant the Appellant the benefit of doubt after eye Prosecution witnesses contradicted themselves on the manner of the accused driving.

3. The Learned Magistrate erred in law and fact in requiring the Appellant to prove his innocence thus shifting the burden of proof.

4. The Learned Magistrate erred in law and fact in not giving the Appellant the benefit of doubt, the Prosecution having failed to establish the elements of the offence of causing death by dangerous driving.

5. The Learned Magistrate erred in law and fact in finding that the Appellant had driven in a dangerous manner against the weight of evidence to the contrary.

6. The Learned Magistrate erred in law in handing down an excessive and harsh punishment.

The facts of the Prosecution case were briefly as follows:- PW1, Joseph Gitau Githangi who is a businessmen in Eldoret was on 28th December, 2003 at about 1 p. m. driving along Nairobi – Nakuru highway in the company of PW2, Ng'ang'a Kinuthia headed for Eldoret in his motor vehicle registration

number KAQ 253V Toyota Corolla. Apparently the road was busy. As they approached Kinale Forest turn off the vehicle ahead of them attempted to overtake other vehicles and in the process collided with an oncoming vehicle which subsequently lost control and hit a pick-up that was behind them. The driver of the motor vehicle KQU 543 Datsun Station Wagon that caused the accident failed to stop. The two then pursued the said driver and managed to block his way. He was forced to park his vehicle by the roadside and was brought back to the scene of the accident. Upon arrival at the scene, PW1 then contacted the Police on his cell phone and informed them of what had transpired. The Police responded immediately and came to the scene whereat PW1 pointed out the Appellant as the person who had caused the accident.

The oncoming vehicle into which the Appellant collided was KAD 085T. As a result of the collision, the driver of the said motor vehicle lost control and collided with at the motor vehicle registration number KAG 174E that was being driven towards Eldoret by PW4. Following the collision, the driver of motor vehicle KAD 088T sustained fatal injuries and passed on whilst undergoing treatment at Kijabe Hospital. Following further investigations, the Appellant was subsequently charged with the instant offence.

Put on his defence, the Appellant in a sworn statement said that on 28th December, 2003 at about 2.30 p. m. he was driving along Nairobi-Naivasha Road headed for North Kinangop. At Kinale and having driven for about a Kilometre from the Police road block, a Toyota Vehicle grey Metallic in colour hit him forcing him to pull over to the left side of the road. That vehicle never stopped. However when the Appellant came out of his motor vehicle he had a loud bang and realised that there had been an accident. He rushed to the scene. He joined other people in rescuing the victims of the accident. After the victims had been ferried to the Hospital, the Appellant informed the Police of his own prior accident. He was then instructed to drive his vehicle to Lari Police Station for inspection. Following the inspection, the Appellant's motor vehicle was found to have defects and was accordingly charged with driving a defective motor vehicle to which he pleaded guilty and was fined Kshs.5,000/=. The motor vehicle was then released to him on 30th December, 2003. On 22nd January, 200, the Appellant went to Lari Police Station to have the Police abstract filled. It was then that he was told by Inspector Kinoti that there had been new developments in the matter and that he was going to be charged with causing death by dangerous driving. The Appellant maintained that PW1 and PW2 lied when they said that he had attempted to drive off after the collision. He categorically denied having been involved in the fatal accident.

In arguing his Appeal, the Appellant was represented by Mr. Wandago, Learned Counsel whereas, Miss Nyamosi, Learned State Counsel appeared for the state.

Counsel for the Appellant submitted that the Prosecution failed to call a key witness, the motor vehicle examiner whose evidence would have established whether there was contact between the Appellant's motor vehicle and the deceased's motor vehicle as well as the grey metallic vehicle that the Appellant claimed had hit him but failed to stop Counsel submitted that in the absence of such evidence collision between the 2 motor vehicles could not be established. Counsel submitted that though the Learned Magistrate relied on the evidence of PW1 and PW2, to find the conviction, their evidence was contradictory and therefore unreliable. Some of the contradictions alluded by Counsel were whether there was a Police road block near the scene of the accident, whether the deceased's vehicle overturned after the collision and whether the Appellant's motor vehicle could move after the accident. Counsel submitted that the subordinate Court failed to weigh the evidence of the eye witness and resolve the glaring disparities in favour of the Appellant. Learned Counsel also faulted the Learned Magistrate for finding that the Appellant was enroute to Nairobi from Naivasha yet the converse was the true version. Because of this factual error, the Learned Magistrate erroneously concluded that the Appellant had collided into the deceased vehicle from the near. Counsel further submitted that the Learned Magistrate shifted the burden of proof when she observed that the damage on the Appellant's car was consistent with evidence of PW1 and PW2. Counsel further submitted that the Court failed to give due consideration to the defence advanced by the Appellant which was supported by the evidence of PW4. That PW6 and PW8 said that they never saw the Appellant's motor vehicle and yet they were passengers in motor vehicle KAG 174E that collided with the deceased motor vehicle. It was the Appellant's contention through Learned Counsel the there was no evidence of dangerous driving and or overtaking. That the Police sketch plan produced in Court did not show the presence of the Appellant's motor vehicle. Counsel

