



**Republic v Shile (Criminal Appeal E016 of 2023)
[2024] KEHC 7158 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 7158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E016 OF 2023**

REA OUGO, J

APRIL 11, 2024

BETWEEN

REPUBLIC APPELLANT

AND

MOSES AMALEMBA SHILE RESPONDENT

(Appeal against the acquittal of the accused person by Hon. D. Ogal (PM) in Kimilili SPMCC No. TR053 OF 2022 on 16/3/2023)

JUDGMENT

1. The respondent faced three counts before the subordinate court and after a full hearing the trial magistrate found that the prosecution had failed to prove its case on all the 3 counts. The appellant dissatisfied with the judgment of the lower court has lodged its petition of appeal on the following grounds:
 1. That the learned trial magistrate misdirected himself in law and fact by misconstruing the provisions of section 46 of the *Traffic Act* Cap 403 Laws of Kenya to acquit the respondent.
 2. That the learned trial magistrate misdirected himself in law and fact by misconstruing the provisions of section 55 (1) as read with section 58 (1) of the *Traffic Act* Cap 403 Laws of Kenya to acquit the Respondent.
 3. That the learned trial magistrate erred in law and fact by acquitting the respondent despite the fact that there was sufficient evidence and proof to show that the Respondent had caused the accident which occurred on 23/6/2021.
 4. That the learned trial magistrate erred in law and in fact by acquitting the respondent despite the fact that there was overwhelming evidence to show that he was clearly on the wrong side of the road at the time of the accident.



5. That the learned trial magistrate erred in law and in fact in acquitting the respondent yet he admitted to have caused the accident leading to the death of the two deceased persons.
2. The respondent, at the subordinate court, faced the following charges:

Count I: Causing death by dangerous driving contrary to section 46 of the *Traffic Act* Cap 403 Laws of Kenya

Particulars of the Offence: On the 23rd day of June 2021, at about 1930 hrs at Shell Petrol station Kimilili area along Kimilili-Chwele road within Bungoma county, being the driver of motor vehicle Registration No. GKB 358T make Ford Ranger drove the said motor vehicle on the said public road recklessly or at a speed or in a manner which was dangerous to the public, having regards to all circumstances of the case, including the nature, condition and use of road and amount of Traffic which is actually at the time on the road and you lost control of motor vehicle and veered to the opposite lane and knocked down motor cycle registration No. KMFP 613G make T v Star ridden by Gilbert Wanjala who was seriously injured and succumbed to the injuries while undergoing treatment.

Count II: Causing death by dangerous driving contrary to section 46 of the *Traffic Act* Cap 403 Laws of Kenya

Particulars of the Offence: On the 23rd day of June 2021, at about 1930 hrs at Shell Petrol station Kimilili area along Kimilili-Chwele road within Bungoma county, being the driver of motor vehicle Registration No. GKB 358T make Ford Ranger drove the said motor vehicle on the said public road recklessly or at a speed or in a manner which was dangerous to the public, having regards to all circumstances of the case, including the nature, condition and use of road and amount of Traffic which is actually at the time on the road and you lost control of motor vehicle and veered to the opposite lane and knocked down one pedestrian namely Margret Nabutola Ndichua who was seriously injured and succumbed to the injuries while undergoing treatment.

Count III: Driving a defective motor vehicle contrary to section 55 (1) as read with section 58 (1) of the *Traffic Act* Cap 403 Laws of Kenya

Particulars of the Offence: On the 23rd day of June 2021 at about 1930 hours, along Chwele-Kimilili road in Bungoma County, being the driver of Motor Vehicle Reg. No. GKB 358T make Ford Ranger, drove the said vehicle on the said public road with the following defects: low brake pressure due to the minimum brake fluids.

3. The role of this Court as the first appellate Court is well settled. It was held in the case of *Okeno v. Republic* (1972) EA 32 that a first appellate Court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate, analyze it and come to its independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
4. The prosecution called 10 witnesses who testified as follows:
5. Frank Muraya Ndichu (PW2) was in Kimilili on the material day and was taking tea at 7:00 p.m. when he heard gunshots. An accident had occurred and he assisted the police in preventing the crowd from torching their vehicle. He received a call from his father James Thuku (PW1) who told him that his mother was not home yet it was late. PW2 called his mother, Margret Nabutola Ndichu (2nd deceased person) but the phone went unanswered. The boda boda riders then told him that his mother was involved in the accident. PW2 went home and told PW1 what transpired and they all went to the hospital at Kimilili and found the body of the 2nd deceased person. The 2nd deceased person also had a daughter, No. 106257 PC Jane Njeri (PW5) who was informed that her mother was involved in an



- accident. PW1, PW2 and PW5 witnessed the post-mortem of the 2nd deceased person conducted on 29/6/2021.
6. Gilbert Wanjala (1st deceased person) was married to Esther Nasimiyu Wanjala (PW3) and also had the son of Patrick Sirengo (PW4). Both PW3 and PW4 were informed that the deceased had been involved in an accident. PW3 went to Kimilili where she confirmed that the 1st deceased person was put in an ambulance and rushed to Bungoma Hospital. PW3 and PW4 testified that the deceased died while receiving treatment and that they both witnessed the post-mortem.
 7. Doctor Graham Masika Makokha (PW8) of Kimilili Hospital produced the post-mortem report for the 1st and 2nd deceased persons. He conducted the post-mortem for Margaret Ndichu on 29/6/2021 at 14:54hrs at Lugulu Hospital. The body was of a 62-year-old woman. The external appearance revealed that there was a shortening of the right limp. There was a closed fracture of the right femur and multiple bruises on the lower limb and eye. There were blood clots on both ears and nostrils. On the respiratory, there was a fracture of the right clavicle. The lung was contused. There was also blood in the abdominal cavity. He concluded that the cause of death was severe head injury secondary to the road traffic accident and produced the post-mortem report for Margret Ndichu as Pexh2.
 8. He also produced the post-mortem report for Gilbert Wanjala as Pexh3 which was done by Dr. Wanambisi. PW8 testified that he was familiar with his handwriting and signature. He testified that an external examination revealed there was a fracture of the left knee joint, a fracture of the tibia bone (left), there was a degloving injury on the right part of the foot. Internally all systems were normal. As a result, it was observed that the cause of death was blood loss secondary to fractured body parts plus degloving injury due to a road traffic accident.
 9. Fred Kisika (PW6) testified that he is a motor vehicle inspector vide gazette notice no. G42/ February 19/2016. He produced the report for motor vehicle registration no. GKB 358T together with motorcycle registration no. KMFP 613G was examined by his colleague Peter Kanoi. According to the inspection, motor vehicle registration no. GKB 358T had the following damages: front grill, bumper front and windscreen (front). The vehicle had a faulty break and that is why it caused the accident. The inspection report for the motorcycle reveals that the same was extensively damaged and written off.
 10. No. M5112 PC Edwin Kemboi (PW7) testified that on the material day, he was in the office with Corporal Cheruyot when they received information that there was an accident at Shell Petrol Kimilili. On arrival, they found police vehicle registration no. GKB 358T Ford Ranger off the road. It was being driven by the respondent but had lost control and veered off the road to the right while facing Kimilili Police Station though it was supposed to be on the left at the time. The vehicle knocked a pedestrian and a motorcycle and both the rider and the pedestrian died while undergoing treatment. On cross-examination, he testified that he took necessary sketch plans and the investigating officer thereof took statements
 11. No. 232940 CID George Ndegwa (PW9) while hospitalized received a call from the OCPD who asked that he should authorize the respondent as driver. He signed a work ticket for motor vehicle registration no. GKB 358T a Ford Ranger. At 10:30 the respondent left Kimilili for Bungoma. On the same day at 19:00hrs, while at the station briefing police officers, he received calls from members of the public informing him that the GK motor vehicle driven by the respondent had been involved in an accident and overturned at Shell Petrol Station. At the scene, he found the vehicle overturned opposite shell. Alongside it was a motorcycle driven by the 1st deceased person who was also involved in the accident. The 1st deceased person had been taken to the hospital by the time he was at the scene. The motor vehicle and the motorcycle were towed to the police station.



