REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NUMBER 56 OF 2019

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO 56 OF 2019

PETER NGUU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Mavoko Criminal Case No. Tr. 1324 of 2016, delivered by Hon C C Oluoch, SPM on 17th May, 2019)

REPUBLIC.....PROSECUTOR

VERSUS

PETER NGUU.....ACCUSED

JUDGEMENT

1. The appellant, **Peter Nguu**, was charged was charged with three counts. In Count I, he was charged with the offence of causing death by dangerous driving contrary to Section 46 of the ***Traffic Act*** Cap 403. On Count II he was charged with the offence of careless driving contrary to Section 49(1) of the ***Traffic Act***, and on Count III he was charged with the offence of driving a vehicle while in an improper condition to Section 55(1) as read with Section 58 of the ***Traffic Act***.

2. He was convicted in all the three counts and in Count I fined Kshs 80,000.00 or 12 months in default, in Count II fined Kshs 10,000.00 or 2 months in default and in Count III fined Kshs 10,000.00 or 2 months in default. His driving licence was also ordered suspended for three years.

3. The prosecution called a total of sixteen witnesses to establish their case and when eventually placed on his defence, the Appellant gave sworn statement. The said prosecution witnesses included police officers and remand officers who were present in the vehicle at the time of the accident, medical personnel and motor vehicle inspector.

4. Dissatisfied with the decision of the trial court, he appealed to this court challenging both the conviction and sentence of the trial court.

5. On his behalf it is submitted that there were a number of inconsistencies regard the approximate speed at which the appellant was driving. It was submitted that though PW1 testified that the appellant was driving at a high speed, in his statement he stated that the Appellant was driving at normal speed. Further the said witness could not have been able to see the speed at which the vehicle was being driven as he was seating at the back of the vehicle. Similarly, PW2 who was seated at the back and was unable to see what was happening stated that the vehicle was being driven at about 80kph though he admitted that he could not see the speedometer. The Appellant cited section 43(3) of the ***Traffic Act*** and submitted that it calls for evidence of more than one person to confirm the charge. It was submitted that the learned trial magistrate failed to consider the evidence of PW7, a motor vehicle inspector, that the skid marks at the centre of the road resulted from worn out tyres and not overspeeding.

6. It was noted that all the passengers seated at the back of the Land Cruiser confirmed that they could not see the road ahead.

7. It was further submitted that there was no evidence that it was actually the Appellant's vehicle that hit the deceased as this was denied by the Appellant. There was also inconsistency in the evidence of PW15 as regards the point of impact.

8. It was therefore submitted that there was no proof that the Appellant drove the vehicle in a manner dangerous to the public as he had put the siren on and there was no evidence that he drove without due care and attention hence the charges in Counts I and II cannot be sustained.

9. As regards the failure to report the defects on the said vehicle, it was submitted that the Appellant testified that he actually reported the defects in the said vehicle to his OCS and that the vehicle was supposed to go for service the following day and that the defects were confirmed by the motor vehicle inspector and the investigating officer.

10. The Appellant relied on **Kitui High Court Criminal Appeal No. 3 of 2017 – Benjamin Mwikya Musyoki vs. Republic** that in order to justify conviction there must have been a situation which, viewed objectively, was dangerous and also some fault on the part of the driver. . In this case it was submitted there is no clear fault placed upon the Appellant to justify the sentence and that the prosecution failed to prove beyond reasonable doubt that the Appellant was to blame for the accident.

11. Being a first time offender, it was submitted that the sentence meted was harsh and excessive.

12. The Court was urged to allow the appeal, set aside the conviction and quash the sentence.

13. The Respondent conceded the appeal.

14. It was submitted on behalf of the Respondent that though the Appellant was charged under Section 49(1) of the ***Traffic Act*** for careless driving, the drafter and the trial court failed to appreciate that the ***Traffic Act*** was amended by ***The Traffic (Amendment) (No. 2) Act*** which did away with the offence of careless driving and substituted it with the offence of driving without due care and attention.

15. It was appreciated that while the substantial elements of the offence in question were not amended, the amendment to the statement spelling out the offence was occasioned by the fact that careless driving cannot be equated to driving without due care and attention as the element of careless driving involves a level of negligence that surpasses a failure to take due care and attention and that this is informed by definition accorded to word "***careless***" in the **Black's Law Dictionary, 9th Ed.** as an action or behaviour engaged in without reasonable care comparable to being reckless. It also defines reckless conduct as much more than mere negligence and a gross deviation from what a reasonable person would do. It was opined that the amendment was a necessary because an offence with elements similar to the offence of careless driving is set out under Section 47 of the Act, namely reckless driving.

16. The state therefore submitted that where one is deemed to be driving carelessly a charge cannot be brought under Section 49(1) of the ***Traffic Act*** but under Section 47 of the Act. It was submitted that it is a clear tenet that the charge must be supported by the elements charged. In this case, the charge of careless driving as was stated was not supported by the particulars of the offence as the particulars stated that the Appellant was driving without due care and attention contrary to what the charge stated hence Count II was defective.

17. It was further submitted that from the same the penalty the suspension of the driving license can be done for a period of 12 months from the date of conviction according to the law. The learned trial Magistrate suspended the appellant's driving license for a period of three years which is contrary to the provision of the Act hence the same should be set aside.

18. It was further submitted that count no. 2 of the charge was duplex since the drafter of the charge sheet in count 2 stated eleven injured persons in the same count which was bad and resulted in duplicity contrary to Section 134 of the ***Criminal Procedure Code***. Reliance was placed on the case of **Mwaniki vs. Republic [2001] EA 158**.

19. It was therefore submitted that this count was bad in law as it was duplex and it embarrassed and prejudiced the appellant.

20. According to the Respondent, the evidence of those who sat at the back of the land cruiser reg. no. GKB 372E could not have seen the speed which the driver was driving. The only person who could see was the police officer PW11 who sat next to the driver and according to his evidence, the appellant herein was driving at a normal speed. Reliance was placed on the holding in **G.M. Daya vs. Republic [1964] E.A 529** where the court held that a person cannot be convicted of careless driving when the finding is based solely on opinion evidence of his speed.

21. It was noted that PW1 testified that he could not see what was happening ahead of them hence there is no way he could have seen the speedometer of the vehicle to testify whether the appellant herein was driving a high speed but rather he testified that the driver was going at a normal speed. PW2 in his evidence testified that the appellant herein drove at a speed of over 80KMPH, yet he also testified that he could not see the speedometer which beats logic how he could not see the speedometer yet he was so sure that the vehicle was going at a speed of over and above 80KMPH. PW3 testified that he couldn't even recollect if the said vehicle hit an electric post or the passenger during cross-examination yet during examination in chief he had stated that he was able to see what was happening ahead from where he was seated at the back of the vehicle. PW6 on the other hand testified that the driver was going at a speed of 180KMPH but yet confirmed that he could not see the speedometer. Looking at the evidence of PW2 he is the only one who saw the appellant almost hit a cyclist yet no other witness corroborated his evidence.

22. It was noted that the evidence of PW7 a motor-vehicle inspector was that the GKB 372E was defective. He confirmed the evidence of the appellant herein that the motor-vehicle had worn out rear brushes before the accident, the bonnet, windscreen rear side front wing and front grill were damaged, all the tires were worn out (emphasis added) and further concluded that the vehicle had pre-accident defect. He

further testified that the defects may have caused the accident because all the tires were worn out.

23. It was submitted that from the evidence, the skidding of the vehicle should have been taken into account in that, the appellant took the necessary measures that is applied brakes when the pedestrian tried to cross the road. PW11 the police officer seated next to the driver testified that the deceased tried to cross the road while the vehicle was approaching and that the driver applied brakes. The trial magistrate should have looked at the sketch map produced as exhibit from the point where the appellant applied the said brakes to the point of impact.

24. Some of the evidence by the prosecution witnesses, it was submitted, was that the vehicle skidded from the centre of the road yet other evidence was that the appellant was driving on the right to the left side of the road. Further the investigating officer who should have clarified the matter contradicted himself when he testified that the vehicle skidded from the point of impact to where it rested yet went ahead to testify that the vehicle skidded from the centre of the road which is the point of impact that the deceased was allegedly hit. PW11 testified that the deceased appeared confused as he emerged intending to cross the road from left crossing to the right while PW2 who allegedly could see what was happening in front testified that the appellant herein swerved towards the left, hit the pedestrian then lost control of the vehicle. PW3 on the other hand testified that he could see in front and that the appellant herein took the wrong right lane and further he could not recollect if the vehicle GKB 372E hit an electric post and the pedestrian who was walking off the tarmac road. PW6 testified that he could see the road clearly and that the appellant (driver) took the right lane to overtake while the pedestrian was on the left side of the road, the vehicle overturned while PW8 testified that the vehicle avoided the electric pole and the vehicle overturned at the side of the road. From the evidence of PW8, he did not testify whether the appellant hit a pedestrian while the evidence of other witnesses is that the appellant hit the pedestrian avoiding the electric post.

25. It was submitted that from the evidence on the sketch map and PW11 it is clear that the driver appellant herein took due care, he was not negligent in that he applied brakes as the deceased approached the road trying to cross, he even had siren on as confirmed by all the prosecution witnesses to alert all road users to give way which is legally provided under Rule 83 of the ***Traffic Rules***. From the evidence, the vehicle skidded to avoid hitting the pedestrian but due to the fact that the tyres were worn out the same could not be avoided as confirmed by PW7 the vehicle inspector.

26. From the above, it was contended that the prosecution evidence was marred with a lot of contradictions as to what happened that day to warrant the appellant to be convicted of the charges before him. The prosecution should have called an independent witness who was not in the motor vehicle to give evidence as to whether the deceased was indeed by the road or crossing the road. There was no evidence brought forward by the prosecution that the appellant herein was driving GKB 372E beyond the speed indicated in the motor-vehicle. Further there was no proof that the road had existence of speed limit road signs for the prosecution to rule out that the driver had gone past the set limit hence careless driving. Reliance was placed on Rule 83 of ***Traffic Rules*** and it was submitted that in Kenya, the ***Traffic Act***, expressly exempts police, fire brigade and ambulance vehicles from observing the applicable speed limits. From the evidence the appellant herein testified that he was going at a speed of 50kmph which was corroborated by PW11 who testified that the driver was going at a normal speed hence he was neither over speeding nor driving without due care to other road users. In addition, the appellant was ferrying accused persons from court.

27. As regards the defects, it was submitted that it was the evidence of the appellant that he had reported the motor-vehicle defects to the OCS and that the same was to be addressed the following day. It is unfortunate that the OCS could not be summoned to either corroborate or deny the same as he had already passed on. The court has a duty to presume that the accused is innocent till proved guilty by the evidence presented before court. The trial magistrate assumed the opposite that the notice of entry was done after the accident had happened. There was no evidence by the prosecution witnesses that the entry was made by the appellant after the accident. The duty to release the vehicle to transport accused persons lies with the OCS who has a duty to know whether the same vehicle is roadworthy as confirmed by PW15, the investigating officer that according to the work ticket of the vehicle that the vehicle was authorized to be on the road and that it had four worn out tyres as the report given by the appellant herein. He further confirmed that an officer cannot compel their boss to act where the boss has refused to act.

28. As for the sentence, it was submitted that from Section 43 of the ***Traffic Act*** in relation to penalties of driving in relation to speed the suspension of the driving license should not exceed a minimum period of one month and a maximum period of 3 months. The trial magistrate suspended the Appellant's driving license for a period of three years contrary to the provision of the Act. According to the Respondent, the sentence imposed on the Appellant was excessive since he was not at fault, he applied brakes, had reported the defects as per the work sheet, PW11 testified that the driver was going at a normal speed. Further, he had experience 1 and ½ years having been a driver at Mlolongo Police Station which shows he had driving experience and had never been involved in any similar incident. The cause and circumstances of the accident may properly be inferred from other facts proved. Such facts in this case are the position of the vehicles after the accident, the point of impact on the road, the point of impact on the vehicles involved in the accident, evidence as to the weather and visibility, and the evidence on the section of the road at which the accident occurs. The trial Magistrate should have considered the circumstances of the case in that there were other underlying circumstances that caused the accident like the defective GKB 372E that the appellant had already reported to the OCS and further PW2 testified that it has slightly drizzled. The Investigating officer could only state his opinion as to how the accident appeared to have been caused and could only testify as to how he found and photographed the scene upon arrival at the accident. There was no evidence that the appellant was driving under the influence of alcohol or any other intoxicating substance [or] deliberately taken risk and or controlled the motor vehicle with care abandon, had a bad driving record, or with selfish regard for other road users or passengers hence the sentence was excessive.

29. Taking into consideration all the above-highlighted areas, the Court was urged to find that the proceedings were irregular, the conviction unsafe and sentence irregular and that the Appellant was thereby prejudiced hence the conviction should be set aside and sentence quashed.

Determination

30. I have considered the evidence adduced as well as the submissions made on behalf of the respective parties. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court 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 (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424."

31. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

1. 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 the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. 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."

32. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. We adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd vs. Uganda Railways Corporation [2002] 2 EA 634,** thus:

"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In *Sembuya v Alports Services Uganda Limited [1999] LLR 109* (SCU), Tsekooko JSC said at 11:

'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scruitinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"

33. It was therefore held in **David Njuguna Wairimu vs. Republic [2010] eKLR** by the Court of Appeal as follows:-

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

34. In the same vein the Court of Appeal in **Isaac Njogu Gichiri vs. Republic [2010] eKLR** expressed itself as hereunder:

'With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: *"I find that the defence of the 5th accused is not true."* We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: "*The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances.*" We agree with this confirmation."

36. It was therefore concluded by the Supreme Court Uganda in **Odongo and Another vs. Bonge** Civil Appeal 10 of 1987 (UR), (**Odoki, JSC**) that:

"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

36. Even though the State conceded the appeal, it is not automatic that this court must in those circumstances allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."

37. That was the position adopted in **Lamek Omboga vs. R., Kisumu Court of Appeal Criminal Appeal No. 122 of 1982** where the Court of Appeal expressed itself as hereunder:

"When the appeal opened before us, Mr Okoth for the appellant began submitting that as State Counsel did not support the conviction in the first appeal in the High Court, the State was in effect withdrawing the charge and the appeal should have been allowed. With respect, we do not agree. An appellate court is not in any way bound by the opinion of State Counsel as to the merits of an appeal."

38. I have on my part considered the material placed before me. It is true that the particulars of the offence in count II did not agree with the statement of the offence. Whereas the offence was that of careless driving, the facts set out were in respect of the offence of driving without due care and attention which is prescribed at Section 49(9)(a) and (b) of the ***Traffic Act***.

39. Since as submitted by **Mr Ngetich**, Learned State Counsel that the ***Traffic Act*** was amended by ***The Traffic (Amendment) (No. 2) Act*** which did away with the offence of careless driving and substituted it with the offence of driving without due care and attention, the Appellant was charged with an offence which was not known to law in count II. In **Henry O. Edwin vs Republic [2005] e KLR** where the Court of Appeal stated that:

"It is trite law that an accused person must be charged with an offence that is known to law. Particularizing the charge enables the accused person know the offence with which he is charged and the likely sentence that he would get should he be convicted. This is information that enables the accused person to adequately prepare his defense. We adopt with approval the sentiments of the High Court in Sigilani –vs Republic [2004] 2 KLR 480 where it was held that: "The Principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead specific charge that he can understand. It will also enable the accused to prepare his defense." We have looked at the Act. Section 5, the section under which the appellant was charged provides for "penalty for other acts connected to narcotic drugs etc." There is no section 5(b). The appellant was therefore charged under a non-existent provision of law. This renders the charge sheet fatally defective."

40. I therefore agree that the conviction of the Appellant in Count II cannot be sustained.

41. As regards count I, the challenge is on the evidence. Section 46 of the ***Traffic Act. Cap 403 Laws of Kenya*** provides as follows:

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.

42. This provision and provisions couched in similar terms has been the subject of judicial pronouncements in this country and in other jurisdictions.

43. The Court of Appeal went on to re-state the standard of proof and the test, as was laid down in **Kitsao vs. 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. "Fault" was dealt with by **Megaw, LJ** in **Republic vs. Gosney [1971] All ER 220** at 224 as follows:

"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."

44. 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."

45. In **Atito vs. Republic** (above cited), at page 281, the court said:

"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."

46. The law as regard the test to the applied when considering whether or not a driver is said to have been driving in a dangerous manner was stated in the case of **R –vs- Evans [1962] 3 All ER 1086** at page 1088 where **Fenton Atkinson J. A.** stated that:

"… the objective test, because it has been laid down again and again in the reported cases, among others by Lord Goddard C.J. in Hill –vs- Baxter (1) where he said:

> **"the first thing to be remembered is that the statute contains an absolute prohibition against driving dangerously or ignoring halt signs. No question of mens rea enters into the offence; it is no answer to a charge under the section to say 'I did not mean to drive dangerously' or 'I did not notice the halt sign'."**

It is quite clear from the reported cases that, if in fact a man adopts a manner of driving which the jury think was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best."

47. Section 46 of our ***Traffic Act*** is similarly worded like the English Act that the learned judge referred to and states that "*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* …" The said section of the ***Traffic Act*** is absolute in terms of liability. It does not matter that the driver thought that he was driving as best as he could in the circumstances. If the court is of the opinion that he was driving dangerously, then he shall be found guilty of the offence of dangerous driving. The above English decision was quoted with approval by **V. V. Patel, J.** in the case of **Okech –vs- Republic [1990] KLR 705**.

48. In **Thoya vs. Republic [2000] eKLR**, **Waki, J** (as he then was) held that:

"On persuasive authority in the Tanzanian case of *Pyarali -vs- Republic* [1971] EA 169:

> **"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. The Court of Appeal in *Atito -vs- Republic* [1975] EA 281 also laid down the law on the standard of proof:

> **"to justify a conviction for 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".**

"Fault" was defined in another Court of Appeal case *Orweryo Missiani - vs- 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."**

49. In this case I agree that the evidence adduced had serious contradictions and inconsistencies regarding the speed at which the vehicle was being driven. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:**

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."**

50. The contradictory evidence presented before the trial court if discounted leaves no independent evidence which can sustain a conviction and as was held by the Court of Appeal in **Ngure vs. Republic [2003] E.A.**:

> **"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."**

51. Having considered the state of the prosecution evidence, I find that the same fell short of the standard expected in order to sustain the offence in Count I.

52. As regards Count III I agree the un-contradicted evidence before the court showed the Appellant did take steps when he realised that there were defects in the said vehicle. There was evidence that the Appellant swerved and that due to the defective tyres, the vehicle skidded. In **Atito vs. Republic [1975] EA 278**, the Court of Appeal dealt with a case in which the appellant had been convicted for the offence of dangerous driving resulting in the death of two persons. At page 280 the court said:

> **"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."

53. Having considered the evidence in this case, I agree that the prosecution failed to prove its case to the required standard. While it may well be that the evidence could prove negligence in a civil case, it clearly fell short of the standard expected in a case of this nature.

54. In the premises I find that the appeal was properly conceded. The appeal succeeds, the appellant's conviction is hereby set aside and the sentence imposed on his quashed.

55. Judgement accordingly.

Judgement read, signed and delivered in open court at Machakos this 3rd day of March, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Mutua for Mr Gachau Kariuki for the Appellant

Mr Ngetich for the Respondent

CA Geoffrey