



**Njeru v Republic (Criminal Appeal E053 of 2024)
[2024] KEHC 14086 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14086 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E053 OF 2024
LM NJUGUNA, J
NOVEMBER 13, 2024**

BETWEEN

BENSON NAMU NJERU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. J. N. Githaiga (R.M) in the Magistrate's Court at Siakago Traffic Case No. E001 of 2024 delivered on 28th June, 2024)

JUDGMENT

1. The appellant herein was charged with the offence of driving without due care and attention contrary to section 49 (1) of the *Traffic Act*. The particulars being that; on the 8th day of April, 2023 at about 1900 hours at Ishiara along Ishiara-Kathwana road in Mbeere North sub-county, within Embu County, being the driver of motor vehicle registration number KDG 947 C make Isuzu drove the said motor vehicle without due care and attention and caused an accident by knocking down Niceta Karimi Nthiga a pillion passenger causing her harm.
2. He pleaded not guilty to the charge and the matter proceeded to full hearing with the prosecution calling four witnesses.
3. PW1 was Niceta Karimi who testified that on the 8th April, 2023 at around 1900 hours, she was leaving her farm heading home using a motorcycle as a pillion passenger, and when she got to St. Kizito Primary School, there was a school bus in front of them and when it got to the school, it entered into a path. That unfortunately, the driver of the said bus reversed without due regard to them and hit them. That they were thrown on the side of the road and she lost consciousness and regained it while at Ishiara Level IV Hospital. She sustained deep cut wounds on her left eye and on the head. She was admitted at Embu Level (5) Hospital for four days and she was discharged later.



4. On cross examination, she stated that the distance between the bus and the motorcycle was about 100 metres and that she saw the motor vehicle entering St. Kizito Primary School without indicating. That the driver of the bus reversed while she and the rider were in motion and the driver hit the rider. That she was seated behind the rider and she was not focused on what the bus was doing.
5. PW2 was Hilary Wachira who stated that on the 08/04/2023 he was riding a motorcycle to the shop to fuel the same and on his way back, PW1 stopped him and she carried her on the motorcycle as a pillion passenger. That there was a school bus in front of him which, on reaching St. Kizito Primary School, partly entered a feeder road towards the school. That he slowed down and proceeded on his journey but after a while, the driver of the bus reversed and hit the left side of the motorcycle while he was still in motion. He fell on the road and lost consciousness and he found himself at Embu Level (5) Hospital. He sustained injuries to his left leg and hand. That he did not have a valid driving licence and that the driver of the bus failed to indicate when he was reversing.
6. On cross examination, he stated that the distance between the bus and the motorbike was 100 meters and that the driver of the bus did not indicate that he was joining a feeder road. That part of the bus was on the road and that he was on the left lane when he was hit and that he was on a yellow line. That the driver of the vehicle reversed the bus and he was in motion with his motorcycle when it was hit by the bus.
7. PW3 was P.C Gideon Cheboi who stated that he investigated the case and in the course of his investigations, he visited the scene of the accident at St. Kizito Primary School. That when he got at the scene, both the motorcycle and the bus were not at the scene and both PW1 and PW2 had been rushed to Embu Level (5) hospital as they had sustained serious injuries and by then, the appellant had reported the accident at Ishiara Police Station. He processed the scene, drew sketch plans and from his investigations he blamed the appellant for the accident. On cross examination, he stated that he did not arrest PW2 as he was not on the wrong and he was on his rightful lane heading to Kathwana general direction.
8. PW4 was Joshua Ileri Njagi a clinical officer at Mbeere District Hospital. He examined PW1 who was referred to Mbeere District Hospital from Ishiara Police Station after she had been involved in a road traffic accident. That she had blood-stained clothes, she was in pain but was mentally stable. She had a cut wound on the left forehead and stitching was done locally. She also had bruises on the left shoulder joint and left elbow joint. He assessed the degree of injury as harm.
9. At the close of prosecution's case, the appellant was placed on his defence. He gave unsworn evidence and called two witnesses in support of his case. He stated that on the 08/04/2023, he had been assigned the duty of ferrying people from Gatitu to attend a wedding at Kiaritha. That at 6.45a.m he went to St. Kizito Primary School to pick the passengers and he heard a loud bhang at the back and the school bus was hit from behind. That he alighted and PW2 indicated that he had hit his pillion passenger. That he was surrounded by bodaboda riders who were threatening to burn the school bus. He rushed to Ishiara Police Station and reported the accident who went to the scene and took photographs and the vehicle was taken for inspection. He was later arrested and charged with the offence before the Court.
10. DW2 was James Ileri Gaciati who stated that on the 08/04/2023 at around 1800 hours, they were at the gate of St. Kizito Primary School with other passengers inside the school bus when it was hit by a motor cycle. That the motorcycle swerved and hit the bus on the left side. That PW1 was not a pillion passenger as alleged by both PW1 and PW2. That he was able to see clearly because it was not dark and there were security lights.



11. DW3 was Irene Igoki Njeru who stated that on the 08/04/2023, she was among those people who were attending a wedding and were using the school bus which was being driven by the appellant. That the school bus came at around 1900 hours, it indicated and when it got by the side of the road, he saw a motorcycle swerving on the road and it hit the school bus as the school bus was branching off the road. The motorcycle slid and landed into a ditch. The police officers came to the scene and took photographs. That it was dark but one could see, but could not recognize people's faces. That the motorcycle did not have a pillion passenger.
12. After considering both the prosecution's and defence evidence, the learned magistrate, in her judgment delivered on the 28th June, 2024, convicted the appellant and sentenced him to pay a fine of Kshs.50,000 and in default to serve six (6) months imprisonment.
13. Being dissatisfied with the decision of the trial court, the appellant herein filed the petition of appeal dated the 10th July 2024 listing seven (7) grounds of appeal.
 1. The Learned Magistrate erred in Law and facts in convicting the Appellant on the basis of unreliable, insufficient, incredible and contradictory evidence and in not finding that the Prosecution did not prove it's case against the appellant beyond reasonable doubt and that the appellant had a credible and reliable defence.
 2. The learned Magistrate erred in Law and Facts in not finding that PW2 was to blame for the Accident that occurred on 8th April, 2023 involving motor vehicle Number KDG 947C and the motorcycle that was being ridden by PW2 as he failed to exercise due care and attention and the motorcycle rammed into the said motor vehicle from behind.
 3. The Learned Magistrate erred in law and facts in not finding that PW2 was careless in his riding of the said motorcycle as while riding behind Motor vehicle Number KDG 947C, he failed to keep a distance and rammed into the said motor vehicle from behind as a result of his recklessness and that PW2 was clearly not observing Traffic Laws as he was attempting to overtake motor vehicle number KDG 947C when it was not safe to do so and without first of all giving way to motor vehicle Number KDG 947C to fully turn and get off the road.
 4. The learned Magistrate erred in law and facts in not finding that PW3, the investigating officer carried out shoddy and insufficient investigations and unlawfully failed to cause PW2 to avail the motorcycle he was riding to the Police and also failed to charge PW2 for riding without due care and attention, riding without a valid Driving Licence and for failing to stop after the accident.
 5. The learned Magistrate erred in law and facts in not finding that it was not possible for a motor vehicle that was moving forward to suddenly start reversing without the motor vehicle first stopping and that it was not therefore possible for Motorvehicle Number KDG 947C to knock PW1 and PW2 or the motorcycle that PW2 was riding in the circumstances alleged by PW1 and 2.
 6. The Learned Magistrate erred in law and facts in not finding that PW1 was knocked by the motorcycle that PW2 was riding and that it is not motor vehicle number KDG 947C that knocked PW1 and further PW2 interfered with the Accident scene by removing his motorcycle before the police arrived and failing to take the motorcycle to the police station as part of investigations.
 7. The learned Magistrate erred in law and facts in not finding that PW2 was riding a motorcycle in a careless and/or reckless manner without due regard to the safety of other road users and



without following Traffic Laws and that PW2 was responsible for the Accident that occurred on 28th April, 2023 by failing to keep a distance and to give way to motor vehicle Number KDG 947C.

14. The appeal was disposed of by way of written submissions.
15. As a first appellate court, this court is called upon to re-evaluate, scrutinize and exhaustively examine the evidence tendered before the subordinate court to see if it supports the findings and conclusion of the trial Court and to arrive at its own conclusion as well. (see the case of Peter Kifua Kiilu & Another Vs. R (2005) eKLR 174 in which the Court of appeal cited the case of Otieno Vs. R (1972).
16. The appellant herein was charged with the offence of Driving without due care and attention contrary to section 49 (1) of the Traffic Act. The section provides;
 1. Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable-
 - a. For a first offence, to a term of imprisonment not exceeding one year or a fine not exceeding one hundred thousand shillings;
 - b. For a second or subsequent offence to a term of imprisonment not exceeding two years or to a fine not exceeding two hundred thousand shillings, and the court may exercise the power conferred by part VIII of suspending any driving licence or provisional driving licence held by the offender disqualified from holding or obtaining a driving licence for a period of twelve months starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the latter’.
17. In the case of Republic Vs. Wallale (1958) EA 582, the Court held;

“a conviction for driving without due care and attention cannot be founded on the mere fact of collision but must be made on a finding of fact that the driver charged with the offence was guilty of some act or omission which was negligent and which was a departure from the standard of driving expected of a reasonably prudent driver”.
18. The elements of the offence are that; the appellant was the one driving the vehicle and that he did so without due care and attention.
19. On the first element, it is not in dispute that the appellant is the one who was driving motor vehicle registration number KDG 947C at the material time.
20. On the 2nd element, the term fault was defined by the Court of appeal in the case of Orweryo Misiani Vs. R. (1979) KLR 285 at page 289;

“Faults certainly do 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 might be a momentary lapse, even though normally no danger would have arisen from it, is sufficient”
21. The evidence available from PW1 and PW2 is that, at the material time the appellant was driving in front of them and when he got to St. Kizito Primary School, he entered into a path. PW2 proceeded



on the road as he rode his motorcycle, but unfortunately the appellant reversed without due regard to PW1 and PW2 as a result of which he hit them. According to PW2 when the bus partly entered the feeder road, he slowed down and later proceeded with his journey but after a while, the appellant reversed the bus and hit him when he was in motion.

22. According to the appellant, the vehicle was hit from behind by PW2. His version of the events is the same as the evidence that was adduced by DW2 and DW3, only that DW3 in his evidence, stated that the bus was branching off the road when it was hit.
23. The Court has perused the sketch plan that was produced as exhibit 5, it indicates that the point of impact was at the centre of the road. This is a clear indication that the bus had already forked at St. Kizito which clearly indicates that he was not hit from behind by PW2, as he claims. As the learned magistrate rightly observed, PW2's motorcycle was neither hit on its front nor its back but it was hit on the left side and this gives more weight to the evidence of PW1 and PW2 vis-à-vis that of the appellant and his witnesses.
24. It is not therefore true that the appellant's motor vehicle was hit from the back as he alleges. His own witness DW2 in his evidence stated that the appellant's vehicle was branching off the road when the accident occurred which would mean that the vehicle could not have been hit from behind.
25. The appellant has taken issue with the distance of 100 meters between the vehicle that he was driving and the motorcycle before the accident occurred. PW2 has clearly stated that when he saw the appellant branching without indicating, he slowed down and later proceeded with his journey not expecting that the appellant would reverse, but unfortunately, he did reverse and hit his motorcycle on the left side while he was in motion.
26. Considering the evidence of the prosecution, and the defence that was tendered by the appellant, this court is convinced that the appellant was to blame for the accident in the circumstances under which the accident occurred. He reversed into the main road without due care and attention as a consequence of which, he hit the motorcycle that PW2 was riding.
27. I find that the appeal has no merits and hereby dismiss the same.
28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

.....for the Respondent