12. No. 237984 Inspector Stanley Kipkorir Koech (PW10) testified that he was the investigating officer. He testified that on 23/6/2022 their patrol vehicle GKB 358T was released for patrol. At 7:30 p.m. They received information that the vehicle was involved in a fatal road accident along Kimilili Chwele Road at Shell Petrol Station. The respondent lost control of the vehicle and caused it to collide with the motorcycle and the 1st deceased died on the spot as a result of the accident. The 2nd deceased person succumbed to her injuries while at Kimilili Sub-County Hospital. The investigations reveal that the vehicle was headed towards the Chwele direction while the motorcycle was heading in the opposite direction. The vehicle rested on the right side facing Chwele in a ditch upside down. The motorcycle was underneath the vehicle. The front part and the roof of the vehicle were damaged. He drew the rough sketch and fair sketch plans. PW10 produced as exhibits rough sketch plans (Pexh4), Fair Sketch plan (Pexh5), Accident summary (Pexh6), Legends and measurements (Pexh 7 (a) and (b)), work tickets (Pexh8). PW10 testified that they blamed the respondent for the accident as he was driving in the wrong lane at the time of the accident. On cross-examination, he testified that he relied on the facts at the scene and the last position of the vehicle showed that it rested on the right side. He believed that the respondent was overtaking or driving at high speed. He also explained that because it was raining, they could not see skid marks.
13. The respondent in his defence testified as DW1. According to the respondent, before he left with the vehicle he checked the tyres, brakes and fluids which were okay. On his way back to Kimilili, he stopped at the supermarket, bought supplies and proceeded home. He testified that he then saw a lorry from the opposite side and suddenly a motorcycle that carried a woman as its pillion passenger. The motorcycle hit his front tyre and the car veered to the right and he managed to stop the vehicle. The people who were at the scene started throwing stones at him. They pushed the car off the road as they wanted to torch the vehicle. He was assisted by some people to flee the scene to a nearby restaurant. The police then came and chased away the angry mob. On cross-examination, he testified that the original investigating officer did not testify.
14. The appeal was canvassed by way of written submissions. The appellant identified the sole issue for the court's determination: who should be held responsible for the accident. They submit that the respondent is solely to blame for the accident because the prosecution witnesses stated that the vehicle was driven by the respondent. They cited the case of *Ngure v Republic* (2003) EA where the court held that the mere occurrence of an accident is not enough to prove a charge of causing death by dangerous driving under section 46 of the *Traffic Act*, the evidence must disclose a dangerous situation and the driver must be shown to be guilty of a departure from the normal standard of driving which would be expected of the reasonably prudent driver. It was argued that the respondent was not prudent enough at the time of the accident and he is squarely to blame. They also relied on the case of *Atito v Republic* (1975) E.A 278 where the court held that the question is whether the appellant took avoiding action at all or in good time, and whether by not taking this action, or delaying taking it unduly, he caused a dangerous situation to arise for whose consequences he is criminally liable.
15. The appellant argues 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 respondent but there must also be some fault on the part of the respondent causing that situation. The question, therefore, is not just whether or not there was a dangerous situation but whether the respondent also played a part in causing the situation to be dangerous. It is not in doubt that the most the prosecution could show was an error in judgment on the part of the driver. Section 46 of the *Traffic Act* is absolute in terms of liability. It does not matter that the driver thought that he was driving dangerously, then he should be found guilty of the offence of dangerous driving.



16. The respondent's submissions were in Kiswahili but the same are hereunder summarised in English. He submits that the prosecution led evidence from 10 witnesses but none of the witnesses testified that saw how the accident occurred. All prosecution witnesses testified that they were informed of the accident via telephone. He submits that he is the only person who testified witnessing the accident and that he saw the boda boda carrying a pillion passenger trying to overtake another vehicle and that when they hit his vehicle on the right. His evidence was further corroborated by the motor vehicle inspection report that revealed that the car was damaged on the right front side. He submits that in light of the circumstances, the prosecution failed to prove its case to the required standard.

Analysis And Determination

17. I have considered the pleadings and the parties' submissions. The main issue in this appeal is whether the prosecution proved its case to the required standard, beyond reasonable doubt. The respondent was charged with being in contravention of section 46 of the *Traffic Act* which 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.”

18. In this case, the prosecution did not avail any eye witness who witnessed how the accident occurred. PW2 did not witness the accident having testified that he was taking tea and that he went to the scene to help the police from the mob that wanted to torch the police vehicle. PW1, PW3, PW4, PW5, PW6, PW7, PW8, PW9 and PW10 were not at the scene when the accident occurred. The police officers PW7, PW9 and PW10 all testified that they arrived at the scene after the accident occurred. PW10 further testified that it was raining and that he could not see the skid marks. The prosecution needed to establish that the respondent was to blame for the accident. In the case of *Timothy Orwenyo Missiani v Republic* [1979] KLR 285 the court stated that:

“As regards the first question, it is relevant to consider the degree of blame worthlessness on the part of the driver which has to be proved by the prosecution before he can be convicted of the offence of causing death by dangerous driving.”

19. The only person before the trial court who witnessed the accident was the respondent. DW1 testified that as he left the supermarket, he noticed a lorry coming from the opposite side of the road. Suddenly a motorcycle carrying a pillion passenger hit his front tyre and the car veered to the right side of the road. A large mob gathered and started throwing stones at him. They pushed the car off the road to the ditch as they wanted to torch it. The police then arrived and dispersed the angry mob.
20. The fact that the accident occurred and that two people lost their lives was not in dispute. However, the prosecution did not provide any evidence to show that the respondent drove the vehicle recklessly, at speed or in a manner which was dangerous to the public. The trial magistrate's finding that the offence



under counts I and II was not proved cannot be faulted as he correctly held that no eye witness was called despite there being witnesses at the scene.

21. On count III, driving a defective motor vehicle contrary to section 55 (1) as read with section 58 (1) of the *Traffic Act* Cap 403 Laws of Kenya. Section 55 (1) and 58 (1) of the *Traffic Act* provide as follows:

“ 55.

- (1) No vehicle shall be used on a road unless such vehicle and all parts and equipment thereof, including lights and tyres, comply with the requirements of this Act, and such parts and equipment shall at all times be maintained in such a condition that the driving of the vehicle is not likely to be a danger to other users of the road or to persons travelling on the vehicle.

.....

58.

- (1) Any person who drives or uses on a road a vehicle in contravention of the provisions of section 55 or section 56 shall be guilty of an offence and liable to a fine not exceeding four hundred thousand shillings or to imprisonment for a term not exceeding two years or to both:

Provided that rules under this Act may provide that a person who is guilty of an offence under section 55 or 56 shall be liable to pay a fine according to a prescribed scale, and different scales may be prescribed for first offenders, and for second or subsequent offenders, within a prescribed period, but so that no person shall thereby be liable to pay a fine greater than the maximum provided by this subsection; and for the avoidance of doubt it is declared that liability of a person to pay a fine on a prescribed scale shall not affect that person's liability to imprisonment under this subsection as an alternative to, in addition to, or in default of, the payment of a fine.”

22. The appellant relied on the evidence contained in the Certificate of Examination and Test of Vehicle, Pexh 1 (a). The Motor Vehicle Inspector, PW6 testified that the inspection revealed that the vehicle was damaged on the front grill, pumper front and windscreen. The vehicle also had a faulty brake. According to Pexh 1(a), it was noted that the vehicle had a pre-accident defect as there was low brake pressure due to below-minimum brake fluid. There was sufficient evidence that the respondent did not maintain the vehicle as required and, in my view, the offence in count 3 was sufficiently proved.
23. The prosecution has proved that the respondent committed the offence in count 3. The lower court's order of acquittal on this count is quashed and set aside. The respondent, Moses Amalemba Shile, is found guilty of the offence of driving a defective motor vehicle contrary to section 55(1) as read with section 58 (1) of the *Traffic Act* Cap. 403. He is sentenced to pay a fine of Kshs. 100,000/= or in default serve 6 months imprisonment. Right of Appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF APRIL 2024.

R.E. OUGO



JUDGE

In the presence of:

Miss Matere For the Appellant

Respondent – present in person

Wilkister -C/A

