



REPUBLIC OF KENYA



**Muchai v Republic (Criminal Appeal 26 of 2020)
[2023] KEHC 2863 (KLR) (4 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 2863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 26 OF 2020**

AC MRIMA, J

APRIL 4, 2023

BETWEEN

BENARD MUCHAI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. Mrs. V. Karanja, (Senior Resident Magistrate) in Kitale Chief Magistrate's Court Traffic Case No. 180 of 2018 delivered on 7th May, 2020)

JUDGMENT

Introduction:

1. The Appellant herein, Benard Muchai, was charged before the Chief Magistrates Court at Kitale in Traffic Case No. 180 of 2018 with three offences under the [Traffic Act](#), Cap. 403 of the Laws of Kenya.
2. The offences are as follows: -

Count I:

Causing death by dangerous driving contrary to Section 46 of the [Traffic Act](#):

On 31st May 2017 at about 10:00 a.m. along the Kitale – Eldoret road in Trans Nzoia County, being the driver of motor vehicle registration number KCK 895C Toyota matatu, the Appellant drove the said motor vehicle on a public road recklessly and at a speed 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 motor vehicle and the amount of traffic which is actually at the time and which might reasonably be expected to be on the road, improperly overtook another motor vehicle and collided with an oncoming motor vehicle registration number KCE 418Z FAW Lorry and as a result of the collision, caused the death of a passenger in the matatu namely Isabella Wamboi.



Count II:

Causing death by dangerous driving contrary to Section 46 of the *Traffic Act*:

On 31st May 2017 at about 10:00 a.m. along the Kitale – Eldoret road in Trans Nzoia County, being the driver of motor vehicle registration number KCK 895C Toyota matatu, the Appellant drove the said motor vehicle on a public road recklessly and at a speed 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 actually and which was expected to be on the road, improperly overtook another motor vehicle and collided with an oncoming motor vehicle registration number KCE 418Z FAW Lorry and as a result of the collision, caused the death of a passenger in the matatu namely Samuel Kipngetich Kipkirui.

Count III:

Reckless driving

On 31st May 2017 at about 10:00 a.m. along the Kitale – Eldoret road in Trans Nzoia County, being the driver of motor vehicle registration number KCK 895C Toyota matatu, the Appellant drove the said motor vehicle on a public road recklessly and at a speed 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 actually at the time and which might reasonably be expected to be on the road, improperly overtook another motor vehicle and collided with an oncoming motor vehicle registration number KCE 418Z FAW Lorry and as a result of the collision, three passengers sustained serious injuries.

3. The Appellant denied the charges and he was tried. He was subsequently found guilty as charged and was convicted. He was sentenced to pay fines of Kshs. 200,000/=, Kshs. 200,000/= and Kshs. 50,000/= on the three charges respectively and in default to serve a cumulative term of 5 years imprisonment.

The Appeal

4. Dissatisfied with the findings of the trial Court, the Appellant filed the present appeal through Messrs. J. M. Kimani & Co. Advocates.
5. He faulted the trial Court for failing to critically evaluate the evidence and to consider its totality hence arrived at an erroneous decision. He cited that the evidence was too scanty to sustain any conviction adding that the prosecution had failed to discharge its burden of proof to the required standard.
6. The Appellant lamented that his defence was not considered and that the Court severally misdirected itself. Finally, he grounded that the trial Court erred in failing to consider his mitigating circumstances thereby arriving at a harsh sentence.
7. He prayed that the Appeal be allowed and the convictions be quashed and the sentences set aside. He further prayed that the fines which he paid be refunded.
8. The appeal was heard by way of written submissions. Counsel, however, briefly highlighted on the submissions.
9. The Appellant's submissions were dated 4th October, 2022. He argued that the final resting place of the 3 vehicles involved in the accident was in the maize plantation on the left side facing Eldoret. Further, he submitted that since there were two conflicting positions on how the accident occurred, then the Court was invited to carefully analyze the evidence in totality. In his view, his version of facts was truthful as it was supported by the sketch map produced by the police officer.



10. In buttressing his appeal further, the Appellant submitted that the investigating officer failed to interview him before preferring charges. The charges, he continued, were purely based on the account of PW1. As a result, they were biased.
11. The Appellant relied on DW2's evidence to conclude that he was not overtaking any vehicle when the accident occurred. That he had indicated to turn left and proceeded to do so. If anything, he submitted that the lorry was overtaking at a high speed hence the accident. He further observed that no skid or brake marks were found at the accident scene thus negating PW1's account. He discounted PW3's evidence as secondary since she was seated at the back of the motor vehicle.
12. Rehashing his evidence, the Appellant submitted that his version of facts remained verifiable and that the trial Court misapprehended those facts as read with the law thereby came to a wrong conclusion. This led to a miscarriage of justice.
13. Based on the totality of the above, the Appellant was of the view that the lorry was to be blamed for causing the accident since it encroached on his lane and forced him to swerve to the extreme left side of the road. No explanation had been given to establish how it ended up on the left lane. He punched several doubts in the evidence of the prosecution to conclude that it had failed to discharge its burden of proof being beyond reasonable doubt. He urged this Court to allow his appeal.
14. The prosecution's submissions were dated 14th November, 2022 and filed on even date. It opposed the appeal. It was submitted that all the charges had been proved to the required standard of proof.
15. Learned Counsel argued that the trial Court arrived at a proper conclusion having evaluated the evidence in totality. It dismissed all grounds cited in the Petition of Appeal lauding the analysis and final orders rendered by the trial Court.
16. It prayed that the appeal be dismissed.

Analysis

17. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.
18. Having carefully perused the record, this Court is now called upon to determine whether the offences of causing death by dangerous driving and reckless driving were committed, and if so, whether by the Appellant.
19. Before this Court ascertains whether the ingredients of the said offences were proved, first the facts of the case.
20. The prosecution called a total of 6 witnesses in a bid to establish the charges against the Appellant. They were Gregory Muthiani (the driver of motor vehicle registration number KCE 418Z who testified as PW1), Evans Mundia Mungani (the driver of tuk-tuk vehicle registration number KTWA 546D and who testified as PW2), Selina Wanjiku Njenga (a passenger who was in motor vehicle registration number was KCK 895C make Matatu and who testified as PW3), A Clinician one John Koima who testified as PW4, No. 77962 Cpl. Moses Kwelel who was the Investigating officer and who testified as PW5) and Dr. Okumu Otieno Moses who testified as PW6.



21. On being placed on his defence, the Appellant gave a sworn testimony and called a witness one Mbutia Stephen who testified as DW2.
22. It was the prosecution's case that on 31st May, 2017, PW1 was driving motor vehicle registration number KCE 418Z make FAW Lorry (hereinafter referred to as 'the Lorry') from Eldoret towards Kitale on the right side of the highway at a speed of 50kph.
23. The lorry carried goods weighing 10 tons. PW1 met a tuk-tuk vehicle registration number KTWA 546D (hereinafter referred to as 'the tuk-tuk') on its way at around 10:00 a.m. followed by a matatu whose motor vehicle registration number was KCK 895C (hereinafter referred to as 'the Matatu') both heading towards Eldoret. The Matatu was about 10 meters from the lorry and surprisingly it was on the way of travel of the lorry; that was on the left side of the highway leading to Kitale.
24. The tuk-tuk was driven by PW2. He testified that he was aboard the tuk-tuk together with two passengers and some luggage.
25. It was PW1's evidence that the Appellant suddenly commenced the process of overtaking the tuk-tuk. PW1 saw the Matatu at such a close range of about 10 metres away. It was PW1's evidence that the Matatu, however, did not manage to overtake the tuk-tuk. As it speeded back to its lane, its rear part collided with the right side of the lorry. The collision forced the lorry to skid and as PW1 applied brakes, the lorry drifted to the right and hit the tuk-tuk.
26. Out of the impact, the Matatu rolled out of the road and landed on the left side of the road facing the general direction to Eldoret. The tuk-tuk also landed on the same side as the matatu into a nearby maize farm.
27. Resultantly, one passenger died on the spot while several others sustained injuries and were rushed to Hospital.
28. PW1 blamed the Appellant for recklessly overtaking. PW1 was interrogated by the police who arrived at the scene and he later recorded a statement at the Kitale Police Station.
29. PW2 corroborated the evidence of PW1. He stated that upon reaching Sirende area, he slowed down to an average speed of 20kph as he wanted to turn off the road unto the left side. He used the left side indicator and moved accordingly. Before the tuk-tuk was off the road, the Matatu overtook and passed him. He suddenly heard a loud bang about 6 to 7 metres ahead of him.
30. He saw the matatu roll to the left side of the road facing the general direction to Eldoret. The tuk-tuk was also hit and pushed by the lorry to the same direction as the matatu. The tuk-tuk finally landed in a maize farm. As a result of the accident, PW2 sustained injuries and was rushed to Hospital.
31. According to PW3, she was a passenger aboard the matatu and occupied seat number 8. He witnessed the matatu overtaking the tuk-tuk at Sirende area and the matatu suddenly collided with an oncoming lorry. The impact happened before the matatu completed overtaking the tuk-tuk. The matatu rolled twice before PW3 lost consciousness.
32. PW3 posited that the accident occurred in the middle of the road along the yellow line. PW3 sustained injuries on the left hand, spinal cord and right thigh. She further underwent head surgery. She blamed the Appellant for causing the accident as he neither overtook the tuk-tuk when it was safe to do so nor did he indicate before overtaking. She also blamed the Appellant for driving the matatu at a high speed.



33. PW4 produced the P3 form in respect to PW3. He testified that PW3 sustained a deep cut wound on the forehead above the right eye, deep cut on the face, stained fracture on the left eye, pains on both sides of the chest and waist and a left-hand fracture on her wrist.
34. He concluded that PW3 sustained those injuries from blunt objects. He classified the injuries as harm. The P3 Form was produced as an exhibit.
35. PW4 also produced the P3 Form for one Gladys Kemuma Ombati who was also injured in the accident. He observed that she sustained injuries on the frontal head affecting her right eye, nose bleeding, and tenderness on the chest and right elbow as well as her right ankle joint.
36. He concluded that she sustained injures from a blunt object. Her injuries were classified as harm.
37. PW4 further reproduced the P3 Form for one Titus Wafula. He observed that he sustained injuries on the hand, dislocation of the spine, clavicle bone and left back shoulder and four fractured ribs on the right side. The injuries were classified as grievous caused by a blunt object.
38. On 6th June, 2017, PW6 conducted two autopsies on the persons who had died as a result of the accident. The first one was on one Samwel Kiprotich Kipkurui. He observed that the chest was distorted and bruised on the left. There was internal bruise collection of blood on both sides of the chest cavity.
39. He formed the opinion that the deceased died as a result of massive bilateral hemothorax and compressed heart due to a road traffic accident. He produced the Post Mortem Form as an exhibit.
40. The other autopsy was for one Isabella Wambui. PW6 observed bruises on the face with evidence of right shoulder joint dislocation and fracture. Her chest was dented with bruises. Internally, she suffered bilateral hemothorax collection of blood in the chest cavity. The skull was fractured with brain exposure.
41. He formed the opinion that the deceased died due to brain damage due to severe head injury and bilateral hemothorax as a result of a road traffic accident. The autopsy report was produced as an exhibit.
42. The investigating officer, PW5, testified that on the fateful day he was on foot patrol when he was informed that an accident had occurred at Sirende area on the Kitale-Eldoret highway. He quickly retreated to the scene.
43. On arrival, he saw the three suit vehicles having been involved in the accident. All of them were on the right side of the road facing the general direction to Kitale.
44. PW5 interrogated some people at the scene (including PW1) and learnt that the matatu which was heading to Eldoret from Kitale was overtaking the tuk-tuk and in the process it collided with the lorry. On impact, the Appellant lost control, swerved to the left side of the road facing Eldoret and overturned before landing on a ditch. The collision caused PW1 to lose control, swerve to his right and hit the tuk-tuk that was pushed to the maize farm which was off the road. The lorry was also off the road.
45. PW5 testified that one passenger in the matatu died on the spot while another died on arrival at the Hospital. Others, including the Appellant, PW2 and PW3 were seriously injured.
46. PW5 drew a Rough Sketch map and a Fair Map of the scene. He produced both maps as well as an Inspection Report as exhibits.



47. Upon completing the investigations, PW5 preferred the charges against the Appellant. He blamed the Appellant for driving at a high speed and on the wrong side of the road.
48. On cross-examination, PW5 confirmed that he did not interview the Appellant at the scene as he had been rushed to hospital. He observed that there were no visible brake or skid marks on the road. PW5 established only one point of impact and marked it in the maps.
49. After close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence.
50. The Appellant narrated that upon reaching the area where the accident occurred, PW1 overtook at a close distance from his opposite direction while he was heading to Eldoret and right into the matatu's lane. With a view to avoid a collision, the Appellant swerved towards the left side to give way. The lorry then hit the matatu from seat number 4 and the matatu rolled off the road into a ditch.
51. The Appellant maintained that the tuk-tuk was not on the road and denied overtaking it. He lost consciousness and was rushed to hospital where he was admitted into the Intensive Care Unit for two months.
52. The Appellant blamed PW1 for occasioning the accident. He confirmed that he was never interrogated on the circumstances of the accident. He was aware, however, that some people died and others seriously injured. He added that had he been the one overtaking, he would have rolled on the right side.
53. DW2 testified in corroboration of the Appellant's testimony. He stated that he was aboard the matatu and sat next to the Appellant who was the driver. The matatu was driven to, and was on the left-side lane of the road, to Eldoret.
54. He recalled seeing three vehicles on the right-side lane of the road. The vehicles were heading to Kitale from Eldoret. They were a tuk-tuk, a Nissan matatu and the lorry. The tuk-tuk indicated and the Nissan slowed down. The driver of the lorry became impatient and wanted to overtake the Nissan matatu. As he did so, the lorry hit the matatu and it rolled off the road.
55. According to DW2, there was a tuk-tuk which was parked off the road on the left side heading to Eldoret. He maintained that the Appellant was not overtaking the tuk-tuk since it was off the road.
56. The Court will now ascertain whether the offences of causing death by dangerous driving and reckless driving were proved.
57. Section 46 of the [Traffic Act](#) provides for the offence of causing death by dangerous driving as follows: -

46. Causing death by driving

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.

58. Section 47 of the [Traffic Act](#) provides for the offence of reckless driving as follows: -

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—

(a) for a first conviction, to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding two years; and

(b) for a second or subsequent conviction, to a fine not exceeding three hundred thousand shillings, or imprisonment for a term not exceeding one year, and the court shall exercise the power conferred by Part VIII of canceling 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 two years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is later.

(2) Repealed by Act No. 1 of 1986, s. 13.

(3) Where a person is convicted of aiding, abetting, counselling, procuring or inciting the commission of an offence under this section, and it is proved that he was present in the vehicle at the time, the offence of which he is convicted shall, for, the purpose of the provisions of this Act relating to disqualification for holding or obtaining driving licences, be deemed to be an offence in connection with the driving of a motor vehicle.

59. This Court has already reproduced the evidence in this matter. It has also carefully reviewed the evidence and the record including the parties' submissions and the decisions referred to.

60. The prosecution's case as tendered by the six witnesses has to be weighed against the Appellant's case. The evidence of PW1 was variously corroborated by those of the rest of the witnesses.

61. Challenging the prosecution's case, the Appellant gave sworn testimony and called a witness, DW2. As such, a careful consideration of the defence is paramount.

62. It was the Appellant's testimony that on reaching at Sirende area, a lorry overtook at a close distance (See page 29 of the proceedings at page 33 of the Record of Appeal). The Appellant, however, did not state what it was that the lorry overtook throughout his entire evidence. He also did not state whether there were any other vehicles at the place where the accident occurred.

63. On his part, DW2 instead stated that he saw three vehicles at the scene. They were all on the left-side of the road heading to Kitale from Eldoret. They were a tuk-tuk, a Nissan Matatu and the lorry. According to him, the tuk-tuk slowed down and indicated. The Nissan matatu also slowed down, but the lorry



- driver became impatient and as he was overtaking the tuk-tuk he came onto the path of travel of the vehicle he was in and a collision occurred.
64. First, it is highly disturbing why the Appellant did not testify to the three vehicles which were allegedly on the other side of the road at the place where the accident occurred. Second, DW2 did not indicate the direction to which the alleged tuk-tuk indicated to be heading to. Such a clarification was very important since a vehicle can overtake on any side, and even, off the road.
 65. Third, DW2 did not testify to what happened to the other two vehicles which were on the road. It remains unclear whether any of the vehicles was also involved in the accident and if so how.
 66. The defence, in essence, contradicted the evidence of the police, unlike how the Appellant submitted that the police evidence supported his version on how the accident occurred. PW5 visited the scene before the vehicles were removed. He saw the final resting place of each vehicle. He interrogated PW1 among other people. He then came up with a Rough Sketch Map of the scene which he reduced to a Fair Map later.
 67. According to the maps, the point of impact was within the lane from Eldoret heading to Kitale. It was not on the lane heading to Eldoret from Kitale. If it is to be believed that the lorry heading to Kitale swerved from its lane onto the path of travel of the matatu, which was heading to Eldoret, so as to avoid hitting the Nissan matatu which was ahead, then it means that the lorry would have come into contact with the matatu within the lane heading to Eldoret from Kitale. However, that was not the case, instead the impact was on the lane to Kitale from Eldoret.
 68. The Appellant, hence failed to give a credible account so as to explain why the point of impact of the vehicles was on the lane heading to Kitale from Eldoret and not on the lane to Eldoret from Kitale.
 69. The version on the point of impact by PW5 was amply corroborated by PW1, PW2 and PW3. All the four witnesses gave a combined and believable version of how the accident occurred and the possible point of impact. That was not the case with the Appellant. The Appellant's case was overridden by loose ends, loopholes, doubts and statements which were outrightly contradictory, hence, unbelievable.
 70. By placing the prosecution's evidence and the defence side by side, it is apparent that the prosecution's evidence is believable and watertight. The cumulative evidence of the 6 prosecution witnesses affirms a credible state of affairs at the accident scene. The evidence is consistent, realistic and plainly truthful. To the contrary, the defence is highly doubtful. It raised several unanswered questions including why the evidence of the Appellant and DW2 did not easily tally.
 71. This Court, therefore, finds that the defence was an afterthought which was solely aimed at misleading the Court. The defence did not create any doubt whatsoever on the cogent prosecution evidence. The defence is unbelievable and is hereby dismissed.
 72. Having so said, it can only be the case that the Appellant was driving the matatu at such a high speed that he was not able to either stop as the tuk-tuk slowed down or to manage it in such a way as to safely overtake the tuk-tuk without coming into contact with the lorry. Further, the decision to overtake the tuk-tuk in full glare of the oncoming lorry amounted to a dangerous and reckless conduct that led to the death of Isabella Wamboi and Samuel Kipng'etich Kipkurui and left others injured. It was plainly unsafe for the Appellant to overtake the tuk-tuk when he saw that there was an oncoming lorry. That decision was the height of impunity and it regrettably led to loss of lives.
 73. As the driver, the Appellant ought to have remained alive to the fact that the edges of the road at the scene of accident were raised and any vehicle getting off the road risked rolling. That was the evidence



of PW5. A decision to overtake in such circumstances can only be dangerous and reckless one. That was the Appellant. He acted recklessly and dangerously.

74. The totality of the evidence affirms the position that the offences of causing death by dangerous driving and reckless driving were proved beyond any reasonable doubt.
75. The upshot of the above is that the prosecution discharged its burden to the required standard of proof and the trial Court, rightly so, found the Appellant guilty as charged and convicted him.
76. Consequently, this Court finds that the appeal against the convictions lacks merit and is hereby dismissed.

Sentence:

77. The Appellant was sentenced to pay fines of Kshs. 200,000/=, Kshs. 200,000/= and Kshs. 50,000/= on the three charges respectively and in default to serve a cumulative term of 5 years imprisonment.
78. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.
79. In this matter, the Appellant did not establish the infringements of any of the above parameters by the sentencing Court. The sentences, therefore, remain lawful and ought not to be disturbed.
80. The appeal on sentence also fails.

Disposition:

81. Drawing from the above discussion, it is apparent that the appeal is wholly unsuccessful.
82. In the end, the following orders do hereby issue: -
 - a. The appeal is wholly dismissed.
 - b. The file is marked as closed.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 4TH DAY OF APRIL, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Muhoro, Learned Counsel for the Appellant.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Chemutai – Court Assistants.

