



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT ELDORET  
Criminal Appeal 16 of 2002  
APPELLATE SIDE**

**APPELLATE SIDE REPUBLIC .....  
..... APPELLANT**

**-VERSUS**

**STEPHEN SIAKA .....  
RESPONDENT**

**(Being an Appeal from the Judgement of V. W. Wandera Esq., Senior Resident Magistrate, in Eldoret Chief Magistrate’s Court Traffic Case No. 2274 of 2000**

**delivered on 21st December 2001)**

**JUDGEMENT**

This is an appeal by the State against the acquittal of the respondent Stephen Siaka in Eldoret Chief Magistrate Traffic Case No.2274 of 2000, on a charge of causing death by dangerous driving contrary to section 46 of the Traffic Act (Cap.403). The State having been aggrieved by the decision of the Senior Resident Magistrate at Eldoret, filed this appeal on twelve grounds.

At the hearing of the appeal Mr. Omutelema, Principal State Counsel argued all the grounds together. He submitted that the learned trial magistrate erred in acquitting the respondent. That he did not look at the case as a whole. That the learned magistrate erred in not believing the evidence of PW1, PW2 and PW9, that the vehicle was being driven at high speed. These witnesses were at the scene of the accident. They testified that the motor vehicle involved was being driven at high speed and that the driver lost control of the vehicle. The victim of the accident was a pedestrian who was hit by the vehicle off the road. He submitted that the cyclist (PW1) did not cause the accident as he was hit from behind. He urged the court to disbelieve the evidence of PW6. The failure of the respondent to stop when he saw the cyclist was evidence that he was driving at high speed. The vehicle also moved for 50 meters after hitting the cyclist and the deceased. In disbelieving PW2, the magistrate observed that the witness did not produce documentary evidence of ownership of Wagon Wheel Butchery which was not an issue. He urged the court to set aside the acquittal of the respondent and find him guilty.

Mr. Kutwa for the respondent opposed the appeal. He submitted that the court was required to consider three ingredients. Firstly, the court had to decide on the points for determination. Secondly, the reason for the decision. Thirdly, to make a finding. In his view, the magistrate covered the three ingredients of the charge in the judgement. The magistrate found that the issue was whether the respondent had caused death by dangerous driving. He considered the evidence as a whole. The evidence against the respondent was not corroborated.

The magistrate also dealt with the issue of credibility. PW9 was found to be unreliable as he disowned his own statement to the police. The evidence of PW4, PW6 and PW10 supported the version

of the respondent. The investigating officer PW6 recommended that the cyclist be charged in court. From the evidence on record the acquittal was proper. He sought to rely on the case of **Oketch Okale –vs- Republic [1965] EA 555** in support of his assertion that however weak a defence is, the same has to be considered. If the prosecution case raised some doubt, the benefit should be given to the accused. He also sought to rely on the case of **Macharia –vs- Republic [1975] EA 193** and the case of **Mboce –vs- Republic [1973] EA 95** on credibility of witnesses and evidence that was material to the ingredients of an offence.

He also submitted that the State could only appeal on matters of law and not on facts. He relied on section 348A of the Criminal Procedure Code (Cap.75). He submitted that grounds 3, 5, 6, 7, 8 and 10 of the appeal were based on matters of facts. In his view, the appeal was frivolous and without substance.

In his reply, Mr. Omutelema submitted that the question as to whether an acquittal was proper was a question of law. Therefore, the appellant (the State) was entitled to appeal against the acquittal herein.

I have considered the submissions of both counsel in court. I have also perused and considered the evidence on record and the judgement.

I will start with the issue as to whether the appeal is on a point of fact or on a point of law.

The State has appealed against the acquittal of the respondent. In my view, the issue as to whether an acquittal is proper is a question of law and not a question of fact. That objection to the appeal therefore fails.

There are two other main issues raised on appeal. Firstly, whether the magistrate erred, from the evidence on record, in acquitting the respondent. Secondly, whether the magistrate erred in disbelieving witnesses who testified for the prosecution. I have considered the evidence of all witnesses. There are two versions of how the accident occurred, as shown in the evidence of the prosecution witnesses. One version is that the driver of motor vehicle GK Z599 drove at a high speed and hit a cyclist (PW1) who was on his correct side of the road, lost control of the vehicle and hit the deceased pedestrian. The other version is that the cyclist (PW1) suddenly turned right without warning and the driver of GK Z599 hit him and swerved and ended up hitting the deceased on the side of the road.

In considering the evidence, the learned magistrate had this to say in his judgement –

**“The issue in dispute which this court will endeavour to determine is whether accused caused the deceased’s death by dangerous driving. I wish to remind myself that the burden of proof in this case lies squarely on the prosecution. The prosecution has the onus to prove their case beyond any reasonable doubt.”**

The learned magistrate went further to observe as follows –

**“The prosecution called ten witnesses in total. The witnesses are split on the issue of who is to blame for the accident which resulted in the death of Samuel Cheron. PW1, PW2 and PW9 testified that accused drove at high speed knocked a pedal cyclist (PW1) and in the process motor vehicle GK Z599 hit the pedestrian Samuel Cheron. PW4 and PW10 testified that the pedal cyclist (PW1) who was riding on the left side of the road suddenly and without any warning to other road users made a turn to the right thus entering the road thus causing the accident.**

**The investigating officer (PW6) testified that after completing his investigations he formed the opinion that the pedal cyclist (PW1) was to blame for causing the accident and recommended that he (pedal cyclist) be charged with the relevant offence under the Traffic Act.”**

The learned magistrate went ahead to find that the contradictions in the prosecution case were material and created a reasonable doubt as to whether the accused committed the offence. He found that the version of PW4 and PW10 was believable since the plan produced by the investigating officer (PW6) showed that the point of impact where GK Z599 hit the pedal cyclist (PW1) was right in the middle of the road. He made specific findings on the evidence of PW1, PW2 and PW9 and disbelieved their testimony. I have perused the evidence on record. It is not in dispute that there were two versions of evidence on the way that the accident occurred. The said two versions come out of the testimony of the prosecution witnesses themselves. One version that is of PW4, PW6 and PW10 supports the defence of the respondent.

The burden of proof in criminal cases is always on the prosecution to prove an accused person guilty beyond any reasonable doubt. (**see Oketch Okale –vs- Republic [1965] EA 555**). A conviction in a criminal case has to be based on the weight of the actual evidence adduced, and it is the duty of the trial court to consider the evidence as a whole.

In my view, the learned magistrate considered the evidence as a whole. He considered the variances and contradictions in evidence, and came to the conclusion that the prosecution did not prove its case against the respondent beyond reasonable doubt. The learned Principal State Counsel argues that the bicycle was hit from the rear and the speed of the vehicle GK Z599 was high. In my view, the presumption that the one who hits another on the road from the rear is the one to blame, is a presumption depending on actual evidence.

It can be upset by evidence. In our present case, there is evidence that (PW1) suddenly swerved to the right without any warning. If for example, the evidence was that he suddenly braked, I would have found substance in upholding the presumption that the driver of the vehicle GKZ599 was to blame. As it is, I am not able to find that the driver was to blame.

From the evidence on record, I am of the view that it was the attempt by the driver of GK Z599 to avoid killing (PW1) that caused the vehicle to hit the pedestrian who was on the side of the road, causing his death.

The learned Principal State Counsel has also raised the question of speed. In my view, the evidence of speed given by witnesses was an estimate of people standing at a distance from the vehicle. I am of the view that the deceased was killed because the driver of GK Z599 swerved to avoid killing the pedal cyclist (PW1), not because of any proved excessive speed.

Having considered all the evidence on record, and with due respect to submissions of the learned Principal State Counsel, I am of the view that the learned trial magistrate came to a conclusion that he was entitled to. He also had the advantage seeing the witnesses testify and determining their demeanour, which I do not have. I have not seen any misdirection by the learned trial magistrate. The fact that the learned magistrate referred to lack of proof of Wagon Wheel butchery by (PW2) was not a material misdirection in this case.

For the above reasons I dismiss this appeal by the State against acquittal, and uphold the decision of the learned magistrate.

**Dated and delivered at Eldoret this 26th day of July 2005.**

**George Dulu**

**Ag. Judge**

**In the Presence of: Mr. Omutelema Principal State Counsel for State (Appellant)**

**Appellant in person**