concluded his submissions by stating that the Appellant was not involved in the accident. He was involved in a totally different accident.

On her part, Miss Nyamosi, submitted that the sentence imposed upon the Appellant was lenient and that the state was be seeking for the enhancement of the same in the event that the Appeal was found to be without merit.

With regard to failure to call motor examiner as a witness Counsel submitted that it was not necessary as there was the best evidence of eye witnesses in PW1 and PW2. As for the alleged inconsistencies Counsel submitted that they were not material and did not at all affect the Prosecution case. On shifting of the burden, Counsel maintained that there was no such shifting as all that the Learned Magistrate did was to evaluate the evidence placed before her by the Prosecution and the defence. On failure to have the Appellant's motor vehicle in the sketch plan Counsel submitted that the Appellant had driven his vehicle away from the scene. Commenting on the evidence of PW1 and PW2, Counsel submitted that the evidence showed that the Appellant was overtaking without taking the necessary precaution as to whether it was safe to overtake. This was sufficient proof that the Appellant drove dangerously. As to whether or not the Appellant was involved in a totally different accident, Counsel submitted that by virtue of Section III of the Evidence Act being facts within the knowledge of the Appellant, it was incumbent upon him to satisfy the Court that there was indeed another accident in which he was involved. Concluding her submissions the Learned State Counsel submitted that the ingredients of the offence were proved beyond reasonable doubt and the Appeal ought to be dismissed.

In a brief reply, Mr. Wandago stated on the issue of sentence that the same was equal to the offence. He referred the Court to the case of ***KARIUKI VS REPUBLIC (1988) KLR 456*** for this proposition. That the death of the deceased in this case was caused by a head on collision with another vehicle and not the Appellant. The motor vehicles examiner's evidence was critical and should not have been left out. PW1 and PW2 were not expert witnesses. Finally Counsel submitted that the Appellant was involved in another accident and that is why he was initially charged with driving a defective motor vehicle.

It is now settled, that a trial Court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to conclusion only based on the evidence adduced and as analysed. This is a duty no Court should shy away from or play down. In the same breath, a Court hearing a first Appeal i.e. a first Appellate Court also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor and so the first Appellate Court would give allowance for the same. There are a myriad of case law on this but the well-known case of ***OKENO VS REPUBLIC (1972) EA 32*** will suffice.

I must state from the onset that the Learned Magistrate did a commendable job in analyzing and evaluating the evidence before coming to the conclusion that the Appellant was guilty. It is common ground that both the Appellant's and deceased's motor vehicle were involved in an accident. However according to the Appellant, he was involved in an accident with a different motor vehicle which failed to stop. However according to PW1 and PW2 who were eye witnesses to the accident involving the deceased, it was the Appellant who collided into the deceased motor vehicle as he attempted to overtake other motor vehicles. Faced with this two different scenarios, it was upto the Learned Magistrate to critically examine the evidence of the Prosecution and the defence before arriving at her decision. The Learned Magistrate as already stated acquitted herself very well in this noble task.

The accident according to both PW1 and PW2 occurred in broad daylight at about 1 p. m. They were driving along Nairobi – Nakuru road at Kinale area when the Appellant who was ahead of them attempted to overtake other vehicles. In the process he collided with the oncoming vehicle. The driver of the oncoming vehicle lost control of the same and collided with a pick up motor vehicle that was behind PW1 and PW2's motor vehicle. According to PW1 and PW2, the Appellant failed to stop after the accident forcing PW1 and PW2 to pursue it for 100 metres and block its way. It was then that the Appellant was brought to the scene of the accident. The evidence of PW1 and PW2 to my mind was clear, consistent and cogent. These were strangers to the Appellant and accordingly it cannot be suggested that they

ganged up to falsely accuse the Appellant. What would be their consideration for such an undertaking. There is no suggestion that the two witness had a grudge against the Appellant as to propel them to frame the Appellant in the case. Commending on the evidence of PW1 and PW2, the Learned Magistrate stated:

*"…..**I have no reason whatsoever to believe that PW1 and PW2 had any reason to fabricate the evidence against the accused and must commend them for being good citizens who took the responsibility of stopping the accused from running away after causing the accident, and they informed the Police about it while at the scene….."***

It is clear from the foregoing the Learned Magistrate was impressed by the demeanor of these witnesses. An Appellate Court cannot disturb the finding on the credibility of witnesses by the trial Court unless it is clear that no reasonable tribunal could make such a finding – see ***OGOL VS MURITHI (1985) KLR 359***. Similarly findings of fact by the trial Court cannot be disturbed unless it is shown either that the Court misdirected itself or that there was no evidence to support the findings of fact. I entertain no such fears and or doubts in the circumstances of this case.

The Appellant conceded that he was involved in an accident. However this was with another motor vehicle and not the deceased. It is rather intriguing that it is only the Appellant who saw this particular vehicle. There were other drivers on the road who too and it was true what the Appellant alleged, those other drivers could have seen that particular motor vehicle. Indeed the evidence on record suggest that there was heavy traffic on the road. Such an accident considering the damage caused to the Appellant's motor vehicle could not have escaped the attention of other motorists. Further and as correctly submitted by the Learned State. It was incumbent upon the Appellant in terms of Section III of the Evidence Act to adduce evidence to prove the allegation. He failed to do so. The Appellant faulted the Prosecution for not tendering the evidence of a motor vehicle examiner. That the motor vehicle examiner could have been able to establish whether the Appellant's motor vehicle was involved in an accident with the deceased's motor vehicle or another motor vehicle. That he could have done by so determining whether there was grey metallic paint on the motor vehicle of the Appellant's motor vehicle. This was the colour of the motor vehicle the Appellant claimed hit him and disappeared. I do not think that failure to call this particular witness was fatal to the prosecution. As correctly submitted by the Learned State Counsel the Prosecution need not have called such evidence in the face of overwhelming and direct evidence tendered by PW1 and PW2 and which was corroborated by Inspector Kitheka PW7. Further according to PW7, the Appellant did not tell to him that he was involved in another accident when he was pointed out to him by PW1 that he was the one who had caused the accident. It was then that PW7 asked another Police officer to detain the Appellant. I may also point out that if the Appellant felt the evidence of the motor vehicle examiner was critical to his defence, there was nothing to stop him from calling him as a defence witness.

The Appellant was found by the trial Magistrate to be an untruthful witness on the basis that he told the Court that after his vehicle was hit he stopped and went to the accident scene and informed the Police of his accident yet the evidence of PW1 and PW2 and PW7 is to the contrary. Once again this is a finding on the demeanour of the Appellant which I cannot interfere. In my overall assessment of the evidence on record, I would agree with the Leaned Magistrate that the Appellant was less than candid in his testimony.

Yes there may have been some inconsistencies and or contradiction in the evidence of PW2, PW3 and PW10. However the contradictions did not go to the root of the Prosecution case. The contradictions and or inconsistencies only touched on peripheral issues such as whether there was a Police road block after or before the scene of accident, whether the deceased's vehicle overturned after the collision and finally whether the Appellant's vehicle could move after the impact. Depending on the individual observations of the witnesses, one could easily have missed some of the details that were apparent to other witnesses. To the extent therefore the contradictions alluded to in my view did not dent the Prosecution case. This ground of Appeal is therefore not tenable.

The Appellant has also impugned his conviction on the basis that the sketch plan introduced in evidence did not show the presence of his motor vehicle at the scene of the accident. That may well be so. However there is evidence that the Appellant did not stop immediately after the accident. Infact he was chased by PW1 and PW2 for about 100 meters before he was blocked and forced to park his motor

vehicle beside the road and then walked back to the scene of the accident with PW1 and PW2. Indeed even in his own sworn statement, the Appellant concedes that at some point he was told by Police officers to move his motor vehicle from where it was to Kinale junction. There is nothing on record that this was the same Police officer who later drew the sketch map. There was also no evidence that the Appellant drove his vehicle back to the scene of accident. This would therefore explain the absence of the Appellant's motor vehicle in the sketch map. Infact is clear from the evidence of PW8 that he took the measurements long before he was alerted that the Appellant's motor vehicle parked about 300 metres away had also been involved in an accident.

