REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 447 OF 1999

OMONDI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

On 13.2.1999 at about 8.15 am a "*matatu*" (PSV) vehicle registration No KAK 223C Toyota Hiace picked up some passengers from Watamu and set off towards Malindi on the Watamu/Gede Road. Shortly thereafter however it came to grief when at a point on the said road before Gede, the driver swerved to overtake another vehicle travelling in the same direction but lost control, hit a cyclist who was stationary on the opposite side of the road, and swerved back towards the left side of the road, rolling in the process and resting some 47 metres off the road in the bush. The cyclist died instantly and a post mortem report confirmed that he had fractured ribs, spine and skull.

The '*matatu*' was admittedly owned by the appellant but he denied that he was driving it on that day. Among his passengers however were three of the prosecution witnesses who survived with some injuries and testified that it was the appellant who was driving the '*matatu*'. Whoever it was that was driving the vehicle however did not report the accident to the police.

Seven days later, the appellant, whom the police at Malindi had been looking for, reported there and was arrested and charged with three counts of counts:

1. Causing death by dangerous driving contrary to section 46 of the Traffic Act.

2. Driving a motor vehicle on a public road without a driving licence contrary to section 30(1) or alternatively failing to carry a driving licence contrary to section 36(1) of the Traffic Act.

3. Failing to report an accident contrary to section 73(3) of the Traffic Act.

He was tried before Malindi acting Principal Magistrate and was convicted on the three main counts and was sentenced to serve 4 years imprisonment on count 1, a fine of Shs 1000 in default 30 days imprisonment on count 2, and a fine of Shs 500/= in default 14 days imprisonment in count 3. There was an order made for disqualification from driving, holding or obtaining a driving licence for a period of 3 years of completion of the sentence.

Through his advocate Mr Okuto, he has challenged the conviction only and not the sentence. He laid out all grounds in his petition of appeal two of which were abandoned and the other nine argued.

On the first ground Mr Okuto submitted that the eye witnesses tendered by the prosecution were coached in their evidence and it should not have been relied on to convict. The witnesses were PW1, PW2 and PW3 all of whom were passengers in the "*matatu*" and gave consistent evidence. Evidence that it was the appellant who was driving the vehicle; that he was driving at a very high speed; that he swerved to overtake a stationary vehicle and went off the road to the right where he hit a man standing beside his bicycle, lost control of the vehicle which veered back to the left side of the road and overturned, injuring them in the process. The cyclist died. The learned trial magistrate believed that evidence and wondered how the appellant who maintained that he was not present could dispute it. The consistent evidence of three witness does not necessarily betray coaching. There was only one truth of the matter and it had to be told consistently. I choose as the learned magistrate did, to accept that the witnesses told the truth about what they saw as they sat in the *matatu* that fateful day. That ground of appeal fails.

The second ground attacks PW1, and suggests that he was not in the *matatu* which caused the accident. But the evidence of this witness is consistent with the evidence of PW2 and PW3 save for the description of the *matatu* as a Reg "KAA" instead of a "KAK". All other details are correct. I find no substance in such minor discrepancy and find that the witness was indeed a passenger in the vehicle which caused the accident and injured him that morning. The ground of appeal has no substance.

Ground 3 asserts that there should have been an identification parade to test whether the witnesses who testified they saw the appellant driving could pick him out as they never knew him before. That is not entirely true since PW3 testified that he had seen the appellant driving on the same road for a period of one month. PW1 also said he knew him. It is only PW2 who said he did not know this appellant before but he swore that he was the one driving the vehicle that morning. It was not therefore a case of identification where an identification parade would have been appropriate but rather one of recognition for PW1 and PW3. There was no reason to disbelieve what the three eyewitnesses saw. I dismiss that ground of appeal.

There is some substance in the fourth ground of appeal as it is evident that the extra judicial statement which had been objected to by the appellant was read out during the trial within trial and before its admissibility was decided on. Senior state counsel Mrs Mwangi submitted that there was no impropriety in so doing since there is no allegation that it was read out before the trial within trial. But the procedure is that the statement which is challenged is only marked for identification and does not become receivable evidence until its admissibility is established. The legal position is restated in the authority cited by Mr Okuto, *Josefu Masabo s/o Sebukuraya v Regina* (1952) 19 EACA 266, where it was held:

"A statement should never be read out in open Court until it is properly proved by the evidence of …the police officer who recorded it."

The procedure should be followed at all times by trial magistrates. Having said that however, I find that the irregularity caused no injustice to the appellant as there was other cogent evidence relied on by the trial magistrate which on its own could sustain the conviction. That indeed was the evidence analysed at length and believed before a mention was made about the appellant's admission in the extrajudicial statement. At any rate there was admission in the appellant's unsworn statement in Court that he was the owner of the *matatu* and he even produced provisional licence to show that he was authorised to drive at the time. He however denied driving the vehicle that day without saying who was his employee as the driver. There was certainly no burden of proof imposed on the appellant to show who the driver was. But surely after hearing the damning evidence from the eye witnesses that he was driving, it would be a highly optimistic appellant who would leave the identify of the right driver in mystery. That opened the way for the trial magistrate to accept the prosecution evidence which was uncontroverted.

