REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 46 of 2004

(From original conviction and sentence of the Senior Principal Magistrate's Court at Naivasha in

Traffic Case No. 8 of 2003 – J. S. Kaburu [SPM]

JOSEPH KAHONOKI NJOROGE……...………………APPELLANT

VERSUS

REPUBLIC………………………...……………..…….RESPONDENT

JUDGMENT

The appellant, Joseph Kahonoki Njoroge was charged with two counts of causing death by dangerous driving contrary to **Section 46 of the Traffic Act (Cap 403 Laws of Kenya).** The particulars of the offence were that on the 19th of October 2002 at 8.00 p.m. along Nakuru-Nairobi Highway at Naivasha Junction, the appellant being a driver of motor vehicle registration number KAP 318D Toyota Hiace Matatu, (*hereinafter referred to as the said motor vehicle*) drove the said motor vehicle on the said road recklessly or at a speed which was dangerous to the public having regard to all the circumstances of the case, including the nature, condition and the amount of traffic which was actually on the road at the time of the accident and caused the death of Kennedy Ogoti Bosire (*hereinafter referred to as the deceased driver*) who was the driver of motor vehicle registration number KAK 480S Toyota Corolla Saloon and Pauline Wanjiku Thiga (*hereinafter referred to as the deceased*) a passenger in motor vehicle registration number KAP 318D. The appellant pleaded not guilty to the charge and after a full trial was found guilty as charged and fined Kshs 20,000/= or in default was to serve six months imprisonment. The appellant paid the fine but being dissatisfied with his conviction and sentence, appealed to this court.

In his petition of appeal, the appellant raised six grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted based on insufficient evidence of the prosecution witnesses. He was aggrieved that the trial magistrate had disregarded the evidence of the investigating officer and thus reached a decision that he was over speeding at the time the accident occurred. He faulted the trial magistrate for putting into consideration extraneous factors and thus found him guilty of the charges. He was aggrieved that the trial magistrate had shifted the burden of proof from the prosecution and thus required him to prove his innocence instead of the prosecution proving his guilt. He was finally aggrieved that the trial magistrate had sentenced him to a harsh, oppressive and excessive sentence. He urged this court to allow his appeal.

At the hearing of the appeal Mr Mburu, learned counsel for the appellant argued the grounds of appeal as one. He submitted that none of the witnesses who were called to testify by the prosecution testified as to the circumstances in which the accident took place. He submitted that all the passengers who were in the motor vehicle which was being driven by the appellant were asleep at the time the accident took place and therefore did not witness the accident. He took issue with the evidence of PW3 who testified that the said motor vehicle driven by the appellant was being driven at a high speed prior to the occurrence of the

accident yet at the time of the accident the said witness admitted he was asleep.

He submitted that PW15 who was the investigating officer of the case, visited the scene of the accident immediately after the accident and established that the point of impact where the two motor vehicles collided was on the lane which the appellant was lawfully driving on i.e. on the left lane as one is facing Nakuru. This is because the appellant was driving the said motor vehicle from Nairobi towards the Nakuru direction. He submitted that the investigating officer formed the opinion that it was the driver of motor vehicle registration number KAK 480S (*the deceased driver*) who was to blame for the accident and not the appellant. He reiterated that the prosecution had not proved its case to the required standard so as to establish the guilt of the appellant. He submitted that the defence of the appellant was ignored by the trial magistrate when he arrived at the decision finding the appellant guilty as charged. Learned counsel for the appellant urged this court to allow the appeal and acquit the appellant.

Mr Koech learned State Counsel supported both the conviction and the sentence imposed upon the appellant. He submitted that there was overwhelming evidence which proved that the appellant had caused the death of the deceased persons by dangerous driving. He submitted that PW3, PW5, PW8 and PW13 had testified that the appellant was driving the said motor vehicle at a very high speed of more than 100 kph and at one time before the accident PW3 had requested the appellant to reduce the speed of the said motor vehicle but the appellant had ignored his said plea. He submitted that from the evidence which was adduced by the prosecution witnesses, the impact when the two motor vehicles collided was so great that it proved that the appellant was actually driving the said motor vehicle at a high speed.

Mr Koech further submitted that the evidence adduced by the prosecution witnesses established that the appellant rammed into the motor vehicle which was being driven by the deceased driver, when it was stationary. He reiterated that it was proved by the prosecution that the accident occurred at a place where there was a speed limit. The appellant exceeded the speed limit and therefore caused the accident. He urged the court to ignore the evidence of PW16 which contradicted the evidence of other prosecution witnesses. He submitted that taking the totality of the evidence that was adduced before the trial magistrate, the prosecution proved its case on the charge of causing death by dangerous driving to the required standard of proof beyond reasonable doubt. He urged the court to disallow the appeal.

This being a first appeal this court is mandated to reconsider and re-evaluate the evidence adduced by the witnesses so as to arrive at its own independent decision whether or not to uphold the decision of the trial magistrate convicting the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified (*See* **Okeno –vs- Republic [1972] E.A. 32).** The issue for determination by this court is whether the prosecution established to the required standard of proof beyond reasonable doubt that the appellant indeed drove the said motor vehicle at a dangerous and reckless manner that he caused the death of the deceased persons.

I have considered the submissions which were made before me by Mr Mburu Learned Counsel for the appellant and Mr. Koech on behalf of the State. I have also carefully re-evaluated the evidence that was adduced by the witnesses before the trial magistrate. The prosecution and the appellant gave completely opposed evidence as to the circumstances under which the accident occurred. Whereas it is the prosecutions case that the appellant recklessly and dangerously drove the said motor vehicle by driving the same at a high speed and not observing the speed limit at the scene of the accident and further by not having due regard to the vehicular traffic that was on the road at that time and therefore caused the deaths of the deceased persons, it is the appellant’s contention that it was the deceased driver who was careless and reckless and therefore caused the said accident.

The law as regard the test to the applied when considering whether or not a driver is said to have been driving in a dangerous manner was stated in the case of **R –vs- Evans [1962]3 All ER 1086** at page 1088 where Fenton Atkinson J. A. stated that:

“… ***the objective test, because it has been laid down again and again in the reported cases, among others by Lord Goddard C.J. in Hill –vs- Baxter (1) where he said:***

"*the first thing to be remembered is that the statute contains an absolute prohibition against driving dangerously or ignoring halt signs. No question of mens rea enters into the offence; it is no answer to a charge under the section to say 'I did not mean to drive dangerously' or 'I did not notice the halt sign'.*"

It is quite clear from the reported cases that, if in fact a man adopts a manner of driving which the jury think was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best."

Section 46 of our Traffic Act is similarly worded like the English Act that the learned judge referred to and states that "***any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public …"*** The said Section of the **Traffic Act** is absolute is terms of liability. It does not matter that the driver thought that he was driving as best as he could in the circumstances. If the court is of the opinion that he was driving dangerously, then he shall be found guilty of the offence of dangerous driving. The above English decision was quoted with approval by V. V. Patel, J. in the case of **Okech –vs- Republic [1990] KLR 705**.

In the instant appeal, it is evident that the appellant was driving the said motor vehicle at a very high speed during the entire journey from Nairobi to the spot where the motor vehicle was involved in an accident. Several passengers who were in the motor vehicle, testified that the appellant was driving the said motor vehicle at a high speed. PW13 testified how the appellant was nearly involved in an accident at the Globe round about in Nairobi when they commenced the journey because of the manner in which he was driving the said motor vehicle. He also described how the appellant recklessly and dangerously overtook three motor vehicles in a place clearly marked with a yellow line. Although the evidence of PW15 the Police Officer who went to the scene soon after the accident established that the point of impact of the accident was in the lane where the appellant was legally allowed to drive the said motor vehicle i.e. on the left lane of the road as one is travelling from Nairobi to Nakuru, it is clear that if the appellant was driving within the speed limit of 50 kph having approached the road junction towards Naivasha Township, the accident could not have occurred, and if it had occurred, then the deceased persons could not have been killed.

While I agree with the submissions made by the appellant's advocate, that the deceased driver was partly to blame for the accident in that he crossed onto the path of the appellant's motor vehicle, the fact that the appellant had broken the law by driving the said motor vehicle beyond the speed limit makes him equally culpable. In the circumstances of this case therefore, having carefully re-evaluated the evidence adduced, I have reached the same conclusion that the trial magistrate reached that the appellants caused the death of the deceased person by dangerous driving. The appellant drove the said motor vehicle at a reckless speed and ignored the fact that he ought to have reduced the speed of the said motor vehicle when he approached a major junction. The appellant ignored the speed limit set at the spot where the accident occurred.

The upshot of the above reasons is that the appeal filed by the appellant against conviction and sentence lacks merit and is hereby dismissed. The conviction and sentence of the trial magistrate is hereby confirmed. It is so ordered.

DATED at NAKURU this 12th day of May 2006.

L. KIMARU

JUDGE