REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 328 of 2005

(From original conviction and sentence in Criminal Case No. Tr. 1510 of 2001 of the Chief Magistrate's Court at Thika-Betty Rashid PM)

GABRIEL WAMBUA KITILI …….…….....…….……APPELLANT

VERSUS

REPUBLIC …….....……..…….. RESPDONDENT

JUDGMENT

GABRIEL WAMBUA KITILI, hereinafter referred to as the Appellant was charged with the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act. The particulars of the charge were that on the 27th day of June 2001 at about 10 p. m. along Thika/Garrissa Road at Landless area in Thika District of the Central Province, being the driver of motor vehicle registration number KAL 462Q make Nissan Lorry drove the said motor vehicle on public Road recklessly, or at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature. Condition and use of the road and the amount of the Traffic which was actually at the time or which might reasonably be expected to be on the road thereby causing an accident to motor vehicle registration number KAK 543T make Land Rover and death of one ***JOHN MUIA ILIA*** who died instantly.

In a bid to prove this case the Prosecution called 5 witnesses whereas in his defence, the Appellant called 4 witnesses. At the end of the trial, the learned trial Magistrate was persuaded by the Prosecution case and hence found the Appellant guilty of the offence. Accordingly the Appellant was convicted of the offence and sentenced to a fine of Kshs 10,000/= in default to serve 12 months imprisonment. The Appellant was aggrieved by the conviction and sentence. Through Messrs Eboso & Wandago Advocates he lodged the instant Appeal. In his petition of Appeal, the Appellant faults his conviction and sentence by the trial Magistrate on the following grounds.

(i). **THAT** the Learned Magistrate erred in law and gravely misdirected herself by making a finding that the collision occurred on the deceased's vehicles lane.

(ii). **THAT** the Learned Magistrate erred in law and fact in concluding that the accused's vehicle encroached onto the path of the deceased.

(iii). **THAT** the Learned Magistrate erred in law and fact in not considering the accused's explanation of the circumstances leading to the accident.

(iv. **THAT** the Learned magistrate erred in law and fact in failing to give effect to the fact that the Prosecution withheld crucial expert and eye witness evidence.

(v). **THAT** the Learned Magistrate erred in law and fact in convicting the Appellant in total disregard of the evidence led in defence which evidence vindicated the Appellant.

(vi). **THAT** the Learned Magistrate erred in law and fact in not resolving the doubt as to the point of impact of the two vehicles in favour of the Appellant.

(vii). **THAT** the Learned Magistrate erred in law in failing to consider all facts and circumstances surrounding the accident.

(viii). **THAT** the Learned Magistrate erred in law in finding that the prosecution had proved their case beyond reasonable doubt.

The brief facts of the Prosecution case as gleaned from the record were that on 27th June, 2001 at about 9.30 p. m., one John Muia Ilia, deceased was driving Police Land rover registration number KAK 543T along Machakos – Thika Road when at a place known as Landless in Thika, he was involved in an accident with motor vehicle registration Number KAL 462Q a lorry resulting in his death. According to PW2 who was an eye witness to the accident, the fatal accident was solely caused by the driver of the latter motor vehicle, the Appellant herein. That the Appellant whilst driving the motor vehicle had his full lights on and was driving in the middle of the road. The Deceased warned the Appellant by flashing his lights but the Appellant was not deterred and sped on until he collided with the Land rover that the deceased was driving. Following the crash, the deceased head was smashed and apart of the brain removed. Similarly, the deceased's right hand was severed. Following the collision the deceased's motor vehicle went past the rear of the lorry and came to rest in a thicket on the Lorry's side of the road. The deceased died on the spot. The Appellant was then arrested and subsequently charged.

In support of grounds of Appeal, Mr. Wandago Learned Counsel for the Appellant attacked the finding by the Learned Magistrate on the point of impact. According to Counsel, the evidence that the Learned Magistrate relied on in reaching the conclusion that the Appellant drove his lorry in the middle of the road was contradictory. That there was no explanation as to what severed the deceased hand and what caused the brain matter of the deceased to be on the road. Counsel submitted that the only possible explanation was the one given by the Appellant that the deceased was driving his motor vehicle with his head and hand outside. The cause of the death was therefore the deceased's manner of driving. Counsel further submitted that according to PW2, immediately after the accident, Police officers from scenes of crime department were called to the scene and they took photographs. However the Prosecution failed to introduce those photographs in evidence. According to Counsel, the photographs would have been independent evidence to show and proof the actual point of impact. Counsel further pointed out that the Prosecution also failed to call any other independent witnesses although the Appellant's lorry had several labourers on board.

Counsel also faulted the Learned Magistrate for failing to consider the Appellant's defence. That the Learned Magistrate merely recounted the testimony of the Appellant in defence but failed to evaluate it. The earned magistrate failed to consider why the deceased body parts were found on the road. According to Counsel, the Appellant's defence was corroborated by PW2 when he stated that there were actually two trucks belonging to the same company and was following each other on the road. That the Appellant's truck was at the back. It was therefore not possible for the Appellant to have been on the right side of the road unless he was attempting to overtake and yet there was no such evidence.

Counsel further submitted that the element of dangerous driving on the part of the Appellant that allegedly caused the accident was not proved and yet it was a mandatory requirement. For this submission Counsel relied on the case of ***REPUBLIC VS HENNIGAN (1971) 3 ALL ER 133.*** On the failure by the Learned Magistrate to consider the defence put forth by the Appellant and the ramifications of such failure Counsel referred the Court to the case of ***OKETCH VS REPUBLIC (1990) KLR 705.***

Mrs. Gakobo Learned State Counsel appeared for the state and opposed the Appeal. Counsel submitted that the evidence of PW2 was not contradictory but was firm and consistent. That PW2 stated that the Appellant's lorry was being driven almost in the middle of the road. He went further to state in his evidence that the lorry was being driven on their side of the road. The version of how the accident occurred was according to the Learned State Counsel actually supported by the defence. That the Court found the evidence of PW2 credible. Counsel further submitted that the evidence of PW5 on the point of impact shows that the possible point of impact was in the middle of the road where the deceased's brain was found.

On witnesses not being called, Counsel submitted that PW5's explanation that he could not get such witnesses to testify was plausible. This explanation was supported by the evidence of DW3 who testified that he took away the labourers in another vehicle and by the time PW5 came to the scene, there was nobody who came forward to record a statement and subsequently testify.

With regard to the Appellant's defence, Counsel submitted that the same was dealt with exhaustively by the Learned Magistrate. The Court found that the evidence led by the Prosecution was credible. On failure to produce photographs, Counsel submitted that the failure was not fatal to the Prosecution case as sufficient evidence had already been tendered by the Prosecution. Counsel further submitted that the Appellant's manner of driving on the wrong side of the road could be construed to have been a dangerous mode of driving and the trial Court was right to find that the Appellant was guilty of the offence. There were also skid marks of 79.4 metres suggestive of over speeding.

In reply, Mr. Wandago submitted that the allegation that that the point of impact was in the middle of the road was not supported by the final resting place of the vehicle, as captured in the sketch map. The evidence of the point of impact would have been resolved by the scene of crime personnel who however were never called to testify. On skid marks, Counsel submitted that that skid marks of 79.4 metres does not suggest over speeding. The lorry could not have stopped suddenly as it was loaded with 50 people.

As I consider both submissions by Counsel, it must be remembered that as this is a first Appeal I am duty bound to examine and re-evaluate the evidence on record to reach my own conclusion in the matter, always remembering that I had no advantage as the subordinate Court did, of seeing and hearing the witnesses and making due allowance. See ***OKENO VS REPUBLIC (1972) EA 32.*** It is also an established principle that an Appeal Court will not normally interfere with a finding of fact by the trial Court, whether in a civil or Criminal case, unless it is based on no evidence, or on misapprehension of the evidence, or the trial Court is shown demonstrably to have acted on wrong principles in reaching the findings it did. See ***CHEMAGONG VS REPUBLIC (1984) KLR 611.***

In convicting the Appellant, the Learned trial Magistrate relied heavily on the evidence of PW2, Constable Kanyora and PW5. Peter Wambua – the investigating officer. With regard to the evidence of PW2, the trial Court held:-

"……***The Court has carefully considered all the evidence on record and noted that the most incriminating persons (sic) that of PW2 who was in the front co-driver's seat as the deceased drove the Police Land rover to Thika Police Station. PW2 noted that the lorry driven by accused person occupied almost the whole road and despite efforts made by deceased of switching on and off of his Land rover lights the lorry proceeded to advance in their direction and there was a collision……"***

According to the Learned trial Magistrate the accident was caused by the Appellant driving his motor vehicle in the middle of the road a well as having his full lights on whcih blinded the deceased as he drove the land rover. However were these issues sufficiently canvassed in the evidence tendered by the Prosecution? I do not think so. The exact point of collision is in dispute. Whereas the two witnesses testified that the accident occurred in the lane of the deceased's land rover, this is unlikely in view of the fact that part of the brain of the deceased as well as his severed right arm was found in the middle of the road. Further it is noted that following the collision, the land rover crossed the path of the lorry and stopped in the thicket behind the lorry. In my view if the accident happened as alleged by these two witnesses then it would either have been ahead collision and in which event the land rover could not have

crossed the road and landed in the bush behind the lorry or alternatively, on impact the lorry would have pushed the land rover backwards or on its left side. it is also worthy noting that the windscreen of the deceased vehicle was not shattered at all following the collision which further eliminates ahead on collision. In my view and as correctly argued by Counsel for the Appellant, the exact point of impact could not be determined on the evidence of these tow witnesses. That issue would have been resolved and determined had the prosecution sought to introduce the photographs of the scene of accident that were taken by the scene of crime personnel. The investigating officer did admit in his evidence that the scenes of crime personnel were summoned to the scene of crime and took photographs. However for unexplained reasons the photographs were not tendered in evidence. Further there is evidence that there were other eye witnesses to the accident, to wit, employees of Del Monte Company who were aboard the two lorries one of which was involved in the accident. The explanation by the investigating officer that none of these labourers offered to testify is simply incredible. These were employees of Del Monte Company based in Thika. The accident occurred within Thika District. The investigating officer was an Ag. Inspector of Police attached to Thika Traffic Base. I am certain that if the investigating officer did his job properly, there is no doubt that he would have been able to get some of these workers to testify. There is no evidence at all that he attempted to track down any of these witnesses and his attempts were thwarted either by the would be witnesses or their employer. Had these to two sets of witnesses been called, they would have been able to resolve the issue of the exact point of impact as well as whether or not the Appellant was driving dangerously just before the accident.

In ***BUKENYA & ANOTHER VS REPUBLIC (1972) EA 549,*** the Court of Appeal for east Africa, held that the Prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may in an appropriate case lead to an inference that the evidence of uncalled witnesses would have tended to be adverse to the Prosecution. It is important to note that the deceased was a Police officer. Similarly the investigating officer as well as scenes of crime personnel were all Police officers. This is the more reason why the photographs should have been tendered in evidence and the witnesses from the lorry summoned to testify. In my view and as the failure to call the said witnesses was not sufficiently explained and or explained persuasively, the Court ought to have drawn the inference that such evidence if it had been tended would have been adverse to the Prosecution case.

PW2 was the only eye witness to the accident. He was a Police officer and was in the company of the deceased. The trial Court should have been alive to the fact that this witness could say anything to protect his own. In the case of ***OKECH VS REPUBLIC (SUPRA)*** it was stated and rightly so in my view That:-

"…….***..When a Court is confronted with the testimony of a single witnesses in support of a charge, it has to be extremely careful in relying on that testimony without warning itself on the dangers in recording a conviction on such evidence by itself."***

Unfortunately, the trial Court failed in this noble task. It took the evidence of PW2 as gospel truth despite the fact and as already stated, he was a Police officer who was likely to give slanted evidence in a bid to exonerate the deceased from possible blame for the accident. In failing to caution itself of the dangers of relying on the testimony of a single witness, the Court fell into error.

There is evidence that the deceased land rover crashed into the rear right of the lorry. Indeed PW5 testified this:-

"…..***The driver's side of Land rover was hit and lorry, angles for right tyres were hit and right rear wheels….."***

This evidence tends to further eliminate the theory advanced by the two witnesses that the Appellant was driving in the path of the oncoming land rover. If it were so, there would have been a head on collision and possibly the windscreen shattered completely. However from the recorded evidence the windscreen merely had a minor crack. Further the driver's door of the deceased vehicle was not damaged at all. It would appear therefore that the deceased could have crushed into the right rear side of the lorry. The trial Magistrate again did not address herself regarding the evidence of damage to both vehicles. In cases of

this nature I think it behooves the trial Courts to scrutinize the technical evidence regarding the nature and extend of damage sustained by the vehicles involved in a collision. Such evidence if properly interpreted will most probably tend to show the party at fault.

The deceased's severed right hand and part of the brain was in middle road. How was it possible for the deceased to sustain such injuries yet the windscreen was not shattered neither was the door of the Landrover damaged. Was the deceased by any chance driving with both his hand and right hand out of the motor vehicle? That possibility looms large. What then would have caused the deceased to drive in a such manner? Is it possible that perhaps the Landrover did not have lights? If the deceased was driving with both his head and right hand outside the motor vehicle , that in itself was dangerous driving.

The Appellant was charged with traffic offence of causing death by dangerous driving. On the authorities, in order to sustain a conviction, the Prosecution must show that the accused's dangerous driving was the cause of the accident. See generally ***REPUBLIC VS HENNINGAN*** (***SUPRA)*** and ***REPUBLIC VS GOSNEY (1971) 3 ALL E.R 220***

Locally, the point was driven home in the case of ***KAMAU VS REPUBLIC (1963) EA 172*** when the Court stated:-

"…….***It is the onus of the crown to establish affirmatively and beyond reasonable doubt that the person's dangerous driving was due to a cause which was within his control…..."***

In the instant case, it was the case for the Prosecution that Appellant drove the vehicle into the path of the deceased with full lights on. These two aspects combined made the Appellant's driving dangerous. However as I have already stated it was not proved on evidence that indeed the Appellant drove into the path of the deceased. If anything the circumstantial evidence seems to discount that theory.

I am of course referring to the damage caused to the Landrover, where the deceased brain and severed hand was found as well as where the Landrover came to rest immediately after the accident. It is worthy repeating once again that all these issues would have been resolved had the Prosecution called the witnesses that I already alluded to in this Judgment. Learned State Counsel suggested that because there were skid marks by the lorry measuring 79.4 metres, the lorry must have been over speeding and therefore driven dangerously. Speeding perse is not evidence of dangerous driving. To be dangerous the speeding should be accompanied by something else such as recklessness, carelessness etc. There was no such evidence led in the instant case. In any event, there is evidence that the vehicle driven by the Appellant was following another vehicle that was slightly about 50 metres ahead. In such circumstances the possibility that he Appellant was over speeding would be in my view very remote. Learned State Counsel alluded to the possibility that the Appellant may have been overtaking and hence the accident. However there is no such evidence on record. PW2 merely said that the Appellant was driving in the middle of the road. If indeed the Appellant was overtaking then there would have been ahead on collision. Further the Landrover would not after the impact crossed the path of the lorry and landed in the bush behind the lorry.

As for the headlights, once again it as only PW2 who alluded to this matter. I have already held that in view of this witness's interest in the matter, his evidence has to be treated with a lot of caution and circumspection. In any event driving with full lights on cannot by any stretch of imagination be termed as dangerous driving.

Finally regarding the Appellant's defence, I note that the Appellant testified on oath and called 3 witnesses. All the three were eye witnesses to the accident. They all confirmed and corroborated the Appellant's evidence. They all confirmed that the Appellant did not cross into the path of the deceased's vehicle, that he did not drive with full lights, and that he Appellant was following another vehicle ahead of him. He was not overtaking. The trial Court in my view did not give due consideration to the defence advanced by the Appellant. These witnesses were subjected to intense cross-examination but never wavered in their testimony. The Appellant's version as to how the accident occurred appears to me to be more plausible than the Prosecution. The trial Court ought to have accorded the defence better treatment.

Bearing in mind all the foregoing, I am of the considered view that had the trial Court directed its mind properly to the evidence adduced before it, it would definitely have come to the conclusion that the Appellant was not guilty of the offence charged. I will accordingly allow this Appeal, quash the conviction and set aside the sentence. The Appellant should be set at liberty forthwith unless otherwise lawfully held. If the Appellant has paid the fine of kshs.10, 600/= imposed by the trial Court I direct that the same be refunded to the Appellant forthwith.

Dated at Nairobi this 26th day of June, 2006.

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MAKHANDIA

JUDGE