Mwaniki v Republic (Criminal Appeal 14 of 2019)
[2023] KEHC 20130 (KLR) (11 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20130 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 14 OF 2019

CW GITHUA, J

JULY 11, 2023

BETWEEN

CHARLES KARIUKI MWANIKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant, Charles Kariuki Mwaniki was charged, tried and convicted of the offence of causing death by dangerous driving contrary to section 46 of the *Traffic Act*.

2. The particulars were that on 1st October, 2012 at about 22.00 hours along Murang'a-Kenol road in Murang'a County, being the driver of motor vehicle registration number KBJ 058D Toyota matatu, he drove the vehicle in a manner that was dangerous to the public having regard to all circumstances of the case including, the nature, condition and use of the road at the material time as a result of which he rammed into the rear of motor vehicle registration number KAY 197Q, make Mitsubishi lorry, which led to the death of one passenger namely, Patrick Comba Gatuma.

3. Upon conviction, the appellant was sentenced to serve a custodial sentence of three years imprisonment. He was aggrieved by his conviction and sentence hence this appeal.

   In the petition of appeal filed on his behalf on March 26, 2019 by his advocates, Ms. Kirubi Mwangi Ben & Company Advocates, the appellant raised six grounds of appeal which can be compressed to two main grounds as follows;

   i) That the learned trial magistrate erred in law and fact by convicting him on evidence which did not prove his guilt as charged beyond any reasonable doubt as the evidence failed to establish the essential ingredients of the offence of causing death by dangerous driving.

ii) That the learned trial magistrate erred in law and fact by sentencing him to three years imprisonment without taking into account his mitigation and the fact that he was a first offender.

4. The appeal was prosecuted by way of written submissions. The appellant's submissions were filed on February 17, 2023 while those of the respondent were filed on January 18, 2023. The submissions were orally highlighted before me on May 29, 2023 by learned counsel Mr. Kirubi who appeared for the appellant and learned prosecution counsel Ms. Muriu who represented the respondent.

5. This being a first appeal to the High Court, I am enjoined to scrutinize and re - evaluate the evidence presented before the trial court to arrive at my own independent conclusion regarding whether or not to uphold the appellant's conviction and sentence bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witness.

6. This duty of the first appellate court has been succinctly articulated in a plethora of authorities by both the High Court and the Court of Appeal but for purposes of this judgement, it will suffice to cite *Kiilu & another v Republic* [2005] 1 KLR174 where the Court of Appeal stated 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 to appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.
>
> 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 findings and 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"

7. The record of the trial court shows that in support of its case, the prosecution called a total of six witnesses. Two of them, PW1 and PW2 were eye witnesses to the accident in question. PW1 Mr. Amos Oluoch Otieno was the driver of the other vehicle involved in the collision, a lorry registration number KAY 197Q. He testified that on 1st October, 2012 at around 10 PM, he was driving the aforesaid lorry which was transporting concrete poles from Thika to Muran'ga and as he was driving uphill near Wanjii area, a public service vehicle registration number KBJ 058D (the matatu) rammed into its rear. He came out of the lorry and noted that several passengers were trapped in the matatu which was extensively damaged. He assisted in taking the injured passengers to hospital for treatment.

8. In his evidence under cross examination, PW1 stated that he had tied red ribbons and reflective tapes on the right and left side of the lorry to warn other motorists about the load the lorry was carrying. He also denied the appellants claim that the accident was caused by some poles which fell from the rear of the lorry and landed on the matatu.

9. PW2, Mr. Nicholas Macharia, was one of the passengers in the ill fated matatu. He recalled that on 1st October, 2012, at around 10 PM, he was travelling aboard the matatu from Nairobi to Kangema. He recalled that from a place known as Kenol, the driver of the matatu started over speeding and refused to heed his advice to reduce speed. At Makuyu, the driver attempted to overtake a lorry which was carrying logs (referring to the concrete poles) but was unable to do so since there was an oncoming vehicle. He lost control and the matatu rammed into the rear of the lorry crashing into the logs.

10. As a result of the accident, one of the passengers who was the matatu conductor died on the spot while he sustained multiple injuries on the head, chest and right leg. He identified the appellant as the person who was driving the matatu at the material time.

11. The accident was reported to PW6 P.C Elisa Suter who proceeded to the scene accompanied by another police officer.

    She drew both a rough and fair sketch plan of the scene which she produced in evidence as PExhibit 3 and PExhibit 4 respectively. In the course of her investigations, she caused the two vehicles to be examined by a gazzetted motor vehicle examiner. The inspection report prepared in respect of the matatu shows that the vehicle was extensively damaged to the extent that its pre-accident condition could not be established. Motor vehicle Regs. No. KAY 197Q on the other hand only had its rear side head lights damaged. The two inspection reports were produced in evidence by PW5 as P Exhibit 2 (b) and 2(a) respectively.

12. The fact that the matatu conductor died as a result of the accident was established by the evidence of his widow who testified as PW3 and PW4, the doctor who carried out an autopsy on his body. He produced his post mortem report as P.Exh. 1.

13. When placed on his defence, the appellant elected to give a sworn statement and did not call any witness. In his evidence, he admitted having been the driver of the matatu but denied having caused the accident by dangerous driving. He claimed that he had been driving carefully keeping his distance and that it is the lorry which reversed and made the logs hit the matatu. He recalled having seen the lorry ahead of him and noting that it was emitting a lot of smoke.

14. After carefully considering the grounds of appeal, the evidence on record alongside the parties both written and oral submissions as well as all the authorities cited, I find that two key issues arise for my determination in this appeal which are whether the prosecution proved the guilt of the appellant as charged beyond any reasonable doubt and if so, whether the learned trial magistrate erred when sentencing him.

15. On behalf of the appellant, it was submitted that the evidence of PW1 and PW2, the only eye witnesses to the accident was contradictory and that the evidence adduced by the prosecution taken as a whole only proved that an accident occurred in which a person died but did not prove that the accident was caused by the appellants dangerous driving; that therefore , the offence preferred against the appellant had not been proved beyond reasonable doubt.

16. The respondent contested the appeal and the appellants submissions and asserted that the evidence adduced by the prosecution proved beyond any reasonable doubt that the accident in which the late Patrick Comba Gatuma lost his life was solely caused by the appellants dangerous driving; that the appellant was properly convicted and his appeal should be dismissed for lack of merit.

17. In addressing the first issue, the starting point is to set out the elements that constitute the offence of causing death by dangerous driving. To justify a conviction for the offence, the prosecution must prove to the required legal standard that the accident in question was caused by a situation which, viewed objectively, was dangerous and was caused by the fault of the accused person in the manner in which he / she drove the subject motor vehicle.

18. The fault required to be established against a driver facing the offence of causing death by dangerous driving was defined by the court of Appeal in *Timothy Orwenyo Missiani v Republic* [1979] eKLR in the following terms;

> 'Fault certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame .. fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it is a momentary lapse, even though normally no danger would have arisen from it is sufficient....."

19. I entirely agree with learned counsel Mr. Kirubi's submission that proof of occurrence of an accident in which a person died is by itself not sufficient to establish the offence of causing death by dangerous driving. The prosecution must in addition prove that the accident was caused by the accused person's dangerous driving. And in determining the accused persons culpability, the court must consider all the circumstances surrounding occurrence of the accident including the nature, use and condition of the road.

20. In this case, as correctly observed by the learned trial magistrate, it was not disputed that there was an accident involving the aforesaid motor vehicles in which one of the passengers in the matatu died on the spot. In convicting the appellant, the learned trial magistrate after analysing the evidence tendered by both the prosecution and the defence stated as follows;

> ... The evidence before the court suggest that the matatu rammed into the back of the lorry and no poles fell off. If the driver had noticed the smoke and kept a distance from the lorry, then there is no way the two vehicles would have collided. He ought to have kept a safe distance....As a result, I do believe the prosecution. That the driver of the motor vehicle matatu rammed into the back of the lorry. .....In fact, the extent of the damage on the matatu Nissan is a testimony that it rammed into the lorry at high speed and not the lorry reversing into it or at the very least, poles falling backwards into the matatu, the poles were intact...."

21. After my own independent appraisal of the evidence on record, I find no reason to fault the above findings by the learned trial magistrate because they are supported by the evidence on record.

    Contrary to the submissions made on behalf of the appellant, I did not find any material contradiction between the evidence of PW1 and PW2 who gave direct evidence on how the accident occurred. Both witnesses were consistent in their evidence that the collision occurred because the appellant who had been over speeding, rammed into the rear of the lorry. PW2 recalled that the appellant had attempted to overtake the lorry but rammed into its rear when he was forced to go back to his lane after noticing an oncoming vehicle. It is not disputed that the accident happened at night on a hilly stretch of the Kenol-Murang'a Road. The claim that the appellant was over speeding is buttressed by the impact of the accident which is demonstrated by the excessive damage caused to the matatu and the instant death of the matatu conductor.

22. The appellant's conduct of driving a vehicle in which he was conveying passenger's at an uncontrollable speed and attempting to overtake the lorry on a hilly stretch of the road at night before ascertaining that it was safe to do so endangered not only the safety and life of his passengers but also other members of the public who were using the road at the material time.

23. In my view, the appellant's conduct as described above amounted to reckless and dangerous driving. The fact that he admitted in his defence that he had seen the lorry ahead of him and noted that it was emitting heavy smoke yet he failed to reduce his speed or keep a safe distance is further evidence that he completely failed the test of prudent, reasonable and careful driver. I believe I have said enough to demonstrate that I am satisfied that the prosecution proved its case against the appellant beyond any reasonable doubt and that he was properly convicted.

24. On the appeal against sentence, it was argued on behalf of the appellant that the learned trial magistrate erred by imposing a custodial sentence of three years imprisonment without the option of a fine; that given his mitigation, he was entitled to a non-custodial sentence.

25. At the outset, I wish to reiterate that as a general rule, sentencing is a matter that rests with the discretion of the trial court. This is the reason why the mandate of an appellate court to interfere with sentences imposed by the trial court is limited to existence of certain circumstances. These circumstances were well captured by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR where the court expressed itself thus;

> .....On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle.
>
> Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

26. In addition to the above circumstances, an appellate court can disturb a sentence meted out by the trial court if it was satisfied that the lower court abused its discretion when sentencing an appellant or that the sentence was harsh and manifestly excessive in the circumstances of the case.

27. In this case, the record reveals that the appellant was a first offender since the prosecution did not have a record of any previous conviction. The learned trial magistrate in her pre-sentence notes did not indicate whether or not she had considered the fact that the appellant was a first offender. The learned trial magistrate appears to have considered only the nature of the offence , its prescribed penalty and the appellants mitigation before imposing a custodial sentence of three years imprisonment. She did not state on the record why she found a custodial as opposed to a non-custodial sentence appropriate in this case.

28. The Court of Appeal in *Timothy Orwenyo Missiani v Republic* [Supra] after discussing the principles that should guide courts in sentencing persons convicted of the offence of causing death by dangerous driving stated as follows;

> "The offence of causing death by dangerous driving is not an ordinary type of crime. While it cannot be given an aura of protection by putting it in a glass case of its own, the people who commit this offence do not have a propensity for it, neither is it a type of crime committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interests of justice as well as the interest of the public. There are of course cases where custodial sentence is merited, for example where there is a compelling feature such as an element of intoxication or recklessness."

29. Although the sentence imposed by the trial court was lawful as it was within the punishment prescribed by the law, it is my opinion that a custodial sentence of three years imprisonment without the option of a fine for a traffic offender who did not have a record of previous convictions was harsh and manifestly excessive.

    In the premises, the appellant's appeal against sentence succeeds. The sentence imposed by the trial court is hereby set aside. It is substituted with a sentence of fine of Kshs.100,000 in default to serve one year imprisonment.

30. In addition, in compliance with the mandatory provisions of section 46 of the *Traffic Act* which the learned trial magistrate failed to comply with, the appellant's driving licence is hereby cancelled. He is disqualified from holding or obtaining a driving licence for a period of one year with effect from the date he either pays the above fine or completes the sentence in default of payment of the fine.

31. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 11TH DAY OF JULY, 2023.

C. W GITHUA

JUDGE

In the Presence of:

Mr. Mwangi Ben for the Appellant

The appellant

Ms. Muriu for the Respondent

Mr. Quinteen Court Assistant