Grounds 5 & 6 were combined and related to the extrajudicial statement which was retracted. The submission was that there was no evidence to corroborate it.

It has indeed been stated time and again that it is unsafe to act on a retracted confession in the absence of corroboration in material particulars. Mrs Mwangi conceded so. But she submitted that there was corroboration in the evidence of all the prosecution witnesses and that even if the statement was excluded

the case was still proved beyond reasonable doubt. I accept those submissions. Those grounds of appeal fail.

Ground 7 and 8 were abandoned and ground 9 challenged the finding that there was fault on the part of the appellant when the investigating officer gave no evidence of the point of impact. Combined with ground 10 which alleges that there was no evidence to eliminate the possibility that the deceased was drunk and was the one who caused the accident, the two grounds relate to the element of the offence charged that the appellant "drove recklessly at a speed and in a manner which is dangerous to the public". When in other words is a driver culpable under section 46 of the Traffic Act?

I considered the principles in HCCr A 170/98 *Antony Thoya v Republic* (UR) when I relied on *Pyarali v Republic* [1971] EA 169 and said

"the test of whether a piece of driving is dangerous is objective and if the manoeuvre itself is dangerous the degree of negligence or care of the driver is irrelevant"

The judge there followed *Republic v Evans* (1963) 46 Cr App R 62 where it was held

"If a man in fact adopts a manner of driving which the jury thinks was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best".

The prosecution does not have to prove that the dangerous driving was the sole cause of death if it was the substantial cause of it. The Court of Appeal in *Atito -vs- Republic* [1975] EA 281 also laid down the law on the standard of proof.

"to justify a conviction for the offence of causing death by dangerous driving there must not only be a situation which viewed objectively was dangerous but there must also be some fault on the part of the driver causing that situation."

"Fault" was defined in another Court of Appeal case *Orweryo Missiani – v - Republic* [1979] KLR 285 at page 289:

"Fault" certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame…Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient."

The trial magistrate in this case dealt with the issue of culpability as follows:

"However, the fact that the vehicle was driven on the wrong side of the road, that it left the road and hit the deceased who was standing on the pavement, that it eventually crossed the road and overturned on the opposite side, are all facts that put to (sic) a high degree of negligence and recklessness on the part of whoever was driving the said motor vehicle. In short, the manner in which the vehicle in question was driven was dangerous and it is due to such dangerous driving that the accident (sic), in which the deceased was killed,"

With respect I agree with that assessment. There was neither necessity no need to identify the point of impact when it was clear from the evidence that the deceased was standing off the road before he was hit. There was also no need or necessity of examining his stomach contents to establish his sobriety. In whatever state he was as he stood away from the road, no vehicle had the right to hit him. The two grounds of appeal have no merits.

Finally ground 11 which complains about the conviction for driving without a licence. Mr Okuto

submitted that the appellant had been operating the vehicle as a conductor but also had a provisional driving licence at the time. He subsequently obtained a full licence which was produced at the time of hearing.

The relevant licence to consider here is the provisional one as it is the one alleged to have been in existence at the time of the accident. The trial court dealt with that issue as follows:

"As regards the 2nd count, the interim licence that the accused produced does not bear the relevant official seal from the Registrar of Motor Vehicles. The same was issued on 19.1.99 and it expired on a date which looks like 19.1.99 or 19.7.99. It shows that he is licenced to drive motor vehicles class B, C and E. He did not produce the licence on hand at the time he was arrested. It does not authorise him to drive matatus which fall under special type of vehicles (passenger service vehicles).

The Court not only doubts the authenticity of the interim licence, but also finds that the accused person, at the time of the accident, did not have the special type of licence required under section 30(1) of the Traffic Act. He therefore drove the said vehicle without a licence."

Section 30(1) is in part IV of the Traffic Act dealing with "Driving Licences". There are also rules under part III of the Traffic Rules and Rule 12 thereof relates to Provisional licences. It provides *inter alia*:

"12 (1) A Provisional licence shall be subject to the following conditions:

(a) …….

(b) …….

(c) The holder of the provisional licence shall not

(i) ……

(ii) drive any motor vehicle which is carrying passengers for hire or reward."

The *matatu* in question was clearly such vehicle and the appellant was driving it unlawfully even it was accepted that he had a valid provisional licence. That ground of appeal also fails.

There is nothing advanced to challenge the findings on the third count of failing to report the accident. Nor is there any challenge made on the sentence. It is not necessary therefore to express my views thereon. At any rate even if I was to, I find the conviction was proper on that count and the sentence was not illegal but judicially considered.

I dismiss the appeal in its entirety.

Dated and Delivered at Mombasa this 26th day of May 2000.

P.N.WAKI

JUDGE