



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU  
CRIMINAL APPEAL NO.405 OF 2001

(From original conviction and sentence in Traffic  
Case No.1086/2001 of the Senior Resident Magistrate  
At MOLO – J. KIARIE (SRM))

NGANCHA NGUMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

The Appellant Ngancha Ngumo was convicted of causing death by dangerous driving contrary to Section 46 of the Traffic Act. He now appeals against both the conviction and sentence. On the conviction, Counsel for the Appellant submitted that there was insufficient evidence to sustain a conviction. His contention was that PW1 must have been 10 years old because the deceased was 13 years at time of accident and was older than him. That he gave evidence 10 years later.

On the evidence he submitted that PW1 was clear that the deceased had crossed the road from the left to the right side where he was hit. That PW3 the scene visiting officer had observed that the Appellant was not over speeding. That therefore the court's finding that the Appellant left his lane and found the deceased on his own lane and knocked him down is not supported by evidence and neither was the finding that the Appellant left the road and knocked down the deceased. He further submitted that at the trial court in its judgment used the Appellant's evidence to fill in the gaps in the prosecution case. He asserted that she did so by stating that the deceased was hit where people ordinarily crossed. He further asserted that the court's finding that there was no hooting was also not adduced in evidence. He urged the court to find that the instinctive thing that the Appellant could have done was to move to the right to avoid the deceased and not keep to his lane as the court asserted.

The Learned Counsel for the State opposed the appeal against the conviction. He asserted that PW1's evidence that the Appellant was driving on the left side of the road was admitted by the Appellant. He also submitted that PW1's evidence that the deceased had crossed the road completely from left to right and was hit off the road was also admitted by the Appellant in his defence. That the Appellant's defence was that he was swerving to avoid a ditch that was on the road when he hit the deceased and that if he swerved to the left side instead, he would have hit the other boy who was with the deceased. The Learned Counsel urges the court to find that the Appellant knew the road very well having used it for a long time as he stated in his defence and therefore should have been aware of the ditch and of fact people crossed the road ordinarily near there and should have approached the place cautiously.

I have considered these submissions and evaluated the evidence and the record on my own. The facts of the prosecution case are not disputed that the deceased crossed the road from the left to the right. It is not disputed that the Appellant's lane was on the left side. It is not disputed that the Appellant left his lane, drove on the right lane and hit the deceased. The sketch plan of the scene taken by PW4 after the accident shows the deceased lying on the right side off the road except for the head. The Appellant's vehicle is shown 3 metres from right side edge of the road and 2 metres from left edge of the road. It is fair to say he stopped in the middle of the road and had passed the point where the deceased lay.

The Prosecution witness PW1, telling it as he saw said that the Appellant seemed to be following the

deceased because he left his left lane, crossed to the right lane and hit him. Even though there is no clear evidence that the Appellant left the road after changing lanes, it is clear that he was not driving on his lane just before the accident. The trial court was entitled to consider the Appellant's defence on her evaluation of the evidence adduced before it and that evaluation could be termed filling gaps in the prosecution case. The trial court said this in its judgment:-

***“PW1 was firm that deceased was hit on the right hand side of the road off the road. From the sketch plan drawn the body of the deceased lay beside the road at the edge of the road... The Accused in his defence admitted he did not hoot. He also admitted that he knew that that was a crossing spot for pedestrians...and he further admitted he had seen the boys.”***

Going by the above statement I am satisfied that the trial court was doing justice to the case before it by evaluating all evidence adduced before it before arriving at a decision.

I have evaluated the evidence, as I stated before and I agree with the Trial Magistrate's finding of fact that the Appellant drove dangerously. I would not hesitate to add that he was avoiding a ditch and in the process went for the deceased, the Appellant was very candid in his defence to state that even if he swerved to the left, he still would have hit the other boy apparently PW1. I am satisfied that the Appellant was at fault. He made a dangerous manoeuvre by swerving and as he did so he made no attempt to avoid hitting the deceased whom he already stated he had already seen. It is very clear to this court that the accident was not caused by the deceased having crossed the road but by the Appellant's swerving to avoid a ditch. The Appellant's advocate raised the issue of PW1's age at time of this accident. That matter was not raised in the lower court and was never an issue at the time. I do not see how it can be an issue now. There is no evidence of PW1's age at time of accident. The Appellant's Advocate has just suggested how old he could have been. At time he gave evidence he was an adult. His evidence has materially been admitted by the Appellant. In addition to finding this issue an afterthought I find no merit in it. The Appellant was being mischievous in raising it at this stage. I do find that from all the evidence of the case the conviction was safe.

On the sentence the Appellant's Advocate has urged the court to find a fine of 70,000/- excessive given the age of the Appellant at the time. 70 years and the harsh economic times. The Learned State Counsel concedes appeal against the sentence.

Sentence is the sole discretion of the court. However the court must give reasons to back whichever sentence has been arrived at. The trial court considered only the Appellant's age. No reference is made of the offence at all. While the Appellant's driving was wanton and dangerous aggravated by a dangerous manoeuvre as a result of which the deceased was hit, a sentence of 70,000/- fine is quite excessive. I will reduce the fine imposed to that of 40,000/- in default six months imprisonment. I confirm the order of cancellation of the Appellant's driving license for 3 years from the date of conviction.

The Appeal against conviction is dismissed and that against sentence succeeds to the extent provided hereof.

Orders accordingly

Dated and Delivered at Nakuru this 25th day of February, 2003.

**JESSIE LESIIT**

• **JUDGE**