REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 205 OF 2003

WANJIKU

MUCHEMU……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

The appellant herein, Wanjiku Muchemi, Cr. A. No. 205 of 2003, [Form original conviction and sentence in Criminal Case No. Tr.22545 of 2001] was charged with the Traffic offence of dangerous driving on public road contrary to Section 47(1) of the Traffic Act.

The particulars of the charge were that on 26/10/01 at about 11.00p.m. along Mombasa Road at the junction with Kapiti Road Nairobi being the driver of motor vehicle KAM 402J Mercedes Benz saloon, drove the said vehicle on a public road at a speed or manner that was dangerous to the public having regard to all the circumstances of the case, the nature, condition and the use of the road and the amount of traffic which was actually on the road or which was expected to be on the road and failed to stop at the junction and collided with another vehicle KAG 668Q Peugeot 405 saloon and caused grievous harm to its driver namely George Wachira Gichohi.

George Wachira Gichohi testified that on 26/10/01 around 121.00p.m. he was driving his vehicle KAG 668Q Peugeot 405 saloon along Mombasa road from the city center towards Embakasi. He was alone and on reaching the junction of Mombasa Road and Kapiti road, near South B, all of a sudden a vehicle emerged from Kapiti Road and joined Mombasa Road without warning, causing a major collision between his vehicle and the other vehicle. He stated that he saw the other vehicle emerge onto Mombasa Road so sudden that there was no time to take any action and also because he was on the inner lane and there was no way he could avoid hitting the vehicle which had merged onto the road.

He hit the other vehicle at the right side, drivers side, from the drivers door extending to the front bonnet and wheel. As a result of the accident, he sustained serious injuries on the forehead and 3 broken ribs on the right side. He also sustained bruises on both knees and he was temporarily unconscious. The impact of the accident threw his car to the other side of the Mombasa Road – the side that leads to the City Center. The appellant was convicted and sentenced to Kshs.5,000/- or one months jail in default and disqualified rom driving for six months. Being dissatisfied by both the conviction and sentence she appealed on the following grounds:-

1) The learned trial magistrate erred in placing undue weight of the uncorroborated evidence

of P.W. 1 who by his own admission did not see how the accident occurred. 2) The lower court erred in placing undue weight of the evidence of a police office who was not the investigating officer and who did not interview both drivers before coming to the conclusion that the appellant was to blame.

3) The lower court erred in failing to consider the expert testimony given by the defence which testimony was not challenged.

4) The lower court erred in disregarding the defence evidence which evidence was not contradicted.

5) The learned trial magistrate erred in law in shifting the burden of proof upon the defence as to how the accident happened.

6) The learned magistrate erred in law and fact by convicting the appellant on uncorroborated and unscientific theory advanced by the complainant when there was evidence to the contrary adduced by the prosecution witnesses.

7) The lower court erred in law and fact by failing to consider the contradictions inherent in the prosecution case.

8) The learned Senior Resident Magistrate erred in law and fact by convicting the appellant against the weight of the evidence adduced before the court.

I have carefully studied the pleadings and the submissions by counsel for both sides, and re-evaluated the evidence on record from the lower court in light of the grounds of appeal. It is imperative to remind ourselves of the basic principles in all criminal cases. These are that at all stages the burden of proof rests squarely on the prosecution to prove beyond reasonable doubt the guilt of the appellant (accused) and that that burden of proof never shifts. In other words, the appellant has no duty to prove his/her innocence. Indeed, the appellant has the right to maintain total silence and that cannot be taken against him/her.

The appellant (accused) does not need to satisfy the court on any point. The second principle is that any doubt must always be given to the appellant (accused) as such doubt is an indication that the prosecution has not discharged its duty-proof-as by law required.

With the above reminders of the basic principles, I now turn to the matter before this court.

The evidence on record shows that the two ain prosecution witnesses – P.W. 1 – the complainant – and P.W. 2 – the scene visiting officer could not agree on such basic facts as to which side of the P.W. 1's vehicle, and where exactly, was bashed. The evidence of the two witnesses contradicted each other with P.W. 1 stating that the damage was in the right front door extending to the bonnet of the car, while P.W. 2 testified that the damage was at the rear-right door.

Such simple contradictions on key questions like where exactly was the damage on the complainant's vehicle raise the question as to the quantity and the quality of the evidence gathered prior to deciding to charge the appellant. Normally the role of the scene visiting officer would deal with such factual matters. In the present case, if that is not what P.W. 2 was supposed to deal with then the value of P.W. 2, as prosecution witness, was totally eroded.

Be that as it may, there is, from the record, contradictions in the evidence of the two main prosecution witnesses in this case. The doubt created by such contradictions should have gone, and goes, to the appellant. This is one of the basic principles, as herein earlier staed, in all criminal cases.

A close reading of the record from the lower court shows that there were probably three vehicles involved in this accident saga, one of which vehicle failed to stop. This point was not directly in issue but by remaining unresolved by the evidence at the lower court raises doubts as to whether the damage on the

complainant's vehicle – P.W. 1 – was caused by the appellants vehicle or another vehicle – the one that failed to stop.

The problem seems to rest on the application of the law by the learned trial magistrate with regard to the burden of proof.

At J 6, the learned trial magistrate stated thus:

> **"The argument is that the dent which was observed at the rear right wheel was not caused by the complainant's car and that there was another car which hit the appellant's car which car did not stop. But the appellant did not see any car at all. P.W. 1 hit the appellants car on the rear."**

Then the Learned Trial Magistrate dropped this legally lethal bomb. He said:

> **"The appellant is claiming that he was hit by another vehicle which he did not see. It is therefore difficult to believe him. If he had seen the car we would believe, but since he never saw the alleged car we would not believe his story."**

With all due respect to the Learned Trial Magistrate, that was shifting the burden of proof from the prosecution to the appellant, and that is legally unacceptable. Instead of calling on the prosecution to resolve the riddle, the lower court put the burden on the appellant.

The appellant had no duty to convince the court to believe his story. Indeed, the appellant need not, and did not have to give any story to the court to prove his innocence.

The fact that there was a collision and that the complainant's vehicle and herself injured or damaged cannot by itself found a conviction. The appellant must be proved beyond reasonable doubt by the prosecution to have been the cause of such collision and hence the damage and or the injuries. See **JESANI VS. REPUBLIC Criminal Appeal No. 1411 of 1968, [1969] E.A. 600.**

My review and re-evaluation of the evidence on record does not reveal anything to show that the appellant was driving dangerously, as per the charge under Section 47(1) of the Traffic Act.

Looking at the evidence as a whole, I have no doubt in my mind that the prosecution failed to prove its case beyond reasonable doubt, as required by the law. The learned trial magistrate compounded the weakness of the prosecutions case by shifting the burden of proof from the prosecution to the appellant.

All in all therefore this appeal succeeds. I quash the conviction and set aside the sentence.

DATED and delivered in Nairobi this 27th Day of April, 2005.

O.K. MUTUNGI

JUDGE