



**Omogola v Director of Public Prosecutions (Criminal Appeal  
E061 of 2023) [2024] KEHC 7207 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7207 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E061 OF 2023  
TW CHERERE, J  
JUNE 13, 2024**

**BETWEEN**

**STEPHEN OMOGOLA ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

*(An appeal from the sentence in Isiolo Traffic Case No. 258  
Of 2019 by Hon. L.K.Mutai (CM) on 27th April, 2023)*

**JUDGMENT**

1. Stephen Omogola (Appellant) was charged in and convicted for causing death of Stephen Ngolwa on 30<sup>th</sup> August, 2019 by dangerous driving motor vehicle KCQ 065 Y Hino lorry (lorry) contrary to section 46 of the [Traffic Act](#) cap 403 Laws of Kenya.

**The Trial**

2. John Simodoi testified that on 30<sup>th</sup> August, 2019 about 11.30 am, he was riding his motor cycle when he saw a Hino lorry that was being driven from the opposite direction knock down a rider who was direction as the lorry. He identified the rider as Stephen Ngolwa who died on collision with the lorry.
3. Samuel Okoth stated he was riding behind the lorry when he saw it attempt to overtake a rider but in the process knocked down the rider. He identified the rider as Stephen Ngolwa and stated that he died on the spot. Paskal Kaseke similarly stated that the lorry was attempting to overtake deceased when it knocked him and ran over his head.
4. A postmortem conducted of the body of Stephen Ngolwa by Dr. Mohamed on 06th September, 2019 revealed that he suffered fracture of skull, bruises on hands and knees and died of severe head injury with intra cerebral bleeding.



5. PC Guyo visited the scene of the accident. He drew a sketch plan which shows the point of impact to have been on the left lane towards Isiolo direction from Archers post direction. The body of the deceased, his motor cycle were all on the same left side.
6. Accused in his defence stated he slowed down on rubble strips to avoid a body lying on the road and it was at that moment that deceased knocked his lorry causing the accident.
7. After the conclusion of both the prosecution and the defence cases, the learned trial magistrate found Appellant guilty and sentenced him to serve 6 years' imprisonment.

### **Appeal**

8. Aggrieved by sentence, Appellant lodged the instant appeal on 11<sup>th</sup> August, 2023 mainly on the grounds that the prosecution case was not proved to the required standard and his defence was not considered.

### **Analysis and determination**

9. I have considered the grounds of appeal, the record of the lower court and the submissions made for the Appellant.
10. On first appeal, the high court is called upon to analyse and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic Cr App No 280 of 2004 [2005] 1 KLR* where the Court of Appeal held that: -

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

11. The appellant is charged of an offence of causing death by dangerous driving under Section 46 of the [Traffic Act](#). Section 46 of the [Traffic Act](#). Cap 403 Laws of Kenya 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 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.
12. In *Kitsao v Republic MSA H.C.Cr. A. 75 of 1975* (unreported) the Court of Appeal stated 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. “Fault” was dealt with by Megaw, LJ in Republic vs. Gosney [1971] All ER 220 at 224 as follows:

“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 is a momentary lapse, even though normally no danger would have arisen from it, is sufficient.”

13. From the foregoing, the key issue for determination is whether the Appellant played any part in causing the situation to be dangerous. In *Atito v Republic* [1975] EA281, the Court of Appeal stated that:

“The fact that the motor –cyclist may have been at fault in not passing safely in the three or four feet of tarmac available to him is, in our opinion, immaterial. It would not cancel out the appellant’s fault, in not taking avoiding action in time, which fault, whether it should properly be described as careless or dangerous driving, was clearly more, in the circumstances of this case, than a mere error of judgment.”

14. In *R v Evans* [1962] 3 All ER 1086 at page 1088 where Fenton Atkinson J. A. stated that:

“... the objective test, because it has been laid down again and again in the reported cases, among others by Lord Goddard C.J. in *Hill v Baxter* (1) where he said:

“the first thing to be remembered is that the statute contains an absolute prohibition against driving dangerously or ignoring halt signs. No question of mens rea enters into the offence; it is no answer to a charge under the section to say ‘I did not mean to drive dangerously’ or ‘I did not notice the halt sign’.”

It is quite clear from the reported cases that, if in fact a man adopts a manner of driving which the jury think 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.”

15. In *Peter Nguu v Republic* [2021] eKLR, G V Odunga opined that Section 46 of our [Traffic Act](#) is similarly worded like the English Act that the learned judge referred to and states that “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 ...”.
16. The said section of the [Traffic Act](#) is absolute in terms of liability. It does not matter that the driver thought that he was driving as best as he could in the circumstances. If the court is of the opinion that he was driving dangerously, then he shall be found guilty of the offence of dangerous driving.
17. From the evidence on record, the trial magistrate found as a fact that an accident involving the deceased and a lorry that Appellant was driving on the material date.
18. There is no doubt that the lorry was being driven towards the same direction as the deceased was riding. The evidence by 3 prosecution witnesses that the lorry knocked deceased who was riding ahead of the lorry is well corroborated by the sketch plan which reveals that the point of impact was on that very lane.



19. From the foregoing, I find that in view of the corroborated prosecution case, the trial magistrate rightly found that Appellant drove dangerously in all the circumstances and the rejection of the defence was therefore well grounded.
20. When sentencing the Appellant, the trial court ought to have taken into consideration that a lesser sentence should have been imposed with an option of a fine considering that the Appellant was a first offender. In this regard, I find succor in the case of Govid Shamji v. Republic (unreported) Criminal Appeal No.30 of 1975 (Nairobi) where the Court of Appeal held that;

“The offence of causing death by dangerous driving is not an ordinary type of crime.....the people who commit this offence do not have the propensity for it, neither is it a type of crime committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interest of justice as well as the interest of the public. There are of course cases where a custodial sentence is merited, for example, where there is a compelling feature such as element of intoxication or recklessness.”
21. Being guided by the above decision and Section 175(5) of the Criminal Procedure Code which provides that A court determining an appeal referred to in subsection (4) shall affirm, quash or vary an order under this section, as justice requires. Having considered that Accused is a first offender, this court finds good reason to interfere with the sentence.
22. In the end, appeal is determined in the following terms:
  1. The conviction is upheld
  2. The six (6) years imprisonment term is set aside and substituted with a fine of KES. 200,000/- and in default of payment of fine Appellant shall serve 24 months from date of conviction.

**DELIVERED AT MERU THIS 13TH DAY OF JUNE 2024**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistants - Kinoti/Munene**

**Appellant - Present**

**For the Appellant - Ms. Wambulwa Advocate**

**For the DPP - Ms. Rotich (PC-1)**

