



**Ndung'u v Republic (Criminal Appeal 270 of 2019)
[2023] KEHC 660 (KLR) (Crim) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL 270 OF 2019
K KIMONDO, J
FEBRUARY 7, 2023**

BETWEEN

BONIFACE NGURE NDUNG'U APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment in Traffic Case No. 3489 of 2018 in the Chief Magistrates Court at Milimani by E. Riany, Senior Resident Magistrate, dated 20th December 2019)

JUDGMENT

1. The appellant was convicted for causing death by dangerous driving contrary to section 46 of the [Traffic Act](#) (hereafter the Act). He was fined Kshs 100,000 and in default to imprisonment for 2 years.
2. The particulars were that on 13th January 2018 at around 4:00 a.m. along Kiambu Road being the driver of motor vehicle KBW 722F make Audi drove “at a speed or manner which was dangerous to other road users with regard to the use of the road and condition, amount of the traffic expected on the road at that particular time and without due care and attention” he hit motor vehicle KCA 775X make Toyota Voxy killing its driver Mbui Gacoka.
3. The petition of appeal was lodged on 31st December 2019 raising four grounds: Firstly, that the trial court erred by concluding that the proximate cause of the accident was the appellant’s speed of 40-60Kph; and, secondly, that the learned trial magistrate reached a wrong finding “that the deceased’s motor vehicle was not being driven unlighted thereby rendering it invisible or less visible to other road users”. Thirdly, that the trial court misapprehended the CCTV evidence; and, fourthly, that the charge was not proved beyond any reasonable doubt.



4. Learned counsel for the appellant, Mr. Wanjeru, filed submissions dated 20th July 2022. He also sought to rely on two earlier sets of submissions filed in the lower court at the close of the prosecution's case and after the defence case. The pith of the submissions before me was that from the CCTV footage, the deceased's black vehicle's headlights were unlit in violation of rule 23 (1) of the Act. At paragraph 11 of the submissions, he concludes that had the lights been on, the appellant would have been forewarned and avoided the collision.
5. Counsel also argued that there was no evidence that Kiambu Road has a speed limit of 40Kph; and, there was no evidence that the appellant was doing 50-60Kph. In a synopsis, he contends that the offence was not proved to the required standard.
6. The appeal is contested by the respondent through grounds of opposition dated 13th December 2022 and written submissions of even date. In a nutshell, the State submitted that all the elements of the offence were established beyond any reasonable doubt.
7. On 19th December 2022, both learned counsel for the appellant and respondent informed me that they were relying wholly on their submissions.
8. This is a first appeal to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32.
9. The accident occurred in the early morning hours between 3:00 and 4:00 a.m. There were no eye-witnesses. The conviction was thus largely founded on secondary and circumstantial evidence.
10. PW1 was Juma Sylvester, a motor vehicle inspector with the NTSA. He testified that both vehicles suffered extensive damage to their front as detailed in his reports. The rear wheels of the deceased's vehicle were also damaged. When cross-examined, he said the "point of impact of KCA 775X with the other vehicle was on the driver's side. Most probably both drivers were avoiding a head-on collision". He found no pre-accident defects. He produced the two original inspection reports.
11. PW2 was Mbugua Gacoka, a brother of the deceased. He and his cousin PW3, identified the deceased's body for post-mortem purposes. The autopsy was carried out on 13th January 2018 at the City Mortuary by Dr. Peter Ndegwa (PW8). The cause of death was "multiple organ injuries due to blunt trauma consistent with a motor vehicle accident".
12. According to Corporal Abdullahi (PW4) the appellant joined Kiambu Road from the Muthaiga North Estate near an establishment known as Rock City. He was driving downhill towards Kiambu. The deceased was on Kiambu Road heading towards the city centre.
13. PW4 obtained some CCTV footage from a nearby motor vehicle yard. The video clips were produced by Corporal Muthe (PW5) as exhibit 4 (a) to (o). He also produced the relevant electronic certificate and gazette notice containing his appointment. PW5 testified that the appellant was overtaking and collided head-on with the deceased's vehicle. From the footage he observed that-

Between the grass and road is a ditch where the accident occurred. Vehicle coming from right (towards town) and left towards Kiambu. Vehicle comes and fall (sic) on the ditch. There was a collision as it had been trying to overtake 0.3.25 hrs. there was a lot of dust after the accident.



14. When cross-examined further, he said-

Every object reflects light. The deceased's vehicle was from the left side towards right side, say from Kiambu to Nairobi. It's (sic) the vehicle makes the light reflect on the matatu, it is the light of the vehicle that has passed. It is after that the accident occurred. Before the accident, there was no light".

15. In re-examination, he insisted that the headlamps of the deceased's vehicle were lit: "immediately after collision, deceased's car still had the headlights on [clip re-played to verify] after the impact the headlights could have gone off".

