



REPUBLIC OF KENYA



KENYA LAW
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**Masila v Republic (Criminal Appeal E157 of 2021)
[2024] KEHC 17068 (KLR) (Crim) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 17068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E157 OF 2021
AB MWAMUYE, J
DECEMBER 17, 2024**

BETWEEN

SAMSON NYAMAI MASILA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from the conviction and sentence of Hon.
Kasilu Senior Principal Magistrate delivered on 8th December 2021)*

JUDGMENT

1. The Appellant was convicted by the Chief Magistrate's Court at Nairobi for the offence of driving under the influence of alcohol, contrary to Section 44(1) of the [Traffic Act](#) Cap 403, Laws of Kenya. The particulars were that on the night of 5th January 2023, along Uhuru Highway in Nairobi, the Appellant drove motor vehicle registration KBL 100L while under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle. Upon conviction, he was fined Kshs. 100,000 (in default 12 months imprisonment) and disqualified from holding a driver's licence for one year, as provided by law. He now appeals against the conviction and the resulting sentence on several grounds that: -
 - i. The learned trial Magistrate erred in law and in fact by convicting on the charge of driving a motor vehicle while under the influence of alcohol without any lota of evidence or indeed, any finding as to whether or not the accused was incapable of having proper control of the vehicle.
 - ii. The Learned Trial Magistrate erred in law and in fact by convicting without any evidence of intoxication or at all.



- iii. The Learned Trial Magistrate erred in law and fact by convicting on the inadmissible, irrelevant and unavailing evidence of an alleged breathalyzer test without laying any basis for the application of the same in law.
 - iv. The Learned Trial Magistrate erred in law and fact by convicting on a defective charge that fails to disclose or set out the particulars of any offence known under law.
 - v. The Learned Trail Magistrate erred in law and in fact by convicting on contradictory Prosecution testimony and on a low threshold of evidence than required under Statute.
 - vi. The Learned Trial Magistrate erred in law and in fact by failing to consider at all the exculpatory Defence testimony and compelling submissions.
 - vii. The learned trial magistrate erred in law and fact in selectively analyzing the evidence tendered thus arriving at an unjust, wrong and biased findings.”
2. At trial, the prosecution’s case was that on the material night, traffic police officers observed the Appellant’s vehicle weaving dangerously on the road and nearly colliding with other vehicles. They signaled him to stop. The officers noted that the Appellant smelled strongly of alcohol, had bloodshot eyes, and was unsteady on his feet. The Appellant was subjected to a breathalyzer test by an officer from the National Transport and Safety Authority (NTSA). The Alcoblow reading was 0.76 mg/L of breath, which is well over twice the prescribed legal limit for drivers under the relevant Breathalyser Rules. The Appellant was arrested and taken to the police station.
 3. In his defence, the Appellant who testified on oath admitted having taken “one beer” earlier in the evening but claimed he was not intoxicated. He stated that he was driving erratically due to a mechanical problem with his car’s steering, not because he was drunk. He also asserted that the breathalyzer device might have been faulty or improperly administered, since, according to him, “I felt normal”.
 4. The trial magistrate considered this explanation but rejected it, finding that the prosecution evidence overwhelmingly demonstrated intoxication to the level of impaired driving. The court noted that the Appellant’s defence amounted to a mere denial and did not cast reasonable doubt on the prosecution’s case. The Appellant was accordingly convicted and sentenced as aforesaid.
 5. The first and main ground of appeal challenges the sufficiency of evidence that the Appellant was intoxicated “to such an extent as to be incapable of having proper control of the vehicle,” as required by Section 44(1) of the *Traffic Act*. It is trite law that mere consumption of alcohol, or mere drunkenness, is not by itself an offence under Section 44(1) – the crucial element is that the driver’s ability to control the vehicle is impaired by the drink. As the High Court briefly stated, “Driving under the influence of alcohol becomes an offence only when the driver cannot properly control the motor vehicle.” Likewise, in *Yusuf v R* (1971) EA 49, Kneller J. observed that “It is not an offence to drive a vehicle under the influence of drink [per se]; the offence is committed only if, as a result, the driver is incapable of having proper control of the vehicle.”
 6. In the present case, I am satisfied that the prosecution proved this element beyond reasonable doubt. Unlike in cases such as *Benson Mutwiri v Republic* [2017] eKLR, where a conviction was quashed because no evidence was led on whether the driver was in proper control or how the drinking affected his driving, here the evidence of impaired control was cogent and direct. The police officers testified that the Appellant was driving in a swerving, haphazard manner on a public road late at night, creating a danger to other road users. One officer (PW1) described how the Appellant’s lorry drifted from lane to lane and even brushed against a road barrier, forcing other motorists to hoot. This prompted the



- police intervention. Such manner of driving is objective evidence of loss of proper control, attributable, as it turned out, to intoxication.
7. Moreover, upon stopping the Appellant, the officers observed classic symptoms of impairment: staggering gait, slurred speech, and the smell of alcohol on his breath. These observations were not disputed. In addition, the breathalyzer test administered at the scene gave a reading of 0.76 mg/L, which is more than double the legal breath alcohol limit for drivers (0.35 mg/L). While exceeding the prescribed alcohol limit is not itself the statutory definition of the offence, it is certainly strong evidence of significant intoxication. The high reading corroborated the officers' testimony that the Appellant was well over the safe alcohol limit and was indeed in no condition to drive safely. I note that under Section 44(1) as worded, the prosecution need not prove a specific blood-alcohol concentration; it must prove the fact of influence to the extent of incapacity. Here, the combination of the Appellant's erratic driving and his physical symptoms and breath test results proved that fact.
 8. The Appellant's counsel argued that the prosecution did not tender a medical report from a doctor to explicitly opine that the Appellant was incapable of controlling the vehicle. In my view, no such report was necessary. Incapacity can be demonstrated through the facts and circumstances, and the testimony of the officers and the breath analysis was sufficient. I therefore find that Ground 1 of the appeal is not merited – the ingredient of being so intoxicated as to lack proper control was proved beyond reasonable doubt by the prosecution.
 9. Secondly ground 2, regarding the breathalyzer, the prosecution called the traffic police officer (PW2) who actually administered the Alcoblow test on the Appellant. He explained how the test was done and produced the printed slip showing the 0.76 mg/L result. The Appellant did not object to production of this evidence at trial. There was no suggestion that the device malfunctioned. Not every case will require summoning a technical expert to speak to the functionality of a gadget, unless the device's integrity is seriously called into question. Here, it was not. The chain of custody of the Alcoblow printout was straightforward, it was generated on the spot and handed over to the police, and then produced in court. I therefore see no gap or missing link in the evidence.
 10. The Appellant's argument that a blood test should have been done or a doctor's report obtained is likewise without force. The law does not mandate the mode of proof; even circumstantial evidence can suffice if it proves the case. In *Benson Mutwiri v Republic* [2017] eKLR, the High Court emphasized that in drunk-driving cases, the manner of driving and the level of alcohol as evidenced by tests or otherwise are the critical ingredients. Consequently, the conviction based on such scanty facts was quashed. By contrast, in our case both ingredients were amply demonstrated: the Appellant's manner of driving was proven to be dangerous and out of control, and the level of intoxication was evidenced by the high breath reading and the Appellant's physical symptoms.
 11. I therefore find that the trial magistrate was entitled to rely on the totality of the evidence, including the breathalyzer results, which were properly produced. There is no rule requiring corroboration of breathalyzer evidence by a blood test – one is not more probative than the other in law, they are simply different means to the same end. The weight to give the Alcoblow reading was a matter for the court's assessment, and I see nothing wrong in the magistrate according it significant weight alongside the eyewitness testimony.
 12. Under ground 3, the Appellant contends that the prosecution failed to call "crucial" witnesses or produce certain evidence, which failure should be held to weaken the prosecution case. The Appellant points out, for instance, that the prosecution did not call the mechanic who allegedly inspected the vehicle after the incident (the Appellant had claimed a mechanical defect) nor did it call any independent motorists or members of public who witnessed the erratic driving on the road. The



- implication is that the court should infer that such uncalled witnesses might have given testimony favorable to the Appellant. Further, counsel submitted that no report from a medical doctor was adduced.
13. It is certainly a principle of law that the prosecution is expected to call all necessary witnesses to establish the truth, and that if a vital witness is deliberately withheld, the court may draw an adverse inference (see *Bukenya v Uganda* [1972] EA 549). However, it is equally true that the prosecution is not obliged to call a superfluity of witnesses to prove a point. As the Court of Appeal put it in *Keter v Republic* [2007] 1 EA 135: “The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.” In the present case, I find no indication that any witness crucial to the case was omitted. The two police officers who testified were the ones directly involved in the arrest and investigation. Their evidence covered all the core elements of the offence.
 14. I am persuaded that the witnesses called were adequate and their evidence, which the trial court found credible, proved the case to the required standard. The Appellant has not shown that any specific testimony was withheld that would have impacted the outcome. I find that Ground 3 of the appeal has no merit.
 15. The Appellant next argues that the trial court did not give due consideration to his defence and thereby fell into error. He submits that his explanation – that he was not actually drunk and that the erratic driving was due to a mechanical fault – was not fairly analyzed, and that the court’s finding that his defence was a mere denial “which did not shake the prosecution case” indicates a shifting of the burden of proof.
 16. Having reviewed the judgment of the lower court, I am satisfied that the magistrate did consider the Appellant’s defence but found it implausible against the weight of evidence. The judgment explicitly notes the Appellant’s claim about a steering malfunction, but observes that no evidence of such malfunction was produced, and that the vehicle was in fact driven from the scene by another driver without incident. The magistrate concluded that the Appellant’s narrative was an afterthought aimed at diverting blame from his intoxication. Indeed, the trial court stated: “I have considered the accused’s explanation and find it to be a mere denial that does not cast doubt on the prosecution evidence.” The burden of proof remained on the prosecution throughout; the court was simply saying that the defence did not create a reasonable doubt, which is a correct approach.
 17. It is noteworthy that the Appellant’s counsel did not raise any defence or alternative theory early in the trial – the mechanical defect claim emerged only during the defence stage, and it was unsubstantiated. A court is not obliged to accept a defence story at face value; it must weigh it against the prosecution’s evidence. The High Court in *Joseph Maingi v Republic* [2016] eKLR observed that a trial court’s characterization of a weak defence as a mere denial is not an error per se, especially where the judgment makes it clear that the court did consider it. What is required is that the court shows it has evaluated the defence – and in our case, the record demonstrates that the magistrate did so. Accordingly, Ground 4 of appeal fails.
 18. Finally, the Appellant challenges the sentence imposed as being harsh and excessive. I note that the sentence for a first conviction under Section 44(1) of the *Traffic Act* is a fine not exceeding Kshs.100,000 or imprisonment not exceeding 2 years, or both, and mandatory disqualification from driving for at least 12 months. In this case the Appellant was fined Kshs.100,000 (with a default jail term of one year) and disqualified from driving for one year. The Appellant argues that as a first offender who did not cause an accident, a more lenient sentence or an option of a lower fine was called for.



19. The principles upon which an appellate court will interfere with a sentence are well established. The Court of Appeal in *Wanjema v Republic* (1971) EA 493 stated that an appellate court should not disturb the sentence imposed by a trial court unless it is evident that the trial court acted on a wrong principle, overlooked a material factor, or the sentence is manifestly excessive in the circumstances. In this case, the sentence was within the law's limits. The learned trial magistrate considered the Appellant's mitigation but also noted the seriousness of the offence, and his reckless conduct could easily have resulted in tragedy that night.
20. Having weighed the Appellant's case on the appeal against the evidence on the record, I am satisfied that the Appellant was convicted on strong evidence and the prosecution discharged the burden of proof beyond reasonable doubt. I therefore find no merit in the appeal. In the result, I affirm the judgment of the court below and dismiss the appeal.
21. File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF DECEMBER 2024.

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BAHATI MWAMUYE

JUDGE

In the presence of:

Appellant acting in person – Mr. Masila

Counsel for the Respondent – Mr. Mwandawiro

Court Assistant – Mr. Guyo

