



**Ndwiga v Republic (Criminal Appeal E052 of 2022)
[2023] KEHC 2020 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E052 OF 2022
LM NJUGUNA, J
MARCH 8, 2023**

BETWEEN

MORRISON NYAGA NDWIGA APPELLANT

AND

REPUBLIC RESPONDENT

(Arising from Chief Magistrate's Court at Embu Traffic Case No 216 of 2020)

JUDGMENT

1. The appellant herein was charged before the CM's Court at Embu in Traffic Case No 216 of 2020 with two counts; of which Count I, causing death by Dangerous driving contrary to section 46 of *Traffic Act* Cap 403 Laws of Kenya and Count II, failing to stop and report an accident contrary to section 73 (3) as read with section 75 of the *Traffic Act* Cap 403 Laws of Kenya.
2. After the trial, the court considered the facts and the law as presented before it, and reached a determination that the prosecution proved its case beyond any reasonable doubt and thus the appellant was convicted of the two counts and thereafter sentenced. On Count I he was ordered to pay a fine of KES 30,000.00 in default to serve 2 years imprisonment and on Count II to pay KES 10,000.00 in default to serve 1 year imprisonment. The sentences were ordered to run concurrently.
3. The appellant filed a petition of appeal dated October 5, 2022, which set out grounds of appeal as enumerated on the face of the petition and wherein he challenged his conviction and sentence by the trial court.
4. When the appeal came up for hearing, the court directed the parties to file written submissions which directions, both have complied with.
5. The appellant merged grounds 1, 2, 3 and 5 of his appeal and thus submitted that the trial magistrate erred in law and fact by convicting him on insufficient evidence. That he failed to consider the obvious



contradictions in the evidence adduced by PW1, PW2 and PW5 that the motor vehicle that knocked the deceased came from Embu towards Kibugu direction. It was his case that while PW1 and PW2 who alleged to have been eye witnesses to the accident were emphatic in their evidence that the motor vehicle that knocked the deceased was being driven from Embu direction towards Kibugu, PW5 who also alleged to have been an eye witness testified that the vehicle was being driven from Kibugu towards Embu after knocking the deceased.

6. Further, it was his case that from the evidence on record, it was impossible to clearly identify the registration number of the motor vehicle which knocked the deceased for the reason that the deceased was allegedly knocked at 7.30. p.m in the darkness and further, the said motor vehicle was allegedly being driven at a high speed; additionally, that the said motor vehicle did not stop at the scene of the accident. It was contended that PW6 stated that the alleged eye witnesses did not tell him the identity of the vehicle until 18 days and further, the said information regarding the registration number of the vehicle was allegedly given to Embu Base Commander by PW3; yet the said Base Commander did not record statement or attend court as a witness. Further, it was submitted that upon the inspection of the said motor vehicle, it was found to be intact with no pre accident or post-accident defects. It was his case that there was no indication that the motor vehicle had been involved in an accident prior to inspection.
7. On ground 4, it was submitted that the trial magistrate shifted the burden of proof to the appellant thus requiring him to prove his innocence. That the appellant's alibi was dismissed and further, the analysis by the court was very scanty considering the serious nature of the offence with which the appellant herein was charged.
8. On ground 6, it was the appellant's submission that the sentence imposed upon him was excessive considering the mitigation he offered and the fact that the appellant was confirmed to be a first offender. In the end, this court was urged to re-evaluate the evidence herein and find that the same was insufficient to prove the two charges beyond any reasonable doubt. That this court allow the appeal, quash the conviction and set aside the sentence.
9. The respondent on the other hand submitted that the appeal herein is devoid of merit and thus should be dismissed. That notwithstanding, a concession was made only to the extent of the sentence meted out against the appellant in relation to Count II. In response to grounds 1, 3, 4, it was submitted that the ingredients of the offence were proved beyond reasonable doubt. That PW1, PW2 and PW5 stated that the motor vehicle was driven at a high speed and in a zig zag manner and further that, the deceased was knocked while off the road. Reliance thus was placed on the case of *Benard Wambua v Republic* [2021] eKLR.
10. On the second count, it was submitted that section 73 (3) of the *Traffic Act* places an obligation on a person who has caused an accident to report to a police officer or a police station as soon as possible and within twenty four hours of the occurrence of the accident. That in the circumstances herein, the appellant caused the accident on September 11, 2020 at around 7.30 p.m. and PW6, the investigating officer was only informed about the offence on September 16, 2020 and by then, the appellant herein had not reported the accident. It was submitted, therefore, that the trial court properly found that the offence had been proven.
11. In response to ground 2, the prosecution stated that the evidence of PW1 and PW2 was at variance on the direction the motor vehicle was being driven and the direction it took after the accident but contended that the same did not go to the root of the case herein. That the inconsistency was minor and to the contrary, the appellant did not demonstrate how the same prejudiced him. Reliance was placed on the case of *Joseph Maina Mwangi v Republic* [2000] eKLR.



12. On ground 6, it was its case that under Section 46 of the [Traffic Act](#) the sentence provided for is imprisonment for a term not exceeding ten years while the trial court in Count I sentenced the appellant to a fine of KES 30,000.00 in default to serve two years in jail and that the same was within the law. That section 75 which is the penal section in Count II stipulates a sentence for a first conviction to a fine not exceeding five thousand shillings or imprisonment for a term not exceeding three months. Reliance was placed on the case of *Shadrack Kipchoge Kogo v Republic eKLR*. to support its contention that there was nothing wrong with the sentence meted out by the trial court as the same was within the law.
13. This being a first appeal, I am mandated 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 court 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”. [See *Pandya v Pandya* [1957] EA (336).”
14. The main issue for determination in this case, having considered the grounds of appeal, is whether the prosecution proved its case beyond reasonable doubt. It is incumbent upon the prosecution to prove its case beyond reasonable doubt. Put differently, the onus of proof in criminal cases resides with the prosecution, save for some circumstances, such as those in Section 111 of the [Evidence Act](#), where the burden of proof shifts to the accused person in which case, the standard of proof is on a balance of probability.
15. Section 46 of the [Traffic Act](#), Cap 403 of the Laws of Kenya, provides that:

“46. 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...”
16. The appellant herein has contended that the prosecution did not prove its case beyond any reasonable doubt and that the court convicted him on insufficient evidence. That there were obvious contradictions in the evidence adduced by PW1, PW2 and PW5 in reference to the direction the motor vehicle that knocked down the deceased was moving. It was contended that PW1 and PW2 who alleged to have been eye witnesses to the accident were emphatic in their evidence that the motor vehicle that knocked the deceased was being driven from Embu towards Kibugu while PW5 who also alleged to have been an eye witness testified that the vehicle was being driven from Kibugu towards Embu after knocking the deceased.
17. Further, PW6 the investigating officer equally stated that upon the occurrence of the accident, he proceeded to the scene and found many people gathered at the said place. That he tried to gather information from the members of the public if anybody took the registration number of the said motor vehicle which allegedly caused the accident but no one gave out the same to him. It was not until the 16/9/2020 when PW3 gave the registration number to the Base Commander at Embu Police Station.



18. The appellant has also contended that PW1, PW2 and PW5 the alleged eye witnesses, gave contradicting evidence before the court. In *Erick Onyango Ondeng' v Republic* [2014] eKLR, the Court of Appeal cited *Twebangane Alfred v Uganda*, (Crim. App. No 139 of 2001, [2003] UGCA, 6, in which the Court of Appeal of Uganda stated:

With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

19. The question therefore is whether the above witnesses' evidence was contradictory on the occurrence of the accident and whether the contradictions (if any) are grave and point to deliberate untruthfulness or whether they affect the substance of the charge.
20. In this regard, I seek to benefit from the definition by the Court of Appeal of *Nigeria in David Ojeabuo v Federal Republic of Nigeria* [2014] LPELR 22555 that:-

"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

21. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. [See *Osetola v State* [2012] 17 NWLR (Pt1329) 251]. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. [See *Theophilus v State* [1996] 1 NWLR (Pt. 423) 139].
22. Similarly, the Court of Appeal in *Richard Munene v Republic* [2018] eKLR set the law on what inconsistency or contradiction would sway the court when it said :-

"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."(Emphasis added).

23. Applying the above tests, can the prosecution be said to have proved its case beyond any reasonable doubt and can the contradictions be said to have been material. It is true that the evidence of PW5 contradicted that of PW1 and PW2 on the direction the motor vehicle was moving. However, the



evidence of PW 6 who visited the scene confirmed that the body of the deceased was lying on the left side of the road facing Kibugu and that he must have been hit from behind which implies that the vehicle must have been driving from Embu to Kibugu. In any event, with the evidence of PW1, PW2 and PW6 corroborating each other this court would be prepared to disregard the contradiction as it was not material.

24. In my considered view, the merit of this appeal turns on the identity of the motor vehicle that caused the accident on the material day. PW 1, PW 2 and PW5 were eye witnesses. They testified that they identified the vehicle that hit the deceased as motor vehicle registration number KAZ 003K. According to PW1 the police arrived at the scene just five (5) minutes after the accident and took the body of the deceased. Similarly, it was the evidence of PW2 and PW5 that they witnessed the accident and they were still at the scene when traffic police officers arrived at the scene. PW1 and PW5 did not disclose to the police officers the registration number of the vehicle while PW2 in his evidence stated that he disclosed the same to the police.
25. It is important to note that in his evidence, PW 6 who was the investigating officer testified that he got the registration number of the vehicle on the 16/9/2020 which was five days after the accident and the information was given to the Base Commander by PW3 who was not even at the scene when the accident occurred. It is not clear from the evidence on record how PW3 got the registration number that he gave to the Base Commander. Further, the Base Commander himself was not called as a witness to shed more light on why he believed PW 3 when he gave him the registration number of the vehicle. Further, if indeed PW 2 saw and identified the vehicle that caused the accident and gave that information to the police as he alleged in his evidence, why didn't PW 6 state as much in court? It is also worth noting the circumstances under which the accident occurred. First, the evidence before the court is that it was at night. Secondly, the vehicle was speeding and thirdly, the driver did not stop after the accident. In my considered view, any purported identification of the vehicle and its registration number cannot be said to have been free from any possibility of error and this created a lot of doubts in the mind of this Honourable Court.
26. In the circumstances, I find that the conviction of the appellant was not save. I hereby allow the appeal and quash the conviction and set aside the sentences in the two counts.
27. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

