

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII
TRAFFIC APPEAL NO.110 OF 2003

(From original conviction and sentence of the Senior Resident Magistrate's Court at Nyamira in Traffic Case No.271 of 2002 - K. W. KIARIE ESQ., S.R.M)

JUMA MOSES MANDITA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

Appellant was convicted on two counts of causing death by dangerous driving c/s. 46 of the Traffic Act by the S.R.M Nyamira and fined shs.20,000/= on each count or 15 months on each count. He appealed against the conviction and sentence. However when his counsel was submitting after the State Counsel he asked court to find that the conviction was proper but the sentence was not. I presumed he abandoned the appeal against the conviction. He possibly realised the conviction was proper. The evidence in the lower court was overwhelming. The appellant was driving at excessive speed at the time. He was unable to control the vehicle after it hit a pot hole. It left the road and ploughed into a garden hitting two children.

Court was told that the owner of m/v did not comply with S.111 Traffic Act as he had not kept records of the driver. This may be so but there was enough evidence to show appellant was the one driving. Prosecution called witnesses who were in the vehicle. They had even told accused not to drive at excessive speed. I therefore find the conviction was safe and dismiss the appeal against it.

As to the sentence appellant should have been found guilty for one offence. Indeed two people died but it was a result of one act of dangerous driving. In case of ATITO V. R. EA(1975) 278 which the learned magistrate referred to it was held the number of deaths is immaterial. The appellant was fined on two counts. This was not proper.

In total the appellant was fined to shs.40,000/= in default 3 years imprisonment. The question is whether this was harsh. Two people had lost their lives. I do believe that when the magistrate sentenced appellant to a total fine of shs.40,000/= he was considering the totality of the whole accident. The figure of shs.40,000/= therefore is not excessive when one considers that two lives were lost. A fine of shs.40,000/= is not excessive. The only other thing is the default sentence of imprisonment for 3 years. S.46 of the Traffic Act do not provide for fining but where a magistrate opts for the same then he should be guided by S.28 of the Penal Code as amended by Act No.5 of 2003. The Section shows the maximum period which a person can be sentenced to in default of a fine. It provides that where one is sentence to a fine of minimum of shs.15,000/= but not exceeding shs.50,000/= the maximum period is 6 months. Shs.40,000/= does not exceed shs.50,000/= and as such appellant should not have been sentenced to more than 6 months. The sentence of 3 years is therefore illegal.

In the circumstances I set aside the sentence imposed and substitute it with one of a fine of shs.40,000/= in default to 6 months imprisonment.

Delivered and signed on 1/3/04.

KABURU BAUNI

JUDGE.

Mr. Chirchir for state.

Mr. Ondari for Accused.

KABURU BAUNI

JUDGE.