Next the Appellant attacked the Learned Magistrate for her finding that the damage on the motor vehicle KAD 055T and the Appellant's was consistent with the evidence of PW1 and PW2. To that extent, Counsel for the Appellant submitted that the Learned Magistrate shifted the burden of proof to the Appellant. I do not see how the Learned Magistrate's observation as aforesaid can be termed as shifting of the burden of proof. Nothing can be far from the truth. The Learned Magistrate was perfectly entitled to come to that conclusion on the basis of the evidence placed before her.

Having analysed and evaluated the evidence on record, I am satisfied just as was through Learned Magistrate that the Appellant was involved in the accident. He was not at all involved in another accident in which the offending motor vehicle failed to stop. His defence in my view was a calculated ploy to shield himself from responsibility.

Having said so, was the offence of causing death by dangerous driving proved? I have no hesitation whatsoever in answering the question in the affirmative. In the case of ***ATITO VS REPUBLIC (175) EA 278*** the Court held that to justify a conviction of causing death by dangerous driving there must be a situation which was dangerous when viewed objectively and also some fault on the part of the driver causing that situation. The same sentiments were echoed in the case of ***KARIUKI VS RPEUBLIC (1988) KLR 456*** in the following terms:-

"…….***..The offence of dangerous driving was not absolute offence and to justify a conviction, there must be not only a situation which, when viewed objectively, was dangerous but also some fault on the part of the driver causing that situation… fault involved a failure, a falling below the care and skill of a competent and experienced driver in relation to the manner of the driving and to the relevant circumstances of the case….."***

I have no doubt at all in the circumstances of this case that the Appellant was reckless. He took a risk of over taking motor vehicles when it unsafe to do so. Indeed from the evidence, there was heavy presence of traffic on the road on that day and time. In his own words PW1 stated:-

"…..***The road was very busy as the accused just left his lane and decided to overtake (sic) without due care. I remember the accused very well…."***

As for PW2, he testified:-

"…..***The vehicle ahead of us kept on trying to overtake but the traffic was busy…."***

It is clear from the foregoing that he Appellant took a dangerous risk in attempting to overtake other motor vehicles when it was unsafe to do so. As a result of his recklessness an innocent life was lost. The Appellant drove his motor vehicle dangerously, without due care and attention to other road users. He was at fault. A reasonable driver would not undertake such a mission considering the nature of the road and the traffic therein. I have no doubt in my mind that the Prosecution proved by evidence the act of dangerous driving on the part of the Appellant. Accordingly I find that Appeal lacks merit and is hereby dismissed.

On sentence, I note that the Appellant was sentenced to a fine of Kshs.20,000/= or 3 years imprisonment and his licence cancelled for the three years. Clearly the default sentence was illegal. It ought to have been 6 months and not 3 years.

However the state takes the view that the sentence imposed was lenient considering the circumstances in which the accident occurred and that an innocent life was lost. The Appellant was put on notice that in the event that his Appeal was dismissed, the state would be seeking the enhancement of the sentence. Despite the notice, the Appellant elected to prosecute the Appeal nonetheless. The Appeal stands dismissed and I have to consider the invitation by the State. To the Appellant the sentence imposed was commensurate with the offence charged and should not be interfered with.

Sentencing is a matter for the discretion of the trial Court. The discretion must however, be exercised judicially and not capriciously. The trial Court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. The Appellate Court might rightly interfere with the sentence if it is satisfied that the sentence imposed was illegal, too lenient as to amount to a miscarriage of justice or when it is shown that he sentence imposed is manifestly harsh and excessive. In the instant case, the maximum sentence that the trial Court could impose is a jail term of up to 10 years. The Learned Magistrate opted to exercise her discretion and imposed a fine. However, in my view the fine ought to have been commensurate with seriousness of the charge. The fine of Kshs.20,000/= was in my view too lenient as to amount to a miscarriage of justice. I would in the circumstances welcome the states invitation to enhance the sentence.

In view of what I have already stated, I will make the following orders.

(i). The Appeal against conviction is dismissed.

(ii). The sentence is enhanced to a fine of Kshs.60,000/= in default to serve 12 months imprisonment.

(iii). The period of disqualification from holding a driving licence is retained at 3 years.

Orders accordingly

Dated at Nairobi this 5th day of February, 2006.

……

MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Miss Nyamosi for State

Wandago for Appellant

Erick Court Clerk

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MAKHANDIA

JUDGE