Mukhwana v Republic (Criminal Appeal 47 of 2020)
[2023] KEHC 22485 (KLR) (22 September 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 47 OF 2020

JRA WANANDA, J

SEPTEMBER 22, 2023

BETWEEN

PATRICK OTSALO MUKHWANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Kakamega Chief Magistrate's Court Traffic Case No. 10 of 2017)

JUDGMENT

1. The Appellant was charged in Kakamega Chief Magistrate's Court Traffic Case No. 10 of 2017 with the following offences:

   Count I — Causing death by careless driving contrary to Section 46 of the *Traffic Act*, Cap. 403 Laws of Kenya. The particulars of the offence were that on 25/12/2016 at about 1345 hours at Kifingo area along Nakumart-Kifingo Road in Kakamega County, being the driver of the motor vehicle registration number KBR 167K Suzuki Maruti, did drive the said motor vehicle along the said public road in a manner which was dangerous to the public and without due care and attention considering the amount of traffic at the time of accident or expected, hence caused the death of a motor cyclist Timothy Juma who died while being rushed to Mukumu Mission Hospital.

   Count II — Driving a defective motor vehicle contrary to Section 55(1) as read with Section 58(1) of the *Traffic Act*. The particulars were that on the same date and place, being the driver of the same motor vehicle, did drive the motor vehicle on the said road while defective vide Inspection Report No. 893045.

2. The Appellant pleaded not guilty and the matter proceeded to full trial. He was represented by Mr. Mukisu Advocate.The prosecution called 6 witnesses while for the defence, the Appellant was the only witness.

Prosecution evidence

3. PW1 was one Silas Imbayi. He stated that he was a student at a Secondary School, on 25/12/2016 he was with the deceased who was a fellow student, the deceased was riding a motorcycle, PW1 was the deceased's passenger, they were coming from Kefinco, he saw a vehicle registration number KBR 167K, they were following it, suddenly the motor vehicle turned along the road – made a U turn – facing them, suddenly he felt a lot of pain on his body, he lost consciousness, he came to while at St. Elizabeth Hospital where he was admitted for 2 days then discharged, he came to learn that Timothy had passed on, the had the motorcycle KMDM 833M, he did not see the driver of the Maruti vehicle. In cross-examination, he stated that he was not aware whether the deceased had a driving licence, he admitted that they did not have reflective jackets or helmets, the Suzuki Maruti vehicle was in front of them, their motorcycle is the one that collided into the Maruti, he cannot recall whether the deceased attempted to apply brakes, he was following that vehicle closely, the road was not busy, when he saw the motor vehicle it was on the left side of the road, at the time of the accident the rider was on his lane.

4. PW2 was one Musa Ngaira Abdalla who introduced himself as a motorcyclist. He stated that on 25/12/2016 at 1.30 pm he was at the stage at Jua Kali when he saw 3 women and 4 men, they were calling on someone to come and pick them up, he then saw a motor vehicle a vehicle Maruti whose registration number he could not recall, it was white in colour, the vehicle made a U-turn, the driver had not indicated, he saw a motorcycle behind them, it knocked into that motor vehicle, they all fell in a ditch on the right side of the road, the vehicle also fell into that ditch, the motor cycle hit the vehicle in the middle, the motorcycle fell in the ditch on top of the rider and passenger, the vehicle fell on top of them, the rider was seriously injured, the glass was all over his face, he had been cut on the head, even the passenger was cut all over his body. He then identified the driver as the Appellant in Court and stated that the driver just suddenly made a U-turn without any indication. In cross-examination, he stated that both the motor vehicle and the motor cycle were coming from Kakamega town direction, KBR 167K was the registration number of the motor vehicle, in his statement to the police he did not indicate the registration number, he saw the motor vehicle while at a distance of 200 metres, he saw the motorcycle when it was about to overtake the vehicle which was doing a U-turn, when the motorcycle knocked the motor vehicle they were both on the right side of the road, the motorcycle was completely damaged, when the driver reduced his speed the motorcyclist decided to overtake, it appears the police did not record that in his statement, the motor vehicle was across the road obstructing the road, it was not facing where it was going, this what made the motor cycle collide into it.

