



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**Criminal Appeal 250 of 2003**

*{Appeal against both conviction and sentence in the Senior Resident Magistrate's*

*Court Mumias in Criminal Case No. 72 of 2003} (C. M. MWEBI ESQ., SRM)*

**WILBERFORCE WANYONYI WAFULA .....APPELLANT**

**V E R S U S**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

The Appellant, Wilberforce Wanyonyi Wafula, was charged before the Senior Resident Magistrate at Mumias, C. M. Mwebi Esq., in Criminal Case No.72 of 2003, with two counts of causing death by dangerous driving contrary to section 46 of the Traffic Act, Cap.403 , and driving a motor vehicle on the road without a driving license contrary to section 30(1) of the Traffic Act, Cap 403.

The particulars of the first count were that the appellant:-

***“on the 10th day of January, 2003 at about 8.30 p.m. within Shibale Market in Butere/Mumias District of the Western Province, being the driver of motor vehicle registration No. KAA 473N Isuzu Lorry drove the said motor vehicle on the road in a manner or in a such condition as to be 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 traffic which is actually at the time or which might reasonably be expected to be on the road and hence caused the death of GODFREY ODONGO.”***

The particulars of the second count were that the appellant:-

***“on the 10th day of January, 2003 at about 8.30 p.m. within Shibale Market in Butere/Mumias District of the Western Province being the driver of Motor Vehicle registration No.KAA 473N Isuzu Lorry drove the said motor vehicle on the road without a driving license.”***

After hearing the case, the learned trial magistrate found the Appellant guilty on each of the two counts and convicted him accordingly. On the first count the Appellant was sentenced to a sentence of 3 years in prison and disqualified from driving and holding a driving license for a period of 3 years and on the 2nd count he was sentenced to a fine of Shs.2,000/= or two months imprisonment in default. The Appellant appealed against his conviction and sentence and put forward 4 grounds which can be summarized as follows. First, the Appellant submitted that there was no evidence of an eye witness and (2) that the evidence of PW1, PW2, PW3 & PW4 was contradictory and (3) that there was no proof beyond reasonable doubt.

When the appeal came up for hearing, the appellant relied on the grounds in his petition while the Principal State Counsel, Mrs. Kithaka, supported the convictions and sentences and urged the court to dismiss the appeal. The only direct evidence given at the trial in support of the charge was by PWIII Joseph Juma. He saw the lorry on the material night reversing on the deceased. It was dark and he did not see the driver of the lorry. He said it was at night. No other person witnessed the lorry run over the deceased.

The evidence of PWIV, Wilson Wambugu Njoroge, the driver, was suspect. He claimed that the appellant told him he had caused the accident. He said he kept the ignition keys of the lorry and had not parted with them to the appellant. He said the appellant had the lorry but he took no steps to find out why he had taken the lorry and how he had come by the ignition keys he used. He said he was with the appellant when the latter informed the daughter of the owner of the lorry about the accident. He took no steps to let the owner know.

PWV, IP Gideon Kivaa, claimed to have recorded the appellant's incriminating statement which the appellant repudiated but was admitted as evidence after a trial within a trial.

In his judgment, the trial magistrate wrongly attributed the evidence of PWIV to PW1. He also erroneously stated that the appellant's retracted or repudiate statement was corroborated. This was not borne out by evidence. His finding that the appellant was guilty was erroneous as there was no evidence to support such finding.

I have carefully perused the record and the petition of appeal and given due consideration to the submissions of the learned Principal State Counsel. The only evidence before the trial court was the retracted or repudiated confession of the appellant. The evidence of PWIII, Joseph Juma, did not prove that he saw the appellant driving the lorry and the evidence of PWIV Wilson Wambugu Njoroge was clearly not plausible. It was, in-fact, suspect. So as to convict on the retracted or repudiated confession, the trial court ought to have satisfied itself that in the circumstances of the case, the statement could not but be true. Usually a court will only act on a repudiated or retracted confession if it is corroborated in some material particular by independent evidence. (See TUWMOI v. UGANDA [1967] E.A. 84 at page 91 letter G).

It was a misdirection on part of the trial magistrate to state in his judgment (p.J4 paragraph 4) that "I find therefore that this is a case based on a confession but the same has been corroborated and proved....." when there was no evidence of corroboration. This was a serious misdirection because there was no evidence that PWIII had seen the appellant. His testimony was that he had not seen the driver of the vehicle, as it was dark. There was no corroboration of the retracted or repudiated confession.

This being the first appellate court, I have had to carefully re-evaluate the evidence with a view to give the appellant a fresh reconsideration of the case. In reevaluating the evidence, I have made my own findings and inferences and drawn my own conclusions. It is my finding that the retracted or repudiated confession was not corroborated. It is my finding also that in the circumstances of this case, it would be unsafe to rely on it because I am not satisfied that it cannot be said that it could not but be true. The conviction of the appellant by the trial court was most unsafe.

Accordingly, I quash the conviction and set aside the sentence. Unless otherwise lawfully held, the appellant shall be set free.

*Dated at Kakamega this 11th day of November, 2005*

**G. B. M. KARIUKI**

**J U D G E**