Wambaya v Republic (Criminal Appeal E094 of 2024)
[2025] KEHC 9717 (KLR) (7 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9717 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E094 OF 2024

A MABEYA, J

JULY 7, 2025

BETWEEN

JACOB JOSEPH WAMBAYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. G. C. Serem RM passed on the 4/11/2024 in Kisumu Chief Magistrate's Court Traffic __ Case No. E214 of 2024, Republic v Jacob Joseph Wambaya)

JUDGMENT

1. The appellant was charged with two Counts of causing death by driving contrary to section 46 of the *Traffic Act* Cap 403, Laws of Kenya.

2. The particulars of the charge in Count 1 were that on the 22/2/2024 at about 08.45hrs at Nyalenda trading centre along Nyalenda Dunga road in Kisumu County, being the driver of motor vehicle registration no. KCA 999D make Subaru Forester, drove the said motor vehicle at a speed and in a manner that was dangerous to public having regard to all circumstances of the case, including the nature, condition and use of the road and the amount of traffic which was actually at that time or which might be reasonably expected to be along the said road thereby hitting and fatally injury Denis Omondi Ronald, a rider of motor cycle KMEY 366H make Honda who died on the spot.

3. In Count 2, the particulars were that on the 22/2/2024 at about 08.45hrs at Nyalenda trading centre along Nyalenda Dunga road in Kisumu County being the driver of motor vehicle registration no. KCA 999D make Subaru Forester, drove the said motor vehicle at a speed and in a manner that was dangerous to public having regard to all circumstances of the case, including the nature, condition and use of the road and the amount of traffic which was actually at that time or which might be reasonably expected

to be along the said road thereby hitting and fatally injury Evans Odhiambo Obare, a rider of motor cycle KMD 326J make Honda who died on the spot.

4. The appellant pleaded not guilty and a full trial was conducted. The prosecution case was founded on the evidence of nine (9) witnesses. The defence evidence was based on the appellant's sworn testimony and his other 2 witnesses.

5. In its judgment, the trial court found that the prosecution had its case to the required standard and convicted the appellant on both Counts. After considering the appellant's mitigation, the trial court sentenced the appellant to 1 year 6 months' imprisonment on each Count which were run consecutively from the date of judgment. Further, the trial court suspended the appellant's driving license for 1 year starting at the end of his prison sentence.

6. Dissatisfied by that decision, the appellant filed his petition of appeal dated 4/11/2024 raising fourteen (14) grounds of appeal which can be summarised as follows: -

    a. The trial court erred in fact and in law by ignoring the legal principles governing the establishment of a prima facie case.

    b. The trial court erred in fact and in law by finding that there was evidence to support the charge in both Counts 1 & 2.

    c. The trial court erred by acting on wrong principles and misdirected itself in considering irrelevant issues while arriving at its finding.

    d. The trial court erred in law and fact by accepting the prosecution case as proved without taking into consideration the defence case, submissions and judicial authorities thus leading to a miscarriage of justice.

    e. The sentence was excessive under the circumstances without the option of a fine.

7. In support of his appeal, the appellant filed written submissions in which he stated that the prosecution failed to prove its case beyond reasonable doubt whereas his evidence was corroborated by the testimony of DW2, an eye witness.

8. That the prosecution failed to disclose a situation that was dangerous and that the driver was at fault as was held in the cases of Kitui High Court Criminal Appeal No. 3 of 2017 Benjamin Mwikya Musyoki v Republic and the Court of Appeal case of Kitsao v Republic MSA H.C. Cr. A 75 of 1975.

9. That the trial court erred in imposing a custodial sentence of 3 years' imprisonment without the option of a fine as given his mitigation he was entitled to a non-custodial sentence thus the sentence was manifestly excessive.

10. It was submitted for the respondent that DW2 and DW3 did not witness the accident but narrated the events after the accident happened, that the appeal lacks merit, was bad in law and ought to be dismissed. The respondent further submitted that the sentence meted out on the appellant was appropriate and lenient in the circumstances as the appellant was squarely to blame for the accident.

11. This being the first appellate Court, the duty of this Court is to re-evaluate the evidence afresh analyze the same and reach its own independent conclusion and findings at all times considering that it did not see the witnesses testify. (See Okeno v Republic [1972] EA 32.)

12. The Court has considered the record. PW1 Maxwell Ochuodho testified that he saw the appellant's vehicle, a maroon Subaru speeding. On hitting a bump, it hit the boda boda and 3 people then fell

into a ditch. The irate members of the public burnt it down. That the said vehicle was being driven by the appellant.

13. PW2 Spencer Otieno Obura testified that on the material day, he had dropped a passenger at Megacity and was turning back when he heard the sound of something hit a bump. On looking at the side mirror, he saw a maroon car which hit him from behind.

14. PW3 Ronald Omondi did not witness the accident but testified that he passed by the scene after the accident had occurred and saw two motorcycles each on one side of the road, a maroon Subaru and 2 bodies.

15. PW4 Inspector Edwin Birale, the in charge of the Kisumu Inspection Department produced the Certificate of Examination VTB266037 for motor vehicle KCA 999D, a Subaru station wagon. He testified that his inspection revealed that the engine, exhaust system, transmission, steering mechanism, suspensions, front and rear electrical systems and warning signs were all burnt to a shell. He concluded that the damages observed on the burnt shell indicated multiple impact points on the front near side panels.

16. He produced Certificate 23836 for the inspection of motorcycle registration number KMGH 160N TVS. It revealed that the said motorcycle was impacted on the side and that it had no pre-accidents defects. He concluded that it was hit from behind.

17. He also produced Certificate 266038 for motorcycle KMVY 326J Honda. It had extensive frontal impact damage and had no pre-accident mechanical defects. Finally, Certificate 266039 for motorcycle registration number KMDY 366H Honda showed that the same had suffered extensive frontal impact with no pre-accident defect.

18. PW5 Manaseh Moses testified that he identified the body of his nephew Evans Ogembo prior to the postmortem. PW6 Philip Kilimo, a clinical officer at Kisumu County Hospital testified that he filled a P3 form for Spencer Otieno, PW2 while PW7 identified his son's body, Evans Odhiambo Ohore, at the mortuary.

19. PW8 No. 97939 PC Clinton Owaro Orodo testified that he visited the scene after the accident and he produced the sketch plan for the accident scene. He was unable to save the vehicle as the crowd overpowered him and burnt it down.

20. PW9 Dr. Lucy Ombok produced the postmortem report for Evans Obare which showed that he died of massive internal hemorrhage as a result of a blunt and sharp object. She also produced the postmortem report for Roland Omondi which showed the cause of death to have been due to massive internal hemorrhage as a result of blunt force trauma.

21. When placed on his defence, the appellant testified that on the material day, he was heading for a meeting with the OCS Nyalenda. On reaching Nyanza Surf Water, his rear windshield was smashed and 10 motorcycles and pillion passengers tried to stop him alleging that he had hit someone at Kachok. He collided with two motorcycles that tried to block him with one going under the vehicle which forced the car to lose balance and he hit a bump and ended in a ditch.

22. A crowd formed with some trying to help him. An AP officer helped him into one of the vehicles and he was taken to JOOTRH. He later learnt that his vehicle was burnt.

23. DW2 Samwel Ongango corroborated the appellant's case and stated that he was a short distance from the scene of crime. DW3 Janet Kaniaru Kuria attempted to produce a clip of the accident taken from the Citizen TV archives but the same was objected to and the court upheld the objection.

24. The court has considered the record. The appellant was charged with 2 counts of the offence of causing death by dangerous driving contrary to Section 46 of the *Traffic Act*. The said Section provides as follows: -

> " 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, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be 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 whether or not the requirements of section 50 have been satisfied as regards that offence and be liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by Part VIII of cancelling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of three years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later."

25. In the present case, it is not in dispute that on the material day, motor vehicle registration no KCA 999D was being driven by the appellant. At Nyalenda trading centre, it was involved in an accident with motor cycle registration nos. KMDY 326J ridden by Ronald Omondi, KMD 326J and KMEY 366H ridden by Evans Odhiambo Obare and Denis Omondi Ronald who both died as a result of the injuries sustained in the accident.

26. PW1, a boda boda rider, testified that he witnessed the accident. He stated how he was at the 'base' waiting for customers when he saw the appellant's motor vehicle approach from the Dunga direction. It was over speeding when it hit a bump, lost control and went on the wrong side of the road where it hit 3 people. PW2 was one of the victims of the accident. He also corroborated the evidence of PW1.

27. The question is whether the death of the deceased persons, Evans Odhiambo and Ronald Omondi, was as a result of dangerous driving by the appellant. The testimonies of PW1 and PW2 was that the appellant was driving at a high speed when he hit a bump, lost control and proceeded to knockdown the subject motorcycles.

28. Their testimony was corroborated by that of PW4 Inspector Edwin Birale who produced Certificates of Examination that showed that the appellant's vehicle had multiple impact points on the front near side panels. That motorcycle registration number KMGH 160N TVS was hit from behind, motorcycle registration KMVY 326J Honda and KMDY 366H Honda both had extensive frontal impact damage.

29. The question is whether the appellant was at fault and, when driving the subject vehicle created a situation of danger. In Kitsao v Republic Msa High Court Criminal Appeal No 75/1975 (UR), it was held that: -

> " To justify a conviction of 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 of fault."

30. In Peter Ngilu v Republic, (2021) eKLR, the court cited the case of Republic v Gosney (1971) All ER 220 where the issue of "fault" was dealt with. It was stated: -

> " Fault" certainly does not 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 case 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 is a momentary lapse, even though normally no danger would have arisen from it is sufficient."

31. In the present case, the issue therefore is not whether or not there was a dangerous situation created by the appellant but whether he played a part in causing the situation to be dangerous. In other words, was the appellant at fault and did that fault create a situation which was dangerous in the circumstances.

32. In Atito v Republic (1975) EA 281, the court stated: -

> " It would not cancel out the appellant's fault in taking avoiding action in times which fault, whether it should be described as careless or dangerous driving, was clearly more in the circumstances of the case than a mere error of Judgment."

33. The operative words of 'dangerous driving' in section 46 of the *Traffic Act*, are "causing the death of another by driving a motor vehicle recklessly at a speed or in a manner which is dangerous to public ...".

34. The testimonies of the eye witnesses PW1 and PW2 was that, the appellant was driving at a high speed when he hit the bump. It must have been the high speed which caused the vehicle, on hitting the bump, to lose control veer to the wrong side of the road and knock the victims. If the vehicle was being driven in a careful manner, it would not have lost control on hitting the bump. The road bumps are meant to slow down motorists not to cause well driven vehicles to lose control.

35. The question is whether the testimonies of PW1 and PW2 was overturned by the defence offered up by the appellant. The appellant and his witness testified that the accident occurred after he was confronted by a crowd of motorcycle riders and after running over one, he hit a bump and collided with the subject motorcycles.

36. The opinion of this Court is that the defence offered by the appellant was not satisfactory. If at all the appellant had been surrounded as claimed, and if he had run over one of the motorcycles, the vehicle would not have been going at a high speed as evidenced by the impact on the suit motorcycles as detailed in the Certificates of Examination produced by PW4.

37. Further, the sketch map produced by PW8 corroborated the evidence of PW1 and PW2 that it was after the bump that the accident occurred.

38. In the premises, the Court is in agreement with the trial court that the prosecution had proved its case as against the appellant beyond reasonable doubt.

39. The appellant challenged his conviction on the ground that the trial court ignored the principles in establishing a prima facie case. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court of law to return a guilty verdict even if the accused opts to remain silent.

40. In Ramanlal Trambaklal Bhatt v R [1957] E.A 332 at 335, the court stated as follows: -

> " Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution's case, the case is merely one in which on full consideration might possible be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather, hopes the defence will fill the gaps in the Prosecution case. Nor can we agree that the question ... there is a case

to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence." A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a, "prima facie case", but at least it must mean one on which a reasonable, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

41. The Court has considered the record. It is clear that, on the basis of the evidence tendered by the prosecution at the close of its case, the trial court properly directed itself to the law and evidence in placing the appellant on his defence.

42. In Ronald Nyaga Kiura v Republic [2018] eKLR, the court held: -

> "It is important to note that at the close of the prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie case has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the *Criminal Procedure Code* ..."

43. Contrary to the appellant's assertions, it is clear at page 3 of the judgment in paragraphs *13 – 16*, that the trial court considered the appellants case. It proceeded to interrogate the same at page 4 from paragraph *21*.

44. In the end, the Court finds that the appellant's conviction was proper and devoid of any irregularity. The same is hereby upheld.

45. As regards the sentence, the appellant submitted that the same was manifestly excessive and that he should have been given a non-custodial sentence with the option of paying a fine.

46. The offence of causing death by dangerous driving under section 46 of the *Traffic Act* carries a maximum, but not a mandatory, sentence of ten years' imprisonment. In this case, the trial court imposed a sentence of 1 year 6 months' imprisonment on Count 1 and a similar sentence on Count 2. In addition, the trial court ordered the appellant's licence be suspended for a year following the completion of his sentence.

47. Section 46 of the *Traffic Act* provides that a person shall be liable to imprisonment for a term not exceeding ten (10) years. It is not a mandatory sentence and the court exercises discretion depending the facts and circumstances of each case while bearing in mind the principles of proportionality, deterrence, mitigating and aggravating factors. The trial magistrate considered the mitigation, the seriousness of the charge, that appellant was remorseful and was a 1st offender.

48. It is trite that on Appeal there is a cautionary safeguard in the underlying statement that in exercising discretion to interfere with sentence of a trial court this court can only do so within the guidelines issued by the court of Appeal in Benard Kimani Gacheru vs Republic (2002) eKLR restated that:

> "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court, similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not

sufficient grounds for interfering with the dissertation for the trial court on sentence unless, anyone of the matters already states is show to exist.

49. The same court reiterated the entrenched principles in Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No. 253 of 2003 thus: -

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these the sentence itself is so excessive and therefore an error of principle must be interfered (See also Sayeka - vs R (1989 KLR 306)"

50. In the present case, the trial court considered the appellant's mitigation and the nature of the offences. I therefore find no reason to interfere with the sentence meted out by the trial court.

51. In the premises, the Court finds that the appeal lacks merit and dismisses the same in its entirety.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE