



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 165 OF 2003

(From original conviction (s) and Sentence(s) in Traffic case No. 18 of 2002
of the Chief Magistrate's Court at Kiambu (L. Muhiu (Mrs.) R.M)

JOSEPH TORO KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant JOSEPH TORO KAMAU was convicted of one count of CAUSING DEATH BY DANGEROUS DRIVING contrary to section 46(1) of The Traffic Act. He was sentenced to a fine of 20,000/- and in default to serve one year imprisonment. His driving license was also cancelled and he was disqualified from holding a driving license for 3 years. The Appellant being aggrieved by the judgment and sentence of the trial court filed this report.

The facts of the Prosecution case was that the deceased escorted her daughter, PW1, to the road where she boarded a Public Service Vehicle (PSV) whose conductor was PW4. The deceased then waved both the daughter PW1, and the conductor PW4. PW2, a nephew of the deceased was watching from a distance of 2 to 4 metres. The Appellant, driving a van, at what PW2 and 4 described as a speed with PW4 estimating it at between 40 to 60 Kilometres Per Hour, hit the deceased with the left side of the vehicle, ran over her with the front left wheel, dragged her body with the diff and before stopping. PW6, the Police Officer who visited the scene after this accident found blood stains at the scene. He was able to tell the point of impact from blood stains and that the body was dragged on the ground for 5 metres by dragging marks. He also saw skid marks which were 18 metres from the point of impact. The accident occurred on the right side of the road facing Naivasha direction which was the Appellant's off-side. The visibility was clear with no obstruction or bumps on the road.

The Appellant's defence was that the deceased was with a uniformed girl on the road when he first saw them. That while the school girl walked to the left of the road, the deceased walked to the right and that he was unable to avoid her.

The Appellant has raised 14 grounds of Appeal. Through his advocate, MR. SHIMENGA, he argued them in a set of six. MR. SHIMENGA started by submitting ground 1, that the learned trial magistrate erred in finding that the Appellant drove on the right side against the law while ignoring the fact that the deceased was occupying the left side. The counsel further submitted that Rule 75 of the Traffic Rules provides that drivers have a duty to keep left but that the rule does not speak of driving on the left. It was the Appellant's Advocate contention that the Appellant drove on the right side of the road because the deceased was on the left side, from the evidence of PW4. That the learned trial magistrate finding that by moving to the right the Appellant exercised poor judgment was erroneous.

MISS OTIENO, learned counsel for the State opposed the Appeal. On the issue of keeping to the left she submitted that the Traffic Rules are very clear that all traffic should keep left while driving. She further submitted that in fact the Prosecution proved that the Appellant drove on the right side, which was the wrong side on which to drive his vehicle and so the charge that he drove in a manner that was dangerous to the public was proved. She submitted that the Prosecution proved both ingredients of the charge set out in the particulars of the charge which were that he drove at a speed and also in a dangerous manner.

Rule 75 of the Traffic Rules provide:

“75 save where the contrary is allowed by a Police Officer in the execution of his duties, or by indication of any traffic sign, drivers of vehicles shall drive to the left side of all roundabouts, street islands or street refuge s.”

That rule is titled “Duty to keep left .” It is contained in Part VIII of the Traffic Rules under the Traffic Act. Part VIII is titled “TRAFFIC REGUALTION”. Rule 75 cannot be read in isolation. Rule 73 for example provides for meeting or overtaking traffic. Under Rule 73, a driver is permitted to drive on the right for purposes of overtaking other traffic on the road so long as it is safe to do so. In this case, whereas the law provides that traffic in Kenya should keep left, it does not mean that a driver cannot drive on the right side of the road. I believe the correct construction of that rule is that traffic in Kenya keeps left as opposed to parts of Europe or USA where they keep right. For convenience of motorists and other road users, drivers are expected to keep to the left or near side unless they have a reason not to. Once a driver fails to keep left then they must explain why he did not do so and if the explanation given is not satisfactory, then such a driver will be guilty of driving dangerously, carelessly or recklessly, whatever the case may be and such driving will be found to be below the standard of a reasonably prudent driver.

From the evidence adduced by the two parties; it is quite clear that there were two roads at the scene. There was the Highway where the PSV vehicle stopped to pick PW1. The Highway was for vehicles traveling towards Nairobi. There was also a feeder road, a smaller road running parallel to the Highway which is where the Appellant was during and where the accident occurred. The learned trial magistrate came to several findings. Among them was this one at page 5 of the judgment as follows: -

“I also believe the evidence of PW4 to the effect that the deceased started retreating on seeing the vehicle but the vehicle still moved towards her and hit her. I therefore, reject the evidence of the accused to the effect that PW1 and the deceased were in the middle of the road and that PW1 left after he hooted. I find that the deceased was hit by the vehicle of the accused after she had already started retreating on seeing that vehicle.”

I have evaluated the entire evidence on record. I do agree with the learned trial magistrate that indeed the Appellant’s defence that both PW1 and the deceased were on the road and that when he hooted each parted to different sides of the road, therefore excusing his manner of driving, could not have possibly been true. PW1 was candid all along that she did not witness any part of the accident because she had already boarded the PSV when it happened. Both PW2 and 4 who were present at 4 metres and 10 metres respectively, at most, also corroborate PW1’s evidence the she had already boarded the vehicle by the time the deceased was hit. In effect there was the evidence of PW1, 2 and 4 on one side as against the Appellant’s defence to the contrary. PW4 was an independent witness. I do agree with the learned trial magistrate that he was credible and trustworthy. The Appellant was therefore lying when he claims that both PW1 and the deceased were on the road and that each moved off the road towards a different side therefore, excusing his movement from left to the right side of the lane. The truth of the matter is, only the deceased was on the road at the time the accident occurred.

The learned trial magistrate made another finding as follows: -

“From PW4’s evidence, it is clear that the deceased did not ascertain that it was safe to step onto the road before she started doing so. Her conduct does not however, absolve the accused from the blame because the evidence of PW4, and the sketch plans that were availed before the

court show that the accident occurred on the right side of the road. The accused was supposed to be driving on the left side of the road as per the rule of the road in Kenya. The road was straight at the scene and the weather clear. The accused therefore ought to have seen the deceased and taken steps to avoid the accident in view of the fact he had in his control a lethal machine. His moving of the vehicle to the right when the deceased was already retreating was poor judgment on his part... That he moved his vehicle to the right when he ought to have seen that the deceased was already retreating makes me to find that the accused did indeed drive his motor vehicle dangerously thus hitting the deceased.”

MR. SHIMENGA for the Appellant submitted that the deceased was reckless in stepping onto the road backwards and therefore she was the party at fault for the accident. He also challenged the efficacy of PW4's evidence on the basis that PW4 was on a lower ground than where PW1 came from. That argument of PW4 being on one lower ground cannot have any basis. It is clear that PW4 was conductor of the vehicle. By the time the deceased waved him, PW1 had boarded the vehicle. PW4 did not say whether he was on the vehicle or down. The evidence of PW6 cannot be said to have discounted that of PW4 merely because PW6 said there were 'knee-high' bushes or grass at the scene. Besides, PW4's evidence was consistent with that of PW2 who was only 4 feet from the deceased and across the road from her at the time.

The Appellant's counsel challenged evidence of PW2 as against that of PW4. In my view, the challenge was based on a wrong assumption. PW2 and 4 were seeing the scene from different sides of the road. PW4 was on the left side facing Nairobi while PW2 was on the right side. What they saw is not therefore inconsistent given that consideration. In any event, MR. SHIMENGA did seem to settle to the fact that indeed PW2's evidence, when considered all in all against PW4 and Appellant's evidence was consistent with the finding of the court that the deceased moved backwards on noticing the Appellant's vehicle on the road.

The issue of partiality of witnesses was raised but as I already stated, PW4 was an independent witness. PW1 and 2 were deceased's relatives. Their evidence was not partial as such. I think the correct way to assess the evidence is to say that PW4, who was an independent witness, gave evidence that was more detailed than PW2 but which was consistent with his.

As to the learned trial magistrate finding as set out above, she found that even though the deceased was on the road and that she moved backwards to avoid the accident, the Appellant was to blame by driving to the right and not left of the road. I have considered that argument against two factors. One that the deceased was already on the road before the vehicle came to the scene and she retreated on seeing it. Two, the clear evidence adduced that contains the Appellant's manner of driving. One that at no time did he hoot to warn the deceased. Had he hooted, PW2 and 4 could have heard. The Appellant did not slow down his speed even though he admitted seeing the deceased on the road. Putting these two aspects together, that the Appellant did not warn the deceased as he approached and that he never slowed; with the added fact that he was on the right side of the road, which was his off side, and that he hit the deceased with the left side of his vehicle before the impact threw her down. Added to the fact that even by the time he hit the deceased, he still never changed the speed of his vehicle but drove on, overrunning the deceased with the front left wheel and dragging her with the rear wheels, is evident that the Appellant is to blame for the accident. I would say that from the evidence adduced before the trial court, it is evidently clear that the Appellant adopted a manner of driving that was dangerous to members of the public.

The section under which the Appellant was charged reads as follows i.e. Section 46 of the Traffic Act: -

“S.46 Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is 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, shall be guilty of an offence....”

In PATEL vs. REPUBLIC 1968 E.A. 97, the court was considering whether the Appellant's manner of

driving was dangerous. The Appellant had been driving cautiously and orderly on a wet road but suddenly, the car skidded to the right and collided with an on coming car. That court held: -

“No reason had been given by the accused for the car skidding or swerving into the oncoming vehicle and unless some explanation was given there was patent evidence of dangerous driving.”

In this case, the Appellant drove on the left side of the road. He gave an explanation, that he saw two women on the road who moved to different sides of the road and he chose to drive on the right. The learned trial magistrate found that his explanation was false and unreasonable. She found that he lied about the number of women who were on the road. The only other woman who could have been on the road was the one the deceased was escorting and who had boarded a PSV by the time the accident occurred. I have already dealt with this point elsewhere and I have indicted that the learned trial magistrate’s conclusion and finding was correct.

In REPUBLIC vs. EVANS (1962) 3 All E.R. 1086 the court held: -

“If a man adopted a manner of driving which, at his trial on a charge of causing death by dangerous driving the jury think was dangerous to other road users in all circumstances, then on the issue of guilt, it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best .”

That decision has been adopted in our courts. It was quoted with approval in MUSULU vs. REPUBLIC 1969 E.A. 20. The principle is that once a court finds that an accused person adopted a manner of driving that is dangerous, whether by reason of speed or maneuver or other reason, it does not matter that, that manner of driving was by reason of deliberate risk or recklessness, or carelessness, momental inattentiveness or incompetence.

In the instant case the Appellant drove dangerously by reason of speed and maneuver. There is blame which can be laid on him. As a result of driving in the manner he did, the accident happened and a life was lost.

On considering all the circumstances of this case as proved by the prosecution, taking into account the Appellant’s explanation, I am fully satisfied that the learned trial magistrate properly directed herself on the evidence and arrived at the correct decision. I see no basis to disagree with the learned trial magistrate. The upshot of this Appeal is that it is dismissed.

Orders accordingly.

Dated at Nairobi this 21st day of September 2004.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE

