



REPUBLIC OF KENYA



**Hagembe v Republic (Criminal Appeal 2 of 2020)  
[2023] KEHC 23589 (KLR) (Crim) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23589 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL APPEAL 2 OF 2020**

**GL NZIOKA, J**

**OCTOBER 5, 2023**

**BETWEEN**

**JULIANA LIAMBAYA HAGEMBE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence by Hon, E. Riany,  
Senior Resident Magistrate vide Chief Magistrate Traffic Case  
No. 3542 of 2019, at Milimani, Nairobi on, 23rd December, 2019)*

**JUDGMENT**

1. The appellant was charged before the Chief Magistrate's Court at Milimani, Nairobi vide Traffic case No. 3542 of 2019, with the offence of careless driving contrary to section 49(1) of the [Traffic Act](#) (Cap 403) Laws of Kenya.
2. The particulars of the charge are that on the 19<sup>th</sup> day of February 2019 at about 9.20am along University way in Nairobi within Nairobi County, being the driver of motor vehicle registration No. KAQ 436A Toyota Marino drove the said motor vehicle on a Public Road without due care and attention or without reasonable consideration to other persons using the road, thereby changed lane and hit motor vehicle registration number KBY 572D Mitsubishi Outlander causing it damage.
3. She pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution called a total of five (5) witnesses. The prosecution case is that, on the 19<sup>th</sup> day of February 2019, PW2 Kenlike Karuri was driving a motor vehicle registration No. KBY 572D at Globe round about when he was stopped by Police Officers on duty.



4. That, after he was released to proceed on, the accused (herein “the appellant”) who was driving her motor vehicle registration No. KAQ 436A Toyota Marino, changed lanes on the roundabout from lane 3 to lane 2 and hit the complainant’s motor vehicle KBY 572D. As a result, the appellant was held to blame and charged accordingly as stated herein.
5. However, in her defence, she blamed PW2 Karuri for the accident stating that, it is the motor vehicle KBY 572D that hit her motor vehicle. That, although the Police officers who visited the scene requested the parties to negotiate and settle the matter, they could not agree. As such each one took a Police abstract and repaired their respective vehicles. That, she was charged when she insisted on being issued with a receipt for the Kshs 10,000 demanded for cash bail.
6. At the conclusion of the case, the trial court held that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced her to pay a fine of; Kshs 50,000 in default serve six (6) months’ imprisonment.
7. However, being aggrieved by the decision of the trial court, the appellant appeals against the same based on the following grounds
  - a. The Honourable Magistrate erred in law and in fact for convicting the appellant based on an incurably defective charge sheet which could not sustain any proceedings.
  - b. The proceedings are fatally defective on account of being based on particulars of offence that did not disclose the offence charged.
  - c. The Honourable Magistrate erred in law and in fact for convicting the appellant on a charge that was not proved by the prosecution and to which no evidence was tendered in court by any party.
  - d. The Honourable Magistrate erred in law and in fact for convicting and sentencing the appellant based on a case that was not proved beyond reasonable doubt by the prosecution.
  - e. Whereas section 49(1) of the Traffic Act provides for offence of driving without due care and attention or without reasonable consideration for other users, the Honourable Magistrate erred in law and in fact for convicting the appellant for careless driving under section 49(1) of the Traffic Act for changing lanes.
  - f. The Honourable Magistrate failed to address the issues raised by the appellant during the hearing thereby arriving at erroneous decision of convicting and sentencing the appellant
  - g. The Honorable Magistrate failed to take into account the uncontroverted evidence of the appellant thereby violating her constitutional right to fair hearing.
  - h. The Honourable Court failed to appreciate that the particulars of offence in the charge sheet disclosed a different offence from the statement of offence in the same charge sheet and the two could not be the basis of convicting and sentencing the appellant.
  - i. The Honourable Magistrate erred in imposing the sentence she did without taking into account the appellant’s mitigation.
  - j. The Honourable court erred in law and in fact for convicting and sentencing the appellant based on hearsay evidence.
  - k. The Honourable Court erred in law and in fact for shifting and placing the appellant under the burden of proof throughout the trial thereby arriving at erroneous decision.



1. The Honourable court failed to take into account the inconsistency of the prosecution witnesses' evidence thereby arriving at an erroneous decision.
8. At the respondent conceded to the appeal and did not file any response thereto or submissions and neither did the appellant file any submissions as ordered.
9. Having considered the grounds of appeal and the proceedings of the trial court, I find the appellant having failed to file submissions to expound on the grounds that: the charge sheet and/or particulars are defective or inconsistent, that the charge of careless driving is not supported by evidence of changing lanes in the roundabout and the alleged inconsistency in the evidence or hearsay evidence, then all those grounds are not substantiated and cannot stand.
10. Be that as it were, the ground that remain is whether the prosecution proved its case beyond reasonable ground. In that regard, I find that, PW2 Karuri and the mother PW1 Faith Gathoni Gachau, testified that, the appellant changed lanes from lane 3 to lane 2. The appellant denied the same. Therefore there was need to get independent evidence to reconcile the two version.
11. The evidence of (PW5) PC No. 67563 Cp Morris Omondi who produced CCTV surveillance record in form of DVD told the court that, both motor vehicles were heading towards same direction after being released from Co-operative Bank and scratched each other. That the small car came and found the other. He produced footage of the scene as Pexh 4.
12. However, in cross-examination he stated as follows: -

“From the footage, there are no markings. According to the footage there are (six) 6 lanes before the roundabout. At the point of the accident, the other vehicles have started making a curve so it will depend on how big your car is. I have not seen any car change lane” (emphasis added)
13. However, in the judgment of the trial court, the Learned Trial Magistrate stated as follows: -

“Further, the clip played in court was self-explanatory and simply corroborated the prosecution evidence. Having decided to change lanes within the roundabout then the accused is to blame for the accident herein”.
14. It suffices to note that during the trial, PW5 did not even identify the registration numbers of the vehicles involved in the accident or in the footage. He kept on referring to them as, “both heading” and “small car came and found the other” and then clearly stated he did not see any car change lane”.
15. Therefore, with utmost due respect, the finding of the trial court is inconsistent with the evidence of PW5. Further none of the police officers, PW3 No. 79152 Corporal John Muthende and PW4 No. 87995 PC Susan Kawira, witnessed the accident.
16. Furthermore, no Police abstract was produced to confirm the results of investigation. In the given circumstances the appellant should have been given the benefit of doubt. I therefore quash the conviction herein and order the fine paid (if any) be refunded to the appellant.
17. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 5<sup>TH</sup> DAY OF OCTOBER 2023.**

**GRACE L. NZIOKA**

**JUDGE**



In the presence of:-

Mr Wesonga for the Appellant

Mr Ndiema holding brief for Ms Kigira for the Respondent

Ms Ogutu: Court Assistant

