



REPUBLIC OF KENYA



**Nyambariga v Republic (Criminal Appeal 116 of 2019)  
[2023] KEHC 651 (KLR) (Crim) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 651 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL APPEAL 116 OF 2019**

**DO OGEMBO, J  
FEBRUARY 7, 2023**

**BETWEEN**

**FRANCIS MAANGI NYAMBARIGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence arising from Traffic case No. 14098 of 2018 in Chief Magistrate's Court, Milimani, Hon. E. Riany, SRM, dated 9.5.2019)*

**JUDGMENT**

1. The appellant, FRANCIS MAANGI NYAMBARIGA, was charged before the court below on 1 Count of causing death by dangerous driving contrary to section 46 of the *Traffic Act*, Cap 43 Laws of Kenya. That on 14.11.2016 at about 11:00am along at an unmarked Road at Highway depot within Nairobi County, being the driver of motor vehicle registration number KAN 082P, Isuzu Tipper, he drove the said vehicle in a manner which was dangerous to the public hence hit and caused the death of male adult pedestrian namely James Njogu, who was standing in front of the said vehicle.
2. The appellant faced a 2<sup>nd</sup> count of careless driving contrary to section 49(1) of the *Traffic Act*, Cap 403 Laws of Kenya. That on 14.11.2016 at about 11:00Am along an unmarked road at Highway within Nairobi County, being the driver of motor vehicle registration number KAN 082P, Isuzu Tipper, drove the said vehicle without due care and attention to other road users hence hit and caused injuries to one male pedestrian namely Simon Muthike, who was standing in front of the said vehicle.
3. The appellant faced a 3<sup>rd</sup> count of driving a motor vehicle on a public road without a driving licence contrary to section 30(1) as read with section 30(7) of the Traffic Amendment Act, No. 2, Cap 403 Laws of Kenya. That on 14.11.2016, at about 11:00hours along an unmarked road at Highway Depot



within Nairobi county, being the driver of motor vehicle KAN 082P, make Isuzu Tipper, lorry, drove the said vehicle on the said road without a driving licences.

4. The case of the appellant went through the motions of full hearing. The appellant was eventually convicted on the 3 counts and on 13.5.2019 was sentenced as follows:-
  - i. Count I- fined Kshs. 500,000/= or in default to serve 3 years imprisonment
  - ii. Count II – fined Ksh.20,000/- or in default to serve 3 years imprisonment.
  - iii. Count III – fined Kshs.5,000/= or in default to serve 1 month imprisonment.
5. The sentences were ordered to run consecutively. Aggrieved, the appellant, on 27.5.2019 filed herein a petition of appeal dated 25.5.2019. The amended petition raises upto 20 grounds.
  1. That the Senior Resident Magistrate erred in law and fact and seriously misdirected herself in holding that the prosecution had proved its case beyond reasonable doubt whereas the evidence was merely circumstantial and full of contradictions and failed to appreciate and find that the prosecution had failed to prove charges beyond any reasonable doubt as the basic ingredients in criminal law.
  2. That the learned Senior Resident magistrate erred in law and in fact in finding that PW3 has been injured in the accident and that PW3, PW5 and PW7, had identified the appellant as the driver of the subject motor vehicle on the date of the accident whereas the evidence tendered by the prosecution was to the contrary.
  3. That the learned Senior Resident Magistrate erred in law and in fact in finding that PW3 was mentally unstable and proceeded to take down and rely wholly on his evidence to convict the appellant without cautioning herself of the danger of relying on such material piece of evidence.
  4. That the learned Senior Resident Magistrate erred in Law and in fact in presuming the appellant guilty until proven innocent by invoking her personal emotions and theories which were extraneous matters, the facts and evidence before her which as a result became extremely prejudicial to the appellant's case.
  5. That the learned Senior Resident Magistrate erred in law and in fact in finding that the motor vehicle was ignited, driven, moved at a high speed by the appellant using any other key yet there was no eye witness who testified to that effect.
  6. That the learned Senior Resident Magistrate erred in law and in fact in finding that the appellant was not authorized to drive the vehicle went, took it without permission where it was parked within the yard, drove it and rammed over James Njogu who died and Simon Muthike who was injured and stayed in the hospital for 2-3 months without any evidence to that effect.
  7. That that learned Senior Resident Magistrate erred in law and fact in shifting the burden of proof to the appellant by finding that the appellant failed to explain the rush and failure to care for other persons within the yard, matters that were extraneous to that case before the court.
  8. That the learned Senior Resident magistrate erred in law and in fact in finding that the appellant did not care about all other persons contrary to the evidence on record from eye witnesses to the effect that the appellant did not drive the subject vehicle.
  9. That the learned Senior Resident Magistrate erred in law and in fact in finding that the appellant drove the vehicle contrary to the evidence on record to the effect that the ignition key



for the subject vehicle was in custody of PW5 who was not present at the scene of the accident at the time of the alleged accident.

10. That the learned Senior Resident Magistrate erred in law and in fact in finding in the appellant tending evidence to the effect that the employees were baying for his blood and he took cover at Kamukunji police station, it was a confirmation of the actual position contrary to the evidence on record.
  11. That the learned Senior Resident erred in law and in fact in finding that the witnesses from the City Council feared the appellant and failing to find that yet the said prosecution witnesses were truthful, straight forward and honest in their testimony.
  12. That the learned Senior Resident magistrate erred in law and in fact in failing to find that the appellant's constitutional rights to fair administrative action and trial under Article 47, 49 and 50 of *the constitution* had been violated by being arraigned in court 2 years after the commission of the traffic offence and thereby committed an injustice to the appellant and the court failed to analyse the evidence and thus drew inferences and findings culminating in the subject conviction and sentence without any supportive legal and factual basis.
  13. That the learned Senior Resident Magistrate erred in law and in fact in misinterpreting and misapplying the cited cases of Republic Versus Evans (1962)3AYIER 1086 at 1088, Atito Versus republic (1975 EA 278, and Kariuki Versus Republic (1988)KLR 456 whose circumstances were different to convict the appellant.
  14. That the learned Senior Resident Magistrate erred in law and in fact in failing to consider the evidence tendered by the prosecution witnesses on cross examination.
  15. That the learned Senior Resident Magistrate erred in law and in fact in finding a conviction against the appellant in a case where section 50 of the *Traffic Act* has been complied with as the appellant had not been served with the mandatory 14 days statutory notice before prosecution.
  16. That the learned Senior Resident Magistrate erred in law and fact by shifting the burden of proof to the appellant in respect of the charges therein in contravention of trite law and refused to consider the appellants evidence and who heartedly embraced the prosecution's evidence and at times filled gaps that were lacking and failed to weigh in on the credibility of the prosecution witnesses particularly PW4 and PW6.
  17. That the learned magistrate erred in law and fact in failing to believe the appellants defence to the effect that he did not drive the subject vehicle or cause the accident as corroborated by the evidence of PW3, PW4, PW5 and PW6 who testified as having been present when the accident took place.
  18. That the learned magistrate erred in law and fact in basing her judgment on a defective charge sheet and ignoring the amended charge sheet that had been filed by the prosecution.
  19. That the learned magistrate erred in law and fact in refusing to considered the appellant's mitigation while sentencing.
  20. That the sentence imposed upon the appellant with regard to the subject charges was harsh and excessive taking into account all the circumstances of the case preferred against the appellant herein.
6. The appellant has prayed that he conviction be quashed and the sentence be set aside. The respondent, on the other hand, has opposed this appeal and urged that the same be dismissed. By agreement of the



parties, this appeal was canvassed by way of written submissions. And both sides duly complied and filed their set of submissions.

7. On the side of the appellant, it was submitted that as a first appellate court, this court is mandated to weigh the evidence and draw its own conclusion (*Pandya Versus Republic* (1951)EA 336, and *Kiilu & Another Versus Republic* (2005)1 KLR 174. That in a charge of causing death by 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 a reasonably prudent driver (*Ngure Versus Republic*) (2003)EA.
8. That the standard of proof is beyond a reasonable doubt and it is necessary for the prosecution to show that the accused's dangerous driving was a cause of the accident (*Kennedy Mulandi Malinda Versus Republic* (2019)eKLR. The appellant also relied on *Republic Versus Silas Magongo Onzere* (2017)eKLR, on the issue of proof beyond reasonable doubts that;

" as to what constitutes the burden of proof beyond reasonable doubt, the case of *Miller Versus Minister of pensions* (1947) 2 ALLER 372, provides as follows in a passage alluded to me considered the greatest jurist of our time Lord Denning;

"That degree is well settled. It need not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt... it the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence, of course it is doubt but nothing short of that will suffice"

Also that

" In our criminal justice system, there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person."

9. It was submitted that in this case, the prosecution failed to prove any of the ingredients of the charge i.e that the vehicle was driven on a road, or that it was driven in a manner that was dangerous to the public or without due care and attention. That, there was therefore no fault placed on the appellant. That PW3, 4, 5, and 6 did not point to the appellant as the driver.
10. Counsel submitted that the trial magistrate was biased against the appellant in view of the magistrates noted that PW3 does not look mentally stable. That the prosecution did not produce any medical evidence to prove that PW3 was involved in the accident, but the trial magistrate went on to give the details of his hospitalization. That the conviction was not based on actual evidence. He relied on the case of *Okethi Okale & Another Versus Republic* (1965)EA 555, where the court held:-

" ... in every criminal trial, a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial, Judge to put forward a theory of mode of death not canvassed during evidence or in counsels speeches..."

11. Also, that no evidence was led as to the speed at which the accident vehicle was moving and that evidence of PW5 was insufficient. Counsel went on to challenge the evidence of PW5 that the vehicle could be ignited by any Key. That PW5 was an unreliable witness. Similarly, counsel faulted the evidence of the investigating officer, PW7, that PW5 had left the appellant in the vehicle. And for PW4



- and PW6, it was submitted that the 2 recorded their statements more than 5 months later and were witnesses for hire.
12. Counsel for the appellant maintained that the truthful witnesses were PW3, 4, 5 and 6 and that the court by introducing the issue of demeanor of the appellant, the trial magistrate introduced extraneous issues. Counsel denied that the fact that the appellant had to report to the police station to run away from mob justice could be interpreted to be an admission.
  13. On the charge sheet, it was submitted that count II is defective to the extent that the same does not support the statement of the particulars. That whereas the charge sheet refers to the offence of careless driving, the particulars set out referred to driving without care and attention. That Traffic (Amendment Act), No. 2 did away with the offence of careless driving and substituted it with offence of driving without care and attention. That the appellant was charged with an offence not known in law. He relied on Peter Ngu Versus Republic (Machakos Criminal Appeal No. 56/2019, and the Court of Appeal case of Henry O. Edwin Versus Republic (2005)eKLR.
  14. It was also submitted that the rights of the appellant were violated in view of the fact that he was charged 2 years after the date of the alleged incident, and with no explanation offered for the delay.
  15. And on the sentence, it was submitted that the same were extremely excessive.
  16. The respondent side, on the other hand, submitted that the prosecution proved the case against the appellant beyond reasonable doubt as required by the law. That all the prosecution witnesses, save for 2 linked the appellant to the offence.
  17. Also, that the sentence meted out were proper, except that the sentence on Count I was lenient in view of the sentence provided in law of 10 years imprisonment. The Respondent has urged that this appeal be dismissed. I have considered the submissions as filed by the 2 opposing sides. This court is now seized of this matter as a 1<sup>st</sup> appellate court. The jurisdiction of a 1<sup>st</sup> appellate court is well settled. The appellant has referred to Pandya Versus Republic (1957)EA, Ruwala Versus Republic (1957)EA, Kiilu & Another Versus Republic (2005)IKLR, all in agreement that it is to subject the evidence tendered before the trial court to a fresh and exhaustive examination before arriving at its own conclusions on the same. And that in doing so, the court must give allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.
  18. It is therefore imperative that this court closely considers such evidence before the trial court before it can come up with own determination of the issues.
  19. From the record of the proceedings, the case of the prosecution commenced with the evidence of PW1 Joyce Wanjiru Njogu, that the deceased James Njogu Mwangi was her husband. Her evidence was that on 16.11.2016, she identified the body of the deceased at Kenyatta University mortuary before the post mortem. PW2 Stephen Muchoki, on his part, testified that he is an employee of Nairobi City County, and that on 14.11.2016 at about 8:30pm, he had been on duty when an accident occurred involving James Njogu and Simon Muthike fellow employees within the compound. That he got both the 2 victims lying in pain and informed the transport officer. He helped take the victims to hospital. This witness said he did not witness the accident, which otherwise involved a vehicle belonging to Nairobi City Council while at Landhies Road depot. And that the appellant is also an employee of the City Council as a supervisor.
  20. On cross examination, he went on that there was a loud bang that attracted everyone on the compound and where the victims were lying, the motor vehicle KAN 082P was trapped at the scraps of metal.



21. PW3, Simon Muthike Musyoki, testifies that he works with Nairobi County. That on 14.11.2016 he had been walking with a colleague to take tools having just bypassed the deceased, when he heard a vehicle ignited and a loud bang. That the vehicle stepped on some metal and ran over the deceased. The metal flew and hit him breaking his legs. That the vehicle was being driven by the appellant. He remained in hospital for 2-3 months. That before bypassing the deceased, the vehicle had been parked and they were to go work using the same vehicle.
22. He confirmed that the appellant was the driver of the vehicle though he did not see him since the vehicle had been parked. That it was at about 7:00Am though in his statement, the time is shown as 9:30Am.
23. And PW4 Sammy Mburu Mungai, PW4, also an employee of City Council, testified that he had been at the workshop on 14.11.2016 at about 9:30am, when he heard a vehicle at high speed heading towards where James Njogu and Simon Muthike were. That the vehicle hit Njogu, while metals hit by the vehicle hit Muthike. That he helped take both to hospital, but unfortunately, Njogu died. This witness did not see the driver as he was in the opposite direction. He confirmed that the appellant was not employed as a driver and in his observation, the vehicle was being driven at a high speed.
24. Jefferson Mukala was PW5. His evidence was that he is a driver with the City Council. That on 14.11.2016, he had motor vehicle KAV 282P, lorry. That he parked it to go and pick the work ticket when another driver, took and drove it and got it to where the metals were. He confirmed that it was being driven by the appellant. That by the time he got there, the appellant was not there. Further, that since he had his keys, the vehicle was started by other keys. That 2 persons were injured one of whom died. He also confirmed that this vehicle could be ignited by any key, and that the appellant, a supervisor, was not employed as a driver, and was not allowed to drive the vehicle.
25. He confirmed that he had parked the vehicle and took only a few minutes to get the work ticket. That the spare key had been with the transport officer, Mr. Muthee who was not nearby. That the vehicle was not defective though it could be ignited by any key. He did not see the driver himself.
26. Peter Henry Karanja was PW6. He is a casual at the depot. He recalled that on 14.11.2016 at about 9:30AM, he saw a lorry come. He ran away, but the same hit Njogu, before being stopped by the metal. His testimony was that he did not see the driver, but that the lorry hit Njogu while Muthike was hit by metal.
27. PC Joseph Muema was PW7. He investigated this case. His evidence was that on the material date, he was on accident stand by when he had information regarding this incident. He rushed to the scene and found the victims and had been taken to hospital. He later took the witness statements and later recommended that the appellant be charged. In his evidence, the driver of the vehicle had said he had left the accused on board. That he issued the appellant with notice of intention to prosecute. He also testified that the witness initially feared recording their statement as appellant is their supervisor. And Dr. Johanze Oduor, PW8, conducted post mortem on body of the deceased at Kenyatta University Funeral Home on 19.11.2016. In his testimony, he noted the various injuries on the chest and abdomen. He produced the post mortem form. And PW9 Muigai Kagie, a motor vehicle inspector of NTSA, confirmed that the vehicle had no damages nor any pre-accident defects. He produced his report (Exh. 4).
28. After the close of the prosecution's case, the court made a finding that the appellant had a case to answer and placed him to his own defence. The appellant gave sworn testimony.
29. In his evidence, the appellant testified that he had not been around when the accident occurred. That after the accident, the employee said he had been the driver of the vehicle. He however did not see the driver drive the vehicle. That people chased him and he ran to report at Makongeni police station.



- Where he was released on a cash bail of Kshs.20,000/= . That he was only charged 2 years later with no explanation being given for the delay. He denied driving the vehicle though he had said he drove it. He also denied being issues with any notice.
30. On being cross examined, he confirmed that he had been supervising as the luggage was put in the vehicle, together with around 8 people. He had no explanation on why out of the 8, he was the one singled out. And that he just decided to leave after the accident with no reason for that. He confirmed reporting the incident at the police station and being given an OB number and was placed in the cells. The appellants called no witness.
  31. This is basically the evidence the parties tendered before the trial court, the facts of this case are generally agreed by the 2 sides and are fairly straight forward. That in the morning of 14.11.2016 at about 9:30AM, employees of Nairobi City Council (County) had assembled at the Landhies Road depot ready to go to work. They were many. At least upto 8 employees have been confirmed to have been present at the depot. Amongst those specifically confirmed to have been present were the deceased, PW3 Simon Muthike Musyoki, PW2 Stephen Muchoki, PW4 Sammy Mburu Mungai, PW5 Jafferson Mukala, PW6 Peter Henry Karanja and the appellant herein. That PW6, the driver of the accident motor vehicle KAN 082P, ISUZU Tipper, the lorry were to go out in for work, parked it in the compound as he proceeded to obtain the work permit going away with the lorry keys. That suddenly the vehicle was ignited. The witnesses saw it move as a fast speed. It ran over the deceased. In the process, it ran over pieces of metal on its way. Chips or pieces of metal flew and hit PW3 on his legs. That the 2 victims were rushed to hospital, with the deceased James Njogu being pronounced dead upon arrival at the hospital. PW%, on the other hand had to be admitted in hospital for periods between 2-3 months, according to his evidence.
  32. This was obviously a serious accident. It took place during the day at about 9:30AM and in the presence of multiple witnesses who are colleagues at work and who are well known to one another. The colleagues present were even able to take immediate action by taking the 2 victims to hospital. It is therefore surprising and indeed perplexing to note that none of the witnesses (above) present could pin point who exactly was the driver of the vehicle when it cause this accident. I have noted that this is really the main issue for determination in this appeal just as it was before the trial court.
  33. From the evidence on record, PW3 testified that it is the appellant who was the driver of the vehicle when the accident took place. But the evidence of this witness was to say the list inconsistent to the extent that towards his testimony, he stated that he did not see the driver and was only told it was the appellant. Similarly, PW5, confirmed that the vehicle could be ignited by any key and that is the appellant who had been driving the vehicle when it had the accident. And though PW5 did not state the same in his testimony, and though the statement of PW5 was not produced in evidence, it was the testimony of the investigating officer, PW7 that PW5 on being interrogated had stated that as he went for the work ticket, he had left the appellant, a supervisor on board.
  34. This vehicle did not roll along on its own. It must have been driven by someone. The witnesses present (PW2, 3, 4, 5, and 6) all testified as to hearing the vehicle ignited before it started moving at the fast speed. The trial court, in determining who the driver was had this to say.

" All though the hearing, one observation was clear, the witnesses from the city council feared the accused and their demeanor told it. All could come and say they saw the vehicle being driven but when it came to identify of the driver they were not willing to talk and would say they did not see him...."



35. Of course this court has not had the benefit of observing the demeanor of the witnesses as they testified. The trial court did. It is however, on record that the appellant was the supervisor of these witnesses, and so one who obviously exercised authority over them.
36. It is in this matter, material to consider the events that ensued after this incident. By the appellants own testimony in his defence, the employees accused him and bayed for his blood for causing the accident. These were the same colleague employee who had been with him as they readied themselves to work. He had to run to the police station where he reported the incident and was issued with an OB number. He was placed in the cells only to be released on a cash bail of Kshs.20,000/=. In court, he came up now to deny the admission that he had made at the police station that he had indeed been the driver.
37. The Court of Appeal in the case of *Abanga alias Onyango Versus Republic* (Criminal Appeal No. 32 of 1990, dealing with the issue of circumstantial evidence held:-
38. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests;
- i. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
  - ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused,
  - iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”
39. I have considered the circumstances of this case as above numerated and my answer is in the affirmative that it is the appellant, and no one else who was the driver of the accident motor vehicle when it caused the accident leading to the death of the deceased and injury to PW3.
40. As to whether the driver drove the motor vehicle dangerously, the case of *Kariuki Versus Republic* (1988)KLR give a guide that;
- “ .... The offence of dangerous driving was not an absolute offence and to justify a conviction, there must be not only a situation, which when viewed objectively, was dangerous but also some fault on the part of the driver causing that situation ... fault involved a failure, a failing below the care and skill of a competent and experienced driver in relation to the manner of the driver and to the relevant circumstances of the case....”.
41. I am convinced that the appellant caused this accident and the death of the deceased by dangerous driving. He drove the vehicle without authority. By his admission, he is not a licenced driver. He drove the same at an excessive speed in view of the fact that this was within the compound of the depot, not on a road.
42. As to his defence, I have noted that the trial court duly considered the same. I have also considered the same in this judgment and I do not find any merit in the same. I dismiss the same accordingly.
43. Section 46 of the *Traffic Act*, Cap 43 Laws of Kenya, provides for a sentence of a term not exceeding 10 years’ imprisonment. In this case, the appellant, on count I was fined 500,000/= or in default to serve 3 years’ imprisonment. This sentence, was clearly proper and legal. It was not excessive at all as claimed by the appellant. Similarly, the sentences for counts II and III were proper and legal.



44. The appellant raised the issue that the appellant was charged on Count II, of an offence not known in law. I have perused the charge sheet herein. It is of careless driving contrary to section 49(1) of the Act. The particulars therein, goes on to say “without due care and attention.” There are exactly the same words that the statute uses at section 49(1) I therefore do not see or find any defect in this charge. There is even no doubt in my mind that the charge was clear and the appellant pleaded to the same and answered to the same with full knowledge of the charge (Count II).
45. In the circumstances. I do not find any merit in the appeal of the appellant dated 25.5.2019. I dismiss the same wholly. It is so ordered.

**HON. D. O. OGEMBO**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**COURT:**

Judgement Read out in Open Court (on-line) in Presence of the Appellant, Mr. Mageto for the Appellant and Ms. Adhiambo for State.

