



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kiarie v Republic (Criminal Appeal E014 of 2022)  
[2023] KEHC 20356 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20356 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E014 OF 2022  
PM MULWA, J  
JULY 13, 2023**

**BETWEEN**

**GEORGE MBUGUA KIARIE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. E. Ominde (CM) in Kiambu Chief  
Magistrate's Traffic Case No. 719 of 2018 delivered on 23rd March 2022)*

**JUDGMENT**

1. The Appellant was charged, tried, and convicted of the offence of causing death by dangerous driving contrary to section 46 of the Traffic Amendment Act No. 2 of 2012 cap 403 Laws of Kenya. He was also charged but acquitted on a second count of failing to stop after an accident contrary to Section 73(1) as read with Section 75 of the Traffic Act.
2. The particulars were that on the 8<sup>th</sup> day of September 2018 at about 2205 hours at Sacred Heart along Banana - Ruaka bypass road within Kiambu County being the driver of Motor Vehicle Registration No. KAN 032E Peugeot Salon drove the said vehicle at a speed that was dangerous to the public having regard to the nature and use of the road at that time thus hit a pedestrian namely Jacinta Muniva Mutie who died on the spot.
3. On 18<sup>th</sup> September 2018, the appellant pleaded not guilty to the charge(s). In an attempt to prove its case, the prosecution called a total of 6 witnesses. The accused gave sworn evidence and did not call a witness.
4. In her judgment on 23<sup>rd</sup> March 2022, the learned trial magistrate acquitted the appellant on the second count but convicted him on the first count of causing death by dangerous driving. The appellant was thereafter sentenced to pay a fine of kshs. 100,000/= and in default serve 3 years' imprisonment.



5. Aggrieved by the judgment the appellant filed a petition of appeal dated 6<sup>th</sup> April 2022, raising the following 5 grounds:
- i. The learned trial magistrate erred in fact and in law in holding that the prosecution had established beyond a reasonable doubt about the charge of causing death by dangerous driving contrary to section 46 of the [Traffic Amendment Act](#) No. 2017 of 2012 when no sufficient evidence had been adduced to that effect by the prosecution.
  - ii. The learned trial magistrate erred in fact and in law in relying on circumstantial evidence in convicting the appellant, which circumstantial evidence could only be construed in any event in favour of the appellant.
  - iii. The learned magistrate erred in law and in fact in failing to find that the evidence of the only witness who witnessed the accident to wit PW1 was contradictory in that his statement recorded at the police station and the evidence given in court was totally at variance, the court should have given the benefit of doubt to the appellant.
  - iv. The learned trial magistrate erred in law and fact in shifting the burden of proof to the appellant.
  - v. The learned trial magistrate erred in law and in fact in failing to hold that the evidence of the material witness on Joseph Kimani, the person who allegedly came to the aid of PW1 at the scene of the accident not having been called as a witness by the prosecution, the failure to call the said witness should have been construed in favour of the appellant and an adverse inference drawn against the prosecution.
6. He proposed to ask that the entire judgement of the trial court be set aside and he be set at liberty.
7. The appeal was canvassed by way of written submissions.

### **Appellant's submissions**

8. In his submissions filed on 18<sup>th</sup> April 2023, counsel submits that the evidence of PW1 was contradictory and irreconcilable. He testified that he was with the deceased at the time of the accident while in his written statement, he wrote he went home and found the deceased was not home and he heard about the accident. In the presence of an irreconcilable statement, the evidence of PW1 was not credible.
9. Joseph Kimani was a crucial witness who was not called by the prosecution, but is the one who informed PW1 of the occurrence of the accident. The failure by the prosecution to call a material witness is to risk an adverse inference being drawn.
10. The trial court relied on circumstantial evidence to convict the appellant and failed to establish the conditions set in [Chiragu & Another v Republic](#) Civil Appeal No. 104 of 2018.
11. The trial court failed to make a finding on the appellant evidence. He urged the court to allow the appeal and order that the fine paid is refunded to the appellant.



## **Respondent's submissions**

12. In opposing the appeal, the respondent filed submissions on 23<sup>rd</sup> January 2023, wherein it was submitted that the offence of causing death by dangerous driving is provided under Section 46 of the [Traffic Act](#).
13. Counsel submitted the evidence of PW1 was cogent and consistent that the appellant was driving at a very high speed at night and as a result knocked down the victim. The evidence of PW4 was corroborated by PW5 who testified they were riding with the appellant who confirmed they heard a loud bang, and the appellant told them he had hit someone.
14. Further, counsel submitted the place where the body was thrown after the point of impact indicates the driver was driving at a high speed. That the appellant was to blame for the accident as per the evidence adduced in the trial.
15. It was submitted for the respondent that the circumstantial evidence and documentary evidence adduced justified the inference of guilt on the appellant. That the prosecution proved its case beyond all reasonable doubt and the appeal should be disallowed and the conviction and sentence upheld.

## **Facts and evidence before the trial court**

16. PW1 - Paul Kasomo testified that Jacinta Muniva was her fiancée and they were living together. On 8<sup>th</sup> September 2018 at 10.30 pm, they were together heading home. They boarded a Matatu at the Ruaka stage and alighted at a stage near their home. That they were about to finish crossing the road when a vehicle appeared moving at a very high speed and hit the deceased from behind.
17. He told the court the vehicle may have come off the road, he heard a loud bang, the deceased was thrown about 5 meters off the road, and the vehicle did not stop. He said he screamed and some young men came to help. Using a taxi, they took the deceased to Karuri dispensary but she was already dead. He told the court he did not capture the vehicle's registration number. He also did not see the driver but blamed him for the accident.
18. In cross-examination, PW1 told the court that the statement with the police was not true that he had stated that he had arrived home at 23.30 hours found the door locked, called the deceased phone and got information that there was an accident. He maintained that he was with the deceased when the accident happened. He told the court when they alighted from the matatu he checked the road and noticed there was no vehicle before they could cross. The vehicle did not stop after the accident.
19. In re-examination PW1 maintained that he narrated to the police the account of what had transpired and that he had found the police officer had recorded the statement and did not have time to read through and he just signed.
20. PW2 - David Munyao Mutie testified that the deceased was his sister. He received a call on 9<sup>th</sup> September 2018 from PW1 informing him that his sister had been involved in an accident and sustained serious injuries. He was told they meet at Kihara Hospital and when he arrived he found the sister was dead. He moved the body to the city mortuary on 11<sup>th</sup> September 2018 and identified the same to the pathologist for purpose of the post-mortem.
21. PW3 - Simon Wambua Mutuku stated he was the deceased cousin. That on 9<sup>th</sup> September 2018 his other cousin Stella Ndinda called to inform him that their cousin Jacinta Munyiva had been involved in an accident and had passed on the previous night. He called PW2 who confirmed the incident. He later identified the body to the pathologist on 11<sup>th</sup> September 2018.



22. PW4 - Margaret Waithera Mbugua told the court that the accused was her husband. On 8<sup>th</sup> September 2018, at 10.05 pm they were travelling with the accused and their son from Nyahururu. That she was seated as the co-driver and before Banana area the accused was driving at a speed of 50 km/h. That she slept at some point of the journey. And she heard a loud bang and her husband told her it was an accident. The windscreen was smashed and there was damage on the bonnet. The accused stopped briefly but then they drove to Karuri Police Station and reported the accident. She could not tell how the accident occurred.
23. In cross-examination PW4 testified that their vehicle was at a speed of 50km/h and that it was not overtaking and the headlights were on.
24. PW5 - Peter Kiarie Mbugua testified that the accused was his father. He was seated at the back seat and was using his computer. Just before Banana heading to Sacred Heard stretch he heard a loud bang. He did not see anything before the bang. He said the accused was driving at a speed of 50 Km/h as he was able to use his laptop. The accused stopped briefly and after assessing the situation they drove to Karuri Police Station to report the incident.
25. He told the court the section of the road has no street lights and neither are there speed bumps. The vehicle was damaged at the front bonnet.
26. In cross-examination he told the court that he used his laptop occasionally and from his assessment the vehicle was not badly driven
27. PW6 - Eric Kirui attached to Karuri police station was the investigating officer. He testified that on 8<sup>th</sup> September 2018 at 2040 hrs the accused went to the station and reported an accident involving motor vehicle KAN 032E and a pedestrian along Ruaka - Banana Road. He was in the company of his wife and son. He detained the vehicle. At about 2300 hours a good samaritan Kitheka went to the station to report that a victim of an accident had succumbed. He visited the scene at night but did not draw sketch maps. But on the following day, he went back to the scene in the company of the accused and Kitheka, and he drew some sketch maps.
28. According to his assessment, gauging from the place where the deceased body had been thrown, the accused was driving at a high speed. The post-mortem report showed the victim had multiple injuries on the head and abdomen due to blunt force trauma.
29. In cross-examination he told the court the accused was driving at a speed of 80 km/h and that there was no contribution to the accident by the deceased. At the scene, there was a sharp bend of the road at the point of impact. He told the court the deceased was not wearing a reflective jacket but he could be seen by a driver driving at 50km/hr. He further told the court that he charged the accused with the offence of failing to stop after the accident as he did not take the victim to the hospital after the accident.
30. Having been put on his defence the accused (DW1) gave sworn evidence. He told the court on 8<sup>th</sup> September 2018 he was driving motor vehicle KAN 032E from Olkalou heading to Mucatha. At about 10.00 pm and a short distance from Banana town, while driving at a speed of 50 km/h he heard a bang on his vehicle. He noticed that someone had banged his vehicle. He stopped but did not see anyone, but he noticed the centre of the bonnet was dented. He turned and went to report at Karuri Police Station. According to the accused, Kitheka did not witness the accident but heard about it from Joseph Kimani. He denied driving dangerously. He said he drove at a safe speed.



## Analysis and determination

31. I have considered the appeal, the evidence on the record as adduced before the trial court, and the submissions filed. The issues for determination are:
- i. whether the prosecution proved its case against the appellant beyond any reasonable doubt and
  - ii. whether there were material discrepancies in the prosecution evidence adduced before the trial court.
32. This being the first appellate court, it is duty bound to re-evaluate the evidence that was adduced before the trial court and come to its own conclusion bearing in mind that it never saw or heard the witnesses testify.
33. In *Okeno v Republic* [1972] EA 32 the Court of Appeal set out the duties of a first appellate court as follows: “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination...and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
34. That position was upheld in *David Njuguna Wairimu v Republic* [2010] eKLR as follows: “The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions 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 conclusions 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 decision.”
35. The appellant was charged with the offence of causing death by dangerous driving contrary to Section 46 of the *Traffic Act*. The said provisions provide thus: “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 license or provisional driving license held by the offender and declaring the offender disqualified for holding or obtaining a driving license 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.”
36. The appellant faults the prosecution for not calling the crucial witnesses who responded to the scream and helped PW1 to take Jacinta (deceased) to the hospital.



37. The prosecution has the discretion of calling the witnesses whom it thinks will favour its case. It is not duty-bound to call all witnesses that were involved or witnessed a certain transaction.
38. Section 143 of the *Evidence Act* provides that: No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.
39. In *Keter v Republic* [2007] 1 EA 135 the court was categorical that: “The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”
40. Accordingly, this court is not persuaded that the failure of the prosecution/respondent to call Kimani as a witness is fatal to the prosecution case. The prosecution arraigned in court the crucial witnesses who supported the charges it had preferred. It is not the appellant’s concern to dictate the witnesses the prosecution would call to support the charge.
41. With respect to the alleged inconsistencies, contradictions and discrepancies what was doubted was the fact that PW1 was with the deceased at the time of the accident as per what he stated in court and what was in his statement that he went home and found the door locked the deceased was not home and he was informed of the occurrence of the accident. PW1 in cross-examination testified he was with the deceased at the time of the accident and told the court to disregard the evidence in the witness statement.
42. Be as it may the issue is the accident did happen which is not disputed by the appellant. Whether PW1 was at the scene or not will not in any way invalidate the occurrence of the accident. The passengers in the motor vehicle, PW4 and PW5, testified they heard a loud bang in which the appellant confirmed to have hit someone.
43. In *Willis Ochieng Odero v Republic* [2006] eKLR, the Court of Appeal held: “As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of Section 382 of the *Criminal Procedure Code*.”
44. The appellant himself admits to hitting someone, and he proceeded to record a statement at Karuri police station, therefore the contradictions by PW1 are per se not prejudicial to the circumstances of the case. This court notes indeed an accident did happen which was caused by the appellant. The evidence of PW1 was corroborated by PW4 and PW5 who were driving with the appellant at the time of the accident and confirmed they heard a loud bang and the appellant informed them he had hit someone.
45. PW4 and PW5 testified the vehicle was being driven at a speed of 50 km/h. This court notes the extent of the damage to the motor vehicle does not match with the alleged speed of 50 km/h. The windscreen was shattered. The witnesses also seem to agree that the accident occurred on a road bent and it is reasonably expected that motorists exercise caution when approaching such a road. This court finds that the appellant failed to exercise caution and the prosecution proved its case beyond reasonable doubt.
46. On the allegations that the appellant’s defence was not considered, I find no substance in the ground of appeal and submission as the trial magistrate considered the appellants’ defence and weighed it against the prosecution witnesses’ evidence, before proceeding to hold a conviction against the appellant.
47. This court therefore find that the conviction and sentence of the appellant were safe.
48. Accordingly, the court affirms the conviction and sentence. The appeal is dismissed.

Orders accordingly.



**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 13TH DAY  
OF JULY, 2023**

.....

**P. M. MULWA**

**JUDGE**

**In the presence of:**

Kinyua – court assistant

Mr. Karoki h/b for Mr. Maina - for the appellant

Mr. Muriuki (SC) - for the respondent/state

