



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 19 OF 2001

(From Original Conviction and Sentence in Criminal Case No. 21 of 2000
of the Senior Principal Magistrate’s Court at Machakos: J.R. Karanja Esq.
on 14.2.2001)

DANIEL KIVONDO ::: APPELLANT

VERSUS

REPUBLIC ::: RESPONDENT

Coram: J. W. Mwera J.
Mwangi G. Advocate for Appellant
Miss Makungu Advocate for Respondent
C.C. Muli

JUDGEMENT

The appellant was charged with causing death by dangerous driving in that on 18.5.2000 at about 5 p.m. along Nairobi – Mombasa road being the driver of motor vehicle Reg. No. KAD 094 M landrover, he drove that motor vehicle without due care and in a manner which was dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the road and amount of traffic which was actually at the time or which might reasonably be expected on the road and caused an accident by colliding head on with motor vehicle reg. No. KPA 114 W peugeot matatu thus causing the death of Timothy Kisule Mueke.

After hearing nine witnesses the Learned Senior Principal Magistrate also heard the appellant. He then wrote and delivered a judgement in which the appellant was convicted and ordered to serve 18 months imprisonment. His driving licence was cancelled for 3 years with effect from 14.2.200. On 15.2.2001 a 5-point petition of appeal was lodged by Mr. Mwangi who had represented the appellant in the lower court. At the trial Mr. Mwangi abandoned ground 4 and 5 and argued the rest. That there was conflicting evidence of P.W.7 and 8 on the basis that while the former said that one vehicle was ahead of their own motor vehicle Nissan his conductor P.W.8 spoke of five motor vehicle going ahead of them. That the case against his client was not proved beyond a reasonable doubt and here emphasis was laid on the point of impact. That the point that had more shattered glass on the road was not necessarily the point where the motor vehicles collided. That glass would fly far and wide over a given scene. And lastly that the sentence was harsh and excessive in the circumstances.

While the Learned State Counsel supported the conviction she left the matter of sentence to court. The submissions by both counsel is incorporated in this determination below. It was after evaluating the evidence all over again.

It was not disputed that the appellant was proceeding towards Nairobi from Machakos direction. There were other vehicles going in that direction. Whether it was one vehicle or five is no matter. Mr. Mwangi sought to make heavy weather of those statistics but nothing much seemed to turn on that. Definitely, not that with the differing number of motor vehicles, P.W.7 John Mutuku and P.W.3 Peter Mutua should be deemed not to have been at the scene. The lower court was satisfied and this one is, that they witnessed the collision. They even helped in rushing the injured people to hospital. The ground that evidence of P.W.7 and 8 was conflicting has no basis.

This court is satisfied also that the appellant recklessly and dangerously drove in the event that he caused a collision that caused the death of Timothy Mueke.

The appellants land rover may have been going at 50 KPH uphill while the deceased's driver came down hill at about 80 KPH (see REUBEN MUYA P.W.2 and GERISHOM OLINDO P.W.3) but it is also noted from P.W.7 and 8 that the appellant attempted to overtake another motor vehicle ahead of him and going in the same Nairobi way. While doing so the appellant had not been careful enough to consider and have in regard the amount of traffic actually on the road or even expected to be on the road. Had he done so he could have realized that it was dangerous to the public to try to overtake a motor vehicle ahead of him before ascertaining that it was safe to do so. It was not and he caused a collision: P.C. Joseph Kamume (P.W.9) who investigated the accident said in cross examination:

“He (the appellant) failed to keep to his side of the road and caused the collision. I did not see skid marks on the road but I saw broken glasses (sic) on the left side of the road as one face (sic) the direction of Mombasa from Nairobi. The concentration of the glass on the left side of the road determined the point of impact.”

The left side of the road as one faced Mombasa from Nairobi was the lane of the deceased driver in a peugeot. From the strong evidence of the prosecution the Learned Trial Magistrate did not believe the appellant's testimony that in fact it was the peugeot which tried to overtake a NISSAN and thus came into his path to cause the collision. Now if one leaves his lane by trying to overtake a motor vehicle ahead of him, without having regard for oncoming traffic on that road at that time or any that may be expected on that road at that time, and thus causes a head on collision with an on-coming motor vehicle in its lane and death follows, that driver is guilty of an offence under S. 46 of the Traffic Act. It constitutes dangerous driving. The appellant committed that offence when by driving he caused a collision with the peugeot in which the deceased died. In this court's view conviction was on sound evidence and analysis thereof.

As for sentence S.46 (Cap.403) provides for a maximum of 10 years in jail. The 20 Learned Trial Magistrate imposed 18 months only plus the cancellation of the driving licence. He did so after hearing that the appellant was a first offender, young and had a wife with children. That was repeated before this court when it was urged to substitute the prison term with fine as was the case in DONALD MWASHLANDI VS. R. MKS CR. A. 241/1998A (unreported).

The court should remark that the Learned Trial Magistrate imposed what may as well be a lenient sentence after he had observed that deaths due to reckless driving on roads were increasing and had now reached an alarming level. This court nonetheless upholds that sentence. No two cases can be quite the same. This one may not be as the Donald Mwashigandi case where the appellant suffered a tyre puncture at night and stopped in the road on his way to Mwingi to deliver a dead body. One of the mourners he had got out to check the problem and that is how he was killed by a passing lorry. This is not in the same category as where one begins during daylight to overtake other vehicles in front of him, without ensuring that it is safe to do so. That is what the appellant did here.

The appeal is dismissed in its entirety.

Judgement accordingly.

Delivered on 19th March 2001.

J. W. MWERA

JUDGE