5. PW3 was George Ombok Onyango Odeny. He testified that he rides boda boda (motor cycle taxi), on 25/12/2016 he was at Jua Kali stage near Nakumatt Kenfico road, he saw a motor vehicle registration number KBR 167K coming from town, it suddenly made a U-turn then he saw a motorcycle rider with a passenger, it collided into the motor vehicle, all of them fell in a ditch, they assisted the injured to be taken to Mukumu St. Elizabeth Hospital, the rider died, he had serious injuries, he was bleeding a lot, the motorcycle hit the driver's door, the driver of the motor vehicle went with them to the hospital. He then identified the driver in Court as the Appellant. In cross-examination, he stated that saw the motor vehicle at a distance of about 100 metres, when it passed he saw the motorcycle behind it, the motor cycle rider did not make an attempt to stop, PW2 was also present, he did not mention the registration numbers in his statement, the motor vehicle was damaged at the front.

6. PW4 was one Peter Chepkorom who testified that he works for National Transport and Safety Authority (NTSA) as a motor vehicle inspector based at the Kakamega office, on 25/12/2016 he received a report prepared by their motor vehicle inspector which stated that the accident occurred on 25/12/2016 at 3 pm, it involved the motor vehicle registration number KBR 167K and a motor

cycle KMDY 833 TVS, it was a fatal accident along Kakamega-Marada road, on 25/12/2016 the motor vehicle was inspected, the driver's sliding door was damaged, the window was smashed, the driver's side mirror was ripped off, the driver's pillar was dented, it was operating as a taxi but it had no safety belts for all passengers, the inspector concluded that the motor vehicle was thus defective. He then produced the Report, Certificate of examination and the inspector's gazettement number. He further produced the motor cycle inspection report, listed the items damaged as a result of the accident and testified that the motor cycle had no pre-accident defects.

7. PW5 was one Police Constable Wilson Koech. He stated that he is stationed at Kakamega Police Station performing traffic duties, on 25/12/2016 he was on duty when he received a report about an accident that had occurred at Kifinco area in Kakamega town, he proceeded to the scene and found a motor vehicle KBR 167K a Suzuki Maruti, the driver had made a U-turn and this caused the motor cycle behind it to knock into it at the right side, the motor cycle rider died, he was Timothy Juma, he had a pillion passenger who was also injured, he drew the sketch map and measurements of the scene, they towed the motor vehicle, investigations found that the driver (Appellant) was to blame by doing a U-turn, he was hit on the middle of his side as driver. He then produced the sketch plan. In cross-examination he denied that the Appellant made the U-turn at a culvert and not at the road and added that the culvert was ahead not where the Appellant made the U-turn, the point of impact was on the middle of the road, the gate and culvert were ahead.

8. The prosecution's last witness was one Dickson Muchanda Mwaludidi. He stated that he is a pathologist based at Kakamega General Hospital, he had the post mortem report for the deceased, he did the post mortem on 27/12/2016. He then produced the Report and the burial permit. In cross-examination, he agreed that it is documented that the deceased rammed into a motor vehicle. He conceded that the injuries would have been less grevious if he was moving at a low speed.

Defence evidence

9. At the close of the prosecution case, the case found that the Appellant had a case to answer and put him to his defence. Pursuant thereto, the Appellant gave sworn evidence.

10. The Appellant testified that on 25/12/2016 he was driving the said motor vehicle along the said road when at a road junction he needed to turn towards his right, he slowed down and put on his right indicator, as he turned to enter, a motorbike hit his vehicle on the middle right side, the motorbike was behind him and when he started to turn the rider decided to overtake him causing the accident yet he had indicated that he was turning and had even slowed down, the motorcyclist did not wait for the Appellant to pass but decided to overtake him, he blamed the motorcycle rider for the accident. He then produced a copy of his driving licence. In cross-examination, he stated that the brake lights were working, the inspection report also confirmed this position, he has been driving for the last 33 years and he has enough experience as a driver.

Judgment of the trial Court

11. At the end of the trial, by the Judgment delivered on 5/11/2022 the trial Magistrate convicted the Appellant on the charge of causing death by careless driving but acquitted him on the charge of driving a defective motor vehicle. After hearing the Appellant's mitigation, the trial Court sentenced the Appellant to pay a fine of Kshs 50,000/- and in default, to serve 6 months imprisonment.

Grounds of Appeal

12. Being dissatisfied with the decision, the Appellant filed this Appeal vide the Petition filed on 18/10/2020. The Grounds of Appeal raised were as follows:

i. The learned trial magistrate erred in law and fact by convicting the Appellant against the weight of evidence tendered.

ii. The learned trial magistrate erred in law and fact by failing to acquit the Appellant when the deceased was to blame for ramming into the motor vehicle the Appellant was driving.

13. Pursuant to directions given, the Appellant, through Messrs Mukisu & Co. Advocates filed Submissions on 16/01/2023. On her part, Learned Prosecution Counsel N.K. Chala informed the Court that she did not intend to file Submissions but generally submitted orally that the charges were proved. She therefore prayed that the Appeal be dismissed.

Appellant's submissions

14. The Appellant's Counsel submitted that the standard of proof in criminal cases is beyond reasonable doubt, where there is doubt as to whether the accused committed an offence, the accused has to be acquitted. He cited the case of *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR and added that the trial Magistrate ignored the inconsistencies in the testimony of the prosecution witnesses. According to Counsel, PW1 who stated that he was a passenger on the motorcycle that the deceased was riding had no proof that the deceased was a licensed rider, he could not even tell where the point of impact was, they both had no protective gear, PW2 who was an eye-witness stated that when the motor vehicle was hit by the motor cycle they were both on the right side of the road, while PW1 stated that the driver made a U-turn, PW2 stated that the motorcyclist decided to speed past the Appellant's motor vehicle, in his statement to the police the registration number of the motor vehicle was never indicated, PW3 stated that the motor cycle collided into the Appellant's vehicle hence occasioning the accident and that the motorcycle made no attempt to stop, PW3 stated that the motorcycle rammed into the vehicle's door, the motor vehicle inspector PW5 stated that the side mirror and rim were dented suggesting impact from the side and not from the front as intimated by the trial Magistrate, PW6 confirmed that the history in the post mortem form indicated that the deceased had rammed into the Appellant's motor vehicle.

Analysis and Determination

15. I have considered the appeal and submissions by both parties. I have also read the record of the trial Court and the impugned Judgment. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanor of the witnesses (see *Okeno v Republic* [1972] EA 32).

16. Further, in *Robert Onchiri Ogeto v Republic* [2004] eKLR, the Court of Appeal guided as follows:

> " ..... Nevertheless, a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on misapprehension of the evidence, or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision – *Chemagong v Republic* [1984] KLR 611; *Kiarie v Republic* [1984] KLR 739."

17. In my view therefore, the issue that arises for determination in this appeal is the following:whether the prosecution proved the offence of causing death by careless driving to the required standard.

18. I now proceed to analyze and answer the issue:

19. The Appellant was charged under Section 46 of the *Traffic Act* which provides as follows:

> " Causing death by driving or obstruction
>
> 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 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.

20. It is therefore clear that although the Charge Sheet indicated the charge as "causing death by careless driving", the correct description should have been "causing death by dangerous driving'. No issue was however raised on this point and in any case, I do not believe that the Appellant, who was represented by Counsel, was prejudiced in any way by this choice of wording. I will not therefore belabour this point.

21. On the Application of the Section 46 above, the Court of Appeal in *Ngure v Republic* [2003] EA. stated as follows:

> " The mere occurrence of an accident alone is not enough to prove a charge of causing death by dangerous driving under section 46 of the *Traffic Act*. Evidence must disclose a 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."

22. Further, in *Atito v Republic* [1975] EA 278, the Court of Appeal guided as follows:

> " The question in this case is whether the appellant took avoiding action at all, or in good time, and whether by not taking this action, or delaying taking it unduly, he caused a dangerous situation to arise for whose consequences he is criminally liable."
>
> The fact that the motor–cyclist may have been at fault in not passing safely in the three or four feet of tarmac available to him is, in our opinion, immaterial. It would not cancel out the appellant's fault, in not taking avoiding action in time, which fault, whether it should properly be described as careless or dangerous driving, was clearly more, in the circumstances of this case, then a mere error of judgment."

23. In the case of *Paul Thiga Ngamenya v Republic* [2018] eKLR, Hon. Justice G.V. Odunga (as he then was), while citing the case of *Atito v Republic* (*supra*) remarked as follows:

> " 41. The Court of Appeal went on to re-state the standard of proof and the test, as was laid down in *Kitsao v Republic* MSA H.C.Cr. A. 75 of 1975 (unreported) that to justify a conviction of the offence of causing death by dangerous driving there must not only be a situation which, viewed objectively, was dangerous, but there must also be some fault on the part of the driver causing

that situation. The question therefore is not just whether or not there was a dangerous situation, but whether the appellant also played a part in causing the situation to be dangerous. The Court of appeal went on to make the following observation:

> "In *Kitsao's* case the appeal was allowed, as the most the prosecution could show was an error of judgment on the part of the driver."

24. In the same case of *Paul Thiga Ngamenya v Republic* (*supra*), Hon. Justice G.V. Odunga (as he then was), stated further as follows:

> " 45. *In Thoya v Republic* [2000] eKLR, Waki, J (as he then was) held that:
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> "On persuasive authority in the Tanzanian case of *Pyarali v Republic* [1971] EA 169:
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> "the test of whether a piece of driving is dangerous is objective and if the manoeuvre itself is dangerous the degree of negligence or care of the driver is irrelevant".
>
> .....
>
> Again the prosecution does not have to prove that the dangerous driving was the sole cause of death if it was the substantial cause of it. .....
>
> .....
>
> "Fault" was defined in another Court of Appeal case *Orweryo Missiani v Republic* [1979] KLR 285 at page 289:
>
> " 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 be a momentary lapse, even though normally no danger would have arisen from it, is sufficient."
>
> Those are the principles I have to apply. The evidence available and accepted by the learned trial magistrate was that the appellant was driving the matatu at speed.

> Five witnesses who were in the matatu testified so. One of them put the speed at between 90 - 120 Kmph. It was overloaded. It overtook several other vehicles on the same road and was in the process of one such overtaking manouvre when it hit a spot of spilled oil on the road. There is evidence, also accepted by the learned trial court that the oil-spill had been there for sometime. The appellant had passed through the same road three times earlier. There was evidence also that it had rained. Those are the conditions of the road the appellant had to contend with.
>
> The police officer who visited the scene and drew a sketch produced as exhibit 6, showed that the vehicle rolled and came to rest 350 meters away. It had no pre-accident defects as proved by the vehicle examiner exhibit 7. The deceased's head was split into two upon impact according to the post mortem report exhibit 8. I agree with the learned trial magistrate in view of these circumstances and evidence on record that the appellant drove in a dangerous manner. I would dismiss the appeal on conviction and now do so."

25. From the foregoing, it is clear that for the prosecution to have deemed to have proved the offence of causing death by dangerous driving, it needed to demonstrate that the Appellant drove or managed the motor vehicle on a road recklessly or at a speed or in a manner which was dangerous to the public, or left the vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public. In determining these matters, consideration must also be made of 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. The prosecution therefore needed to demonstrate the existence of a dangerous situation and also that the Appellant, as the driver, was guilty of a departure from the normal standard of driving which would be expected of a reasonably prudent driver. The prosecution also needed to demonstrate that the Appellant failed to take avoiding action at all, or in good time, and that by not taking this action, or delaying taking it unduly, he caused or created the dangerous situation.

26. The totality of the above is therefore, in my view, that not only was the prosecution required to demonstrate that there was a dangerous situation, but also that the Appellant played a part in causing the situation to be dangerous.

27. In this instant case, The Appellant's Counsel submitted that the trial Magistrate ignored the inconsistencies in the testimony of the prosecution witnesses. He alleged for instance, that PW1 who stated that he was a passenger on the motorcycle that the deceased was riding had no proof that the deceased was a licensed rider. My finding on this point is that the Appellant did not in any way even attempt to demonstrate how the lack of a licence by the deceased, even if true, contributed to the accident. In any case, from the authorities cited above, it is clear that if the Appellant is found to have been at fault, contributory fault by the deceased would not exonerate the Appellant from liability.

28. Counsel also submitted that PW1 could not tell where the point of impact was. My finding on this point is that, even this submission is true, there were two other eye-witnesses, PW2 and PW3 who indicated that the point of impact was on the road, on the right side.

29. Counsel also submitted that both the deceased and PW1 had no protective gear. Again, the Appellant did not make any attempt to demonstrate how absence of the protective gear by the deceased and PW1, even if true, contributed to the accident.

30. Further, Counsel also submitted that PW2 who was an eye-witness stated that when the motor vehicle was hit by the motor cycle, they were both on the right side of the road, while PW1 stated that the driver made a U-turn. I do not find any inconsistencies in the above testimonies since my understanding thereof is that both Appellant's vehicle and the deceased's motor cycle were initially on their correct lane on the left side of the road with the Appellant in front and the deceased behind him, that the Appellant suddenly slowed down and as a result, the deceased moved to overtake the Appellant's vehicle, unknown to the deceased the Appellant had also began to execute a U-turn manouvre, inevitably therefore the deceased's motor cycle rammed into the Appellant's motor vehicle, that therefore the point of collision was at the middle of the road but towards the right side. This is because by the time of the impact, both the motor vehicle and the motor cycle had already been veering towards the right side of the road as a result of the motor vehicle turning right and the motor cycle overtaking from the right. This explains why the damage caused on the Appellant's motor vehicle by the ramming into it by the motor cycle was on its middle right side. The above recitation is consistent with the Appellant's own testimony that he slowed down and began to turn to the right. Considered in totality therefore, the alleged inconsistency in the testimonies of PW1 and PW2 is in fact non-existent. It is clear that the witnesses said the same thing but in different words.

31. Finally, Counsel submitted that PW2 stated that in his statement to the police the registration number of the motor vehicle was never indicated. Once again, it is not clear to me how this submission can be of any assistance to the Appellant since the identity of the motor vehicle registration KBR 167K as the vehicle that was involved in the accident was never in issue. The prosecution witnesses expressly mentioned the registration number, the same was also confirmed in the documents produced as exhibits and most importantly, the Appellant himself also confirmed the same in his testimony.

32. Considering the facts of this case and the evidence adduced at the trial and applying the principles set out in the cases quoted above and applying the wording of Section 46 of the *Traffic Act*, the question is whether, in making the turn to his right, the Appellant exercised reasonable care and ensured the safety of other road users, particularly the deceased, by sufficiently indicating or signaling his intention to turn right before so turning. There is also the question of whether the turn executed by the Appellant was even lawful in the first place.

33. The Appellant alleged that he slowed down and put on his right indicator. However, PW1, PW2 and PW3 who were eye-witnesses were all emphatic that the Appellant turned suddenly when making a U-turn. PW4, the motor vehicle inspector, disclosed that the Appellant's motor vehicle was operating as a taxi. PW2 was categorical that the Appellant did not put on his indicator at all and that the reason he made the U-turn suddenly was because a presumably potential clients-passengers had beckoned to him from the opposite side of the road (ride side) to turn and pick them up. PW5, the investigating officer, also concluded from his investigations that the Appellant was to blame for causing the accident insofar as he made a U-turn in the middle of the road which is an illegal act. My understanding of the evidence of PW5 is therefore that it would not matter whether or not the Appellant put on his indicator since making of a U-turn in the middle of the road is illegal.

34. Considering all the foregoing, like the trial Magistrate, I, too, find the testimony of the prosecution witnesses to have been more believable as they were credible, plausible and consistent. They were also not shaken during cross-examination. On the other hand, I find the Appellant to have been economical with the truth and his testimony to also have been evasive and selective. I therefore find that the

Appellant made an illegal U-turn in the middle road and also that in any event, in so turning, he did so recklessly, suddenly and without prior indication or signal. I therefore find that the Appellant created a dangerous situation that endangered other road users, particularly the deceased cyclist and his pillion passenger (PW1) and that it this illegal and reckless U-turn manouvre that obstructed the deceased cyclist leading to the collision and in turn, the death of the deceased.

35. As aforesaid, all the Appellant seemed to try to do was to accuse the deceased of having contributed to the accident. As aforesaid, while contributory negligence may be a defence in accident civil cases in apportioning liability of tortfeasors, it is not a defence in a charge of causing death by dangerous driving. To borrow the words used in the case of *Atito v Republic* (*supra*), the fact that the deceased may have been at some fault in not safely passing behind or alongside the Appellant or in overtaking the Appellant is immaterial. "It would not cancel out the Appellant's fault, in not taking avoiding action in time, which fault, whether it should properly be described as careless or dangerous driving, was clearly more, in the circumstances of this case, then a mere error of judgment.".

36. Granted, I am persuaded that the deceased motor-cyclist was moving at a high speed at the time of the collision and may therefore have also been reckless to some extent. This is upon consideration of the severity and magnitude of injuries suffered by the deceased and also the extent of damage caused to both the motor vehicle and the motor-cycle. There is also evidence that the deceased and his pillion passenger never wore or used any protective gear. It is therefore very likely the accident may have been avoided or its effects mitigated had the deceased been moving at a reasonable speed or had he too exercised reasonable care However, as already stated, in a charge of causing death by dangerous driving, the fact that the deceased may have himself contributed to the accident cannot by itself exonerate the driver if it is proved that it is him who created the dangerous situation and that he too was at fault.

37. In conclusion, I agree with the trial Court that the prosecution proved beyond reasonable that the Appellant was liable for the offence of causing the death of the deceased by driving or obstruction when he drove his motor vehicle on a road recklessly in a manner which was dangerous to the public by managing or leaving it on a road in such a position or manner and/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. Accordingly, I find that the Appellant's conduct in driving and/or managing the motor vehicle fell below the standard of care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case.

38. I therefore do not find any justification to interfere with the decision of the trial Court since it has not been demonstrated that it acted on wrong principles in reaching the decision or that the decision is based on no evidence or on misapprehension of the evidence.

Final Order

39. In the end, this Appeal is found to lack merits and is accordingly dismissed:

DATED AND SIGNED AT ELDORET THIS 22ND DAY OF SEPTEMBER 2023

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WANANDA J. R. ANURO

JUDGE