



REPUBLIC OF KENYA



**Republic v Mathenge (Criminal Appeal E011 of 2011)
[2024] KEHC 10653 (KLR) (11 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E011 OF 2011
RC RUTTO, J
SEPTEMBER 11, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

ZACHARY MATHENGE RESPONDENT

(Being an appeal from the Ruling of Hon. M. Okuche (PM) at the Nyeri Chief Magistrate Court Traffic Case No. 277 of 2020 delivered on 26th May 2021)

JUDGMENT

A. Introduction

1. The Respondent was charged with reckless driving contrary to Section 47 (1) of the [Traffic Act](#) Chapter 403 Laws of Kenya. The particulars of the offence were that the respondent, on the 9th day of May, 2020 at around 1830hrs near Thunguma area, along Nyeri-Karatina road within Nyeri County, being the driver of Motor Vehicle Registration Number KBX 122N Toyota Rav4, did drive the said vehicle in a manner which is dangerous to the public, having regards to all the circumstances of the case, including the nature, condition and use of road, by overtaking fleet of vehicles dangerously and hit motor vehicle Registration Number KAT 074E Toyota Town Ace, hence extensively damaging it and also caused injuries to its driver Moris Gathogo and 2 passengers on board; Rebecca Kanyiva and Grace Wambui.
2. Upon close of the prosecution case, the Respondent was acquitted on May 26, 2021 under Section 210 of the [Criminal Procedure Code](#), the prosecution having failed to establish a *prima facie* case.
3. The State was dissatisfied with the acquittal and preferred this appeal on the following grounds: -
 - a. That the Learned trial Magistrate erred in both fact and law by failing to consider the corroborated evidence adduced by all the witnesses that was sufficient prima facie evidence to place the Respondent on his defence.



- b. That the Learned Magistrate erred in fact and in law by failing to consider the evidence of PW1 whose car the Respondent hit on his rightful lane head on.
 - c. That the Learned Magistrate erred in fact and in law by failing to consider the evidence of PW3 who was overtaken by the Respondent on a bend at high speed prior to the incident.
 - d. That the Learned trial Magistrate erred in both fact and law by relying on the untested theory of the defence that the Respondent's Motor Vehicle KBX 122N Toyota Rav 4 had a mechanical fault.
 - e. That the Learned Magistrate erred in both fact and law by failing to take into consideration the evidence tendered on nature, condition, use of the road and all circumstances of the case prior to the accident.
 - f. That the Learned Magistrate erred in both fact and law by failing to take into consideration the evidence tendered by PW6, the Investigating Officer in coming up to his conclusion.
 - g. That the Learned trial Magistrate erred in fact and in law when he engaged in speculation, assumption and conjecture to the prejudice of the prosecution witnesses.
4. On those grounds, the Appellant seeks that: -
- a. The appeal be allowed.
 - b. The Ruling dated May 28, 2021 emanating from Nyeri Criminal Case No. TR 277/2020 be vacated and/set aside in its entirety.
 - c. The Respondent be placed on his defence.
 - d. Any further or alternative relief and/order that this Honourable court may deem fit and just to grant in the interest of justice.
5. This Appeal was canvassed by way of written submissions where the Appellant filed its submissions dated June 14, 2022 with the Respondent filing his, dated October 18, 2022.

B. Prosecution case

6. Before the trial court, the prosecution case was presented by six witnesses. PW1, Maurice Gathogo, testified that on May 9, 2021, at 6:00 p.m., while it was raining, he was driving home in Motor Vehicle Registration Number KAY 074E, a Noah Town Ace, ferrying two co-workers towards Karatina. He stated that a Rav 4 vehicle was approaching from the opposite direction and attempted to overtake at high speed. Upon reaching Thuguma, the Rav 4 collided with his vehicle, causing a multiple-car accident. He stated that due to the rain, he was driving at approximately 30 to 40 kph. The Rav 4 suddenly appeared at high speed and hit his vehicle. He stated that they were treated and discharged from Nyeri Provincial General Hospital.
7. Upon cross-examination, he acknowledged that visibility was compromised due to the rainy conditions and that he only saw the Rav 4 and its registration after it hit them. He reiterated that he was not speeding, as he was driving at 30-40 kph, had his lights on, and could see ahead. He also mentioned that he was not charged with reckless driving.
8. PW2, Rebecca Kanyiva Toto, testified that she works and resides near a butchery. On May 9, 2020, at approximately 6:30 p.m., while she was heading home with PW1 in Motor Vehicle Registration No. KAY 074E, they were struck by Motor Vehicle Registration No. KBX 122N, a Toyota Rav 4, which had veered into their lane. She testified that they sustained injuries



and were treated at Nyeri Provincial General Hospital. It was her statement, that three other vehicles were involved in the accident due to the overtaking maneuver by the Toyota Rav 4. During cross-examination, she mentioned that she was seated in the driver's cabin, and that it had been raining, with several vehicles on the road, leading to compromised visibility. She testified that PW1 was driving slowly, at around 30 kph, and that their vehicle was hit head-on on the driver's side. She emphasized that PW1 was driving very slowly and confirmed that other vehicles were involved in the accident.

9. PW3, Charles Maina Macharia, stated that he was a matatu driver with 2NK Sacco. His testimony was that on May 9, 2020, at approximately 6:30 p.m., while driving from Karatina to Nyeri, it began to rain heavily. He stated that a Toyota Rav4, Registration No. KBX 122N, overtook his vehicle, Registration No. KCM 750M, and nearly collided with it, causing him to overturn. He stated that he did not see the driver of the Rav4. He further stated that while he was not taken to the hospital, other individuals were. His vehicle was towed to the Nyeri police station and inspected.
10. During cross-examination, he confirmed that the Rav4, along with other vehicles, had been involved in an accident. He stated that he saw the accident from a distance after the Rav4 overtook him at Gatitu market on his way to Nyeri. He also stated that his passengers are not witnesses in this case. He testified that the Rav4 overtook 3 to 4 vehicles and that the vehicle that hit him was on the right side as he was heading towards Karatina. He estimated the average speed of the other vehicles to be around 50 kph, noting that the Rav4 was being driven faster than 50 kph, allowing it to overtake them.
11. PW4, Beatrice Wangechi Maina, a medical officer at Karatina Hospital, testified that she had the P3 forms for Grace Wambiro, Lawrence, and Rebecca Kagiri, all dated May 27, 2020. She stated that Grace Wambiro suffered a bruise on the right side of her face, soft tissue inflammation on her left hand, and the degree of injury was classified as harm. That the other P2 dated May 9, 2020 is for Morris Gathogo who sustained a neck injury and bruises to the face, with the degree of injury also classified as harm. Additionally, Rebecca sustained injuries to her legs, and the degree of injury was classified as harm. She produced the three P3 forms as evidence. During cross-examination, she confirmed that all three individuals were treated at the Provincial General Hospital.
12. PW5, Peris Kanani, a motor vehicle inspector, testified that he inspected Motor Vehicle Registration No. KAT 074E, a station wagon, and noted the following damages: radiator, engine, dashboard, steering, front axle suspensions, front bumper, shattered windscreen, smashed rear view mirrors, impact on the chassis, damaged electrical system, and a ripped-off offside rim. He further testified that he inspected Motor Vehicle Registration No. KBX 122N and observed the following damages: dashboard, engine, radiator, steering, front suspensions, grille, offside front door, ruptured airbag, and damaged electrical system.
13. PW6, 842433 PC Anthony Opiyo, the investigating officer, testified that on May 9, 2020 at 7:00 p.m., he received a call from Sergeant Nyamai informing him of an accident at Wambugu Farm, where he found Motor Vehicles Registration No. KBX 122N and KAT 074E. He stated that it was raining heavily, and since a curfew was in effect, everyone was rushing to comply. His investigation revealed that at approximately 6:30 p.m., Zachary Mathenge, while driving Motor Vehicle Registration No. KBX 122N from Karatina towards Nyeri, dangerously overtook several cars in the Thunguma area, leading to a head-on collision with Motor Vehicle Registration No. KAT 074E, which was in its proper lane. As a result of the accident, Morris Gathogo sustained injuries, and both vehicles were extensively damaged. He stated that he



served both parties with notices of intended prosecution, marked as PExhibit 3(a) and 3(b). He confirmed that both vehicles had valid insurances, marked as PExhibit 4(a) and (b), and a valid driving license, marked as PExhibit 5(a).

14. He testified that the accident occurred on a tarmacked road with a continuous yellow line and that the accused was charged with violating Sections 42(3) and 68 of the *Traffic Code*. He assessed that the accused was traveling well over 50 kph, based on the extent of the damages. He also noted that the accused was well known as the chairman of KNUT Nyeri and was aware of the road conditions but chose to overtake despite the continuous yellow line. He produced PExhibit 6(a), (b), and (c) as the sketch plan and legends of measurements.
15. He further stated that the accused was taken to the hospital after the accident and was later released on cash bail. During cross-examination, he mentioned that the accused claimed his vehicle's steering wheel had locked, making it impossible to control. However, a vehicle with a locked steering wheel would typically continue in a straight trajectory. He also stated that the impact occurred on the left side of the road in the direction towards Karatina while it was raining and the road was wet. That the driver of KAT moved out of his lane after the close of the prosecution case, the trial court found that the Respondent had no case to answer and proceeded to acquit the him under Section 210 of the *Criminal Procedure Code*.

C. The Appeal

16. The appeal is as set out in the earlier paragraphs of this judgment. The appellant seeks that the trial court's ruling be set aside. The appellant relies on its written submissions filed dated 14th June 2022, while the respondent relies on his submissions dated 18th October 2022. The parties' submissions are as follows:

a. Appellant's Submissions

17. The appellant submitted that under Section 47 (1) of the *Traffic Act* the point which substantiate and determines the offence is whether the vehicle was driven recklessly in a manner which is dangerous to the public.
18. The Appellant submits that the trial court failed to adequately address the issue of recklessness as charged against the Respondent, instead, it focused on the speed at which the vehicles collided. Furthermore, the Appellant argues that the investigating officer's testimony, which stated that the Respondent's steering wheel locked and could not be controlled, is evidence that should be challenged. This can only be done if the Respondent is put to his defence. The Appellant contends that the prosecution's evidence established a prima facie case against the Respondent, warranting the need for him to be put to his defence.
19. The appellant urged the court to allow the appeal and set aside the ruling of the trial court.

b. Respondent's Submissions

20. The Respondent opposed the appeal and submitted that while the occurrence of the accident is not disputed, what is in question is whether the Respondent was driving recklessly, thereby causing the accident. He argues that the evidence presented by all the witnesses did not meet the required threshold of proving the case beyond a reasonable doubt. The evidence did not demonstrate that the Respondent was reckless and thus caused the accident.



21. The Respondent further submits that since PW1 testified that visibility was poor on the material day due to the rain, PW1 could not accurately determine the speed at which the Respondent was driving. The Respondent also submits that the investigating officer, PW6, confirmed that the steering wheel of the Respondent's motor vehicle had locked, making it impossible to control. This mechanical failure was beyond the Respondent's control and, therefore, should not be considered as evidence of reckless driving without due consideration for other road users.
22. The Respondent in inviting this court to evaluate the evidence on record and make its own conclusions. In addition, they make reference to the case of *R V Gosney* [1971] 3 All ER 220 where the Court of Appeal held that in order to justify a conviction there must have been a situation which viewed objectively, was dangerous and also some fault on the part of the driver. The Respondent also relied on the case of *R v Evans* [1962] 3 All ER 1086 which defined dangerous driving.

D. Analysis and determination

23. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of *Pandya v R* {1957} EA 336; *Ruwalla v R* {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 [*David Njuguna Wairimu v. Republic*](#) [2010] eKLR where the Court of Appeal held that:

“ the duty of the first appellate court is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
24. Having considered the record as well as the submissions by parties, I discern that the only issue for determination is whether the prosecution evidence did establish a prima facie case to warrant putting the Respondent on his defence.
25. In [*Ronald Nyaga Kiura vs. Republic*](#) [2018] eKLR at Paragraph 22 the court stated as follows:

“It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a *prima facie* 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*](#). A *prima facie* case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of *Ramanlal Bhat -vs- Republic* [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”
26. From the foregoing, it is clear that a *prima facie* case ought, on its own, though not necessarily, succeed to sustain a conviction, but a cursory evaluation of the evidence adduced should point towards a finding of or return a verdict of guilt. In determining whether it has been established, the court should



examine, evaluate and consider the weight of the evidence presented by the prosecution to determine the same. Contrary to the submissions by the Respondent, at this stage, the threshold or the standard of proof of beyond reasonable doubt need not be determined.

27. In that regard, I will now turn to the facts of this case as contained in the Record of Appeal. The Respondent was charged with the offence of reckless driving contrary to Section 47 (1) of the [Traffic Act](#). This section provides that: -

47. .
Reckless driving (1) Any person who drives a motor vehicle on a road recklessly, or at speed, or in a manner which is 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 at the time or which might reasonably be expected to be on the road, is guilty of an offence and liable—

28. From the above provision, the ingredients of reckless driving either

- a. Driving a motor vehicle recklessly;
- b. Driving a Motor Vehicle at speed.
- c. Driving the Motor Vehicle in a manner dangerous to the public; while having regard to all circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is at the time or which might reasonably be expected to be on the road.

29. These ingredients are not mutually inclusive and what a court needs to do is to evaluate if any of the ingredients have been met for it to encompass the offence of reckless driving.

30. The evidence adduced by PW1- PW6 confirm that the circumstance and condition of the road on the 9th day of May, 2020 at around 1830hrs near Thunguma area, along Nyeri-Karatina road within Nyeri County was that it was heavily raining and the same affected visibility. This goes without saying that this condition calls for all drivers to exercise care and caution. The Respondent in his submissions also confirmed the foregoing.

31. PW1, PW2 and PW3 stated that the Respondent was driving at a high speed more than other motorists. PW6 added that the accident occurred at a place with a continuous yellow line; to mean that the accused was overtaking at a place with a continuous yellow line in violation of the traffic laws. Outrightly, such act of overtaking at a continuous yellow line, without any sufficient explanation, is an act of recklessness. I note that PW6 alluded to the fact that the steering locked. However, this was in cross-examination and he stated that this 'defence' was put to him by the respondent when doing his investigation. Hence, at the close of the prosecution case, it suffices that there was on record, no explanation that the accident was occasioned by a steering wheel lock PW6 having dismissed that explanation at the investigation level.

32. This court also takes note of the Ruling of the trial court wherein the court held that:

“the prosecution alleges that the accused person was speeding on this material day hence the accident. However, the prosecution could not ascertain at what speed that accused person was doing it. On the other hand the prosecution witnesses states that it had heavily rained on the material day and visibility was very poor. Thus this could also have led to the accident. The prosecution has not excluded the fact. I will find that putting the accused person on his defence would do an exercise in futility.



33. This excerpt by the trial court point to the fact that the trial court only addressed itself to one aspect of the ingredients of reckless driving. Had the court applied itself to all the three ingredients discussed in the earlier paragraphs of this judgment, a *prima facie* case would have been established. The holding of the trial court, to wit, that “the prosecution witnesses states that it had heavily rained on the material day and visibility was very poor. Thus this could also have led to the accident”, negates the fact that the prosecution evidence is that the accident was a head on collision when the respondent drove at a high speed and overtook on a continuous yellow line.
34. I also take note of the authorities referred to by the Respondent and wish to distinguish them as being applicable when determining whether or not a conviction can be sustained.
35. In that regard, it is my conclusion that a *prima facie* case was established and that the accused has a case to answer.
36. Consequently, I allow the appeal. The Ruling dated May 28, 2021 emanating from Nyeri Criminal Case No. TR 277/2020 is hereby set aside in its entirety. I find that a *prima facie* case has been established and the accused has a case to answer. The matter to be remitted back to Nyeri Chief Magistrate Court for defence hearing before a different magistrate.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 11TH DAY OF SEPTEMBER 2024.

RHODA RUTTO

JUDGE

For Appellant:

For Respondent:

Court Assistant:

