



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**CRIMINAL APPEAL NO.17 OF 2019**

**SAMUEL WAHOME WANJIKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from original Conviction and Sentence in Nanyuki CM Traffic Case No 299 of 2016 – L Mutai, CM)***

**J U D G M E N T**

1. The Appellant herein, **SAMUEL WAHOME WANJIKU**, was convicted after trial of two counts of *causing death by dangerous driving* contrary to **section 46** of the *Traffic Act, Cap 403*. It was alleged in Counts I & II that on 05/06/2016 at about 2.00 am at Kandara area along Noromoru–Nanyuki road in Nyeri County, being the driver of motor vehicle registration number KAM 153Z, make Toyota Hilux Double–Cab, he drove the said motor vehicle on a public road dangerously, having regard to all the circumstances of the care, including the nature, condition and use of the road, and the amount of traffic which was actually on the road at the time, or which might reasonably be expected to be on the road, and thereby caused the deaths of respectively one **PETER IRUNGU MWANGI** and one **WILLIAM MURIMI**, who were a passenger and driver respectively of motor vehicle registration number KAD 663P.

2. The Appellant was also convicted in Count III of *failing to report the accident* contrary to **section 73(3) as read with section 75** of the *Traffic (Amendment) Act, No 38 of 2012*, and also in Count IV of *taking and driving the motor vehicle without the consent of the owner* contrary to **section 65(1)** of the *Traffic (Amendment) Act, No 38 of 2012*.

3. On 17/04/2019 the Appellant was sentenced in Counts I and II to six (6) years imprisonment. In addition his driving licence was ordered to be surrendered and cancelled for 3 years from the date of the judgment. For each of counts III and IV the Appellant was sentenced to serve one year imprisonment. All the sentences were ordered to run concurrently.

4. The Appellant has appealed against all the convictions and sentences. The following grounds of appeal are set out in the amended petition of appeal dated 26<sup>th</sup> and filed on 30<sup>th</sup> November 2020 –

- a) That the trial court erred in law by failing to appreciate that there was a first impact between motor vehicles KAM 153Z and KAM 457P for which the Appellant was not to blame, which led to the fatal impact between KAM 153Z and KAD 663P.
- b) That the trial court erred in law and fact by holding that the Appellant “deliberately and carelessly caused the accident...”
- c) That the ingredients of the offences charged were not proved against the Appellant beyond reasonable doubt.
- d) That trial court erred in dismissing the Appellant’s defence.
- e) That the trial court erred in law and fact by convicting the Appellant for non-existent offences under non-existent provisions of the law.
- f) That the sentences imposed were manifestly harsh and excessive.

Learned counsel for the Respondent supported all the convictions.

5. The appeal was canvassed by way of written submissions. I have considered the submissions of both sides, including the cases cited. I have also read through the record of the trial court in order to evaluate the evidence tendered and arrive at my own conclusions regarding the

same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.

6. With regard to Counts I and II (causing death by dangerous driving) the prosecution case was set out by the testimonies of ADAN HASSAN (PW3), FRANKLIN GITONGA (PW7), WILFRED MUTHONI (PW9) and PC JOSEPH CHEPTOT (PW11). That case was that on the material day, time and place, PW3 and PW7 were in motor vehicle KAD 663P driven by the deceased in Count II, William Murimi. The deceased in Count I, Peter Irungu Mwangi, was seated behind the driver. PW7 was seated in the passenger seat to the left of the driver, while PW3 was seated behind PW7.

7. They were driving to Nairobi in a convoy of three cars. KAD 663P was in the middle. Ahead of it was motor vehicle KAM 457P, a Toyota Starlet. The registration number of the motor vehicle behind them is not clear in the proceedings.

8. PW3 and PW7 saw a motor vehicle coming from the opposite direction at speed. It lost control and came to their side. Their driver swerved to the left to try and avoid the other vehicle, but it hit them at the front right side of their car. That motor vehicle from the opposite direction was KAM 153Z driven by the Appellant. Upon impact their driver lost control of the vehicle which overturned a number of times.

9. Both PW3 and PW7 acknowledged that before motor vehicle KAM 153Z hit theirs, it had come into contact with the motor vehicle ahead of them; they said they heard a bang. The investigating officer of the case (PW11) also acknowledged that the Appellant's motor vehicle had been in contact with another motor vehicle just before it collided with motor vehicle KAD 663P, though he did not investigate this aspect of the accident.

10. PW11 visited the scene of the accident the following morning and drew a sketch plan (both rough and fair copies were produced in evidence).

11. It was the Appellant's case throughout (borne out in cross-examination of the prosecution witnesses and in his own sworn evidence), that as he was driving towards Nanyuki he met with three vehicles driving in the opposite direction at high speed with their full lights on. The leading vehicle, which he said had just overtaken another one, hit his vehicle on the right hand side. The vehicle following that one also hit his vehicle on the same right side.

12. The sketch plan prepared by PW11 shows that the point of impact between the Appellant's motor vehicle KAM 153Z and motor vehicle KAD 663P was near the centre line but slightly in the lane of motor vehicle KAD 663P. The sketch plan also shows that the Appellant's motor vehicle skidded some 18.9 meters before it came to a stop on the opposite edge of the road.

13. Skid marks can be a good indicator of speed, and the longer they are, the more likely that the vