



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL APPEAL 209 OF 2004

MOHAMED SWALEH SALIM

Alias

ISLAM ALI AWADH APPELLANT

- Versus -

REPUBLIC RESPONDENT

Coram: Before Hon. Justice Mwera

In person – Appellant/Accused

Ms. Mwaniki for Respondent/State

Court clerk – Kazungu

J U D G M E N T

The appellant faced a charge under section 46 of the Traffic Act (Cap 403) in that on 14/8/2003 at about 9.15 a.m. along Ronald Ngala Road – Nyali Bridge within Mombasa being the driver of motor vehicle registration No. KAP 472 B Nissan Matatu he drove the said motor vehicle in a manner that was dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the said road and the amount of traffic which was actually at the time or might reasonably be expected to be on that road, in that he hit and knocked down a hand-cart pusher who was pushing his hand-cart along side this road and caused the death of Kalume Charo.

After hearing five (5) prosecution witnesses and the appellant in his unsworn statement, the learned trial magistrate found the appellant guilty as charged. After his mitigation, he got four (4) years imprisonment. His driving licence was cancelled with a further order that the appellant should not hold another driving licence until the expiry of three years after serving the prison term.

Being dissatisfied with the conviction and therefore the sentence the appellant put forth four (4) grounds in his amended petition of appeal. He pleaded that his appeal be allowed because the learned trial magistrate erred when she held that the appellant had left his lane to hit the hand cart; that it was in error to find that the hand cart was in its lane when it was hit by the appellant's motor vehicle from behind; that the hand cart was not produced at the trial and the appellant's defence was not considered.

The learned State Counsel responded to the written submission of the appellant while he himself had nothing to add to its contents. The court then rose to subject the evidence (and the judgment) in the lower

court to scrutiny, to satisfy itself if the conviction was indeed proper in the light of the law.

The evidence of David Mwaniki (P.W.1) was that he was pulling the hand cart involved in this accident while the deceased (Kalume) was pushing it from behind. They were coming from Kongowea Market towards city centre. When they got to Nyali Bridge, the pair got in the lane reserved for bicycles and hand carts. The traffic was heavy. Then a matatu hit them from behind. It went along for 50m and stopped near Buxton corner, dragging the deceased's body along.

The witness himself was injured and was admitted to Coast General Hospital. Dr. Said (P.W.5) attended to him (Exhs. P1, P4 form) and certified that P.W.1's injuries were consistent with a road accident.

I.P. Michael Mureithi (P.W.4) of Makupa Police Station attended the scene of this same accident. The said motor vehicle KAP 472 B had moved from its lane, hit the hand cart and come to a stop at Buxton. P.W.4 observed that the hand cart had been in the lane reserved for them and bicycles (extreme left lane as one came from Nyali). Further P.W.4 observed that the hand cart had been hit from the rear and thereby trapped the man pushing it (the deceased). The offending motor vehicle had dragged/pushed his body to where P.W.4 found it standing. Its driver was not on the scene. P.W.4 saw P.W.1 at the scene, injured. He drew a sketch plan (Exh P2) noting the point of impact as being in the hand cart reserved lane, on this road/bridge where tomatoes and potatoes had scattered. His further view was that the offending motor vehicle was moving at a high speed in order to go and stop at the distance it did. The appellant driver was brought to the police station 3 days later.

When the deceased body was taken to Coast General Hospital Mortuary Dr. Mandalya (P.W.3), a pathologist performed a post mortem on it (Exh. P3) where in, he found that the death was caused by injuries due to a road accident.

The appellant was heard in defence to say that the accident was due to bad luck. And that the collision occurred as the deceased's hand cart made to overtake another at a high speed. That, his efforts to avoid the accident did not bear fruit.

As said earlier the lower court delivered its judgment and according to this court that verdict was in accord with the evidence. The accident took place but it was not due to bad luck. The appellant drove into this lane reserved for hand carts and cyclists and hit the hand cart. That is where the impact of the collision was marked on the sketch plan. Like the lower court, this court does not believe that the deceased and his mate Mwaniki (P.W.1) were overtaking another hand cart. Such a question was not put to P.W.1. It came up as an afterthought in the defence. The appellant's motor vehicle came to a stop some 50 m from the point of impact. The impression formed by I.P. Mureithi (P.W.3) of going at a high speed cannot be faulted. Had it been moving moderately or with due regard to the heavy traffic (see P.W.1, and many hand carts by the appellant himself) the motor vehicle could have stopped after a shorter distance. However the charge was driving in a dangerous manner.

In the light of all the above the appellant was properly found to have been driving in so dangerous a manner that he caused the death of Kalume. Traffic was heavy; the hand cart was hit from behind and when it was in a lane reserved for it, and the appellant was driving dangerously considering the circumstances of the road use at the time. Producing the hand cart did not appear necessary, the accident having been admitted.

As for the sentence the learned trial magistrate was within the law to mete it out as she did. From a maximum of 10 years imprisonment the appellant got four years. The orders of canceling the driving licence and stopping a 3 years ban on the appellant not to hold a driving licence after his prison term is also lawful.

In sum this appeal is dismissed in its entirety.

Judgment accordingly.

Delivered on 26th September 2005

J.W. MWERA

JUDGE