16. PW6 was Police Constable Susan Elisha. She was informed of the accident. She found the two vehicles off the road. The deceased was trapped inside his car. She summoned the fire brigade who removed the body. She blamed the appellant as his vehicle was the wrong lane. According to Chief Inspector Impui (PW7) the appellant claimed that he swerved to avoid collision with an oncoming vehicle on his lane, a fact not borne out by the point of impact and the CCTV footage.

17. When the appellant was put on his defence, he testified that the deceased's car headlamps were not lit. He said in chief-

I was driving at 50-60 Kph. I joined road and there was a car in front of me and since one from Kiambu came to my side, I swerved to avoid hitting it but went to the other lane causing the accident. I saw all the other vehicles except this one without headlights.

18. But in cross-examination, he answered-

I didn't see the vehicle. It was a black car hence possibility of reflecting light was minimal. I drove carefully. He did not switch on his lights. Yes, I hit him on his lane and as you can see road, one can overtake.

19. Upon re-appraisal of the evidence, I find as follows. Subject to section 111 of the *Evidence Act*, the legal burden of proof lay with the prosecution. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.

20. I stated earlier that there was no eye-witness. In order to convict on circumstantial evidence, the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. *R v Kipkering arap Koske & another* 16 EACA 135 (1949).

21. Section 46 of the *Traffic Act* under which the appellant was charged 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.

22. One of the grounds in the appeal was that the trial court erred by concluding that the proximate cause of the accident was the appellant's speed of 40-60Kph. But I find it was proved by two factors. Firstly, the impact of the collision as detailed by PW1, PW4, PW5 and the appellant's own admission that [he] was driving at 50-60Kph.
23. As I stated, the accident occurred between 3:00 and 4:00 a.m. To be more accurate and according to the CCTV footage at about 3:23 a.m. or thereabouts. There is thus no doubt it was still dark. The appellant joined Kiambu Road from the Muthaiga North Estate near an establishment known as Rock City. He was travelling downhill towards Kiambu. The deceased was on Kiambu Road heading towards the city centre. The point of impact shows that the appellant left his lane and hit the deceased's car.
24. Although a lot of time was devoted to try and show that the deceased's headlamps were off, it is dispelled by the following evidence: It was at night. The deceased's vehicle was black. In cross examination, the appellant admitted that: I didn't see the vehicle. It was a black car hence possibility of reflecting light was minimal. I drove carefully. He did not switch on his lights. Yes, I hit him on his lane and as you can see road, one can overtake.
25. Furthermore, none of the video clips shows the actual collision. The one at 03.25 shows one of the cars landing in the ditch and a lot of dust or debris flying in the air. The appellant's theory that the deceased's car headlamps were off is pegged on reflection of light against a Nissan matatu parked at the car yard. He testified that-

The Nissan was inside the car yard I was heading towards Kiambu and the other vehicle in the opposite direction. The beams were between 2 posts. After dancing light at back of Nissan the vehicles from Kiambu road would beam their lights and after 3 seconds would appear. After those vehicles passed, its headlights do not appear in the back of the Nissan but collision.

26. I have come to the conclusion that the appellant's version is self-serving. He was obviously overtaking dangerously and did not see the oncoming car. He was going downhill. From the impact either his car or that of the deceased were at high speed. By his own admission, he (appellant) was doing 50-60Kph. It is also consistent with PW5's testimony that the "point of impact of KCA 775X with the other vehicle was on the driver's side. Most probably both drivers were avoiding a head-on collision".
27. Furthermore, and according to PW5, "immediately after collision, deceased's car still had the headlights on [clip re-played to verify] after the impact the headlights could have gone off".
28. The death of the deceased was established by the pathologist (PW8) and the post mortem form (exhibit 3). It resulted from "multiple organ injuries due to blunt trauma consistent with a motor vehicle accident".
29. I readily find that in all the circumstances of the case, including the nature, condition and use of the road and the traffic at the material time, the appellant caused the deceased's death by driving recklessly or at a speed or in a manner which was dangerous to the public or other road users. His conviction was thus safe.
30. I will turn briefly to the sentence. The offence is grave and attracts a jail term of up to ten years. The trial court was also at liberty to exercise the power conferred by Part VIII of cancelling the appellant's driving licence or disqualifying him from holding such licence for a period of three years. Fundamentally, a life was lost. The appellant was fined Kshs 100,000 and in default to serve 2 years in jail. The punishment



was a slap on the wrist. But seeing that there is no appeal on the sentence or any cross-appeal, I will let the matter rest.

31. The upshot is that the entire appeal is devoid of merit and is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2023.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

No appearance by counsel for the appellant.

Ms.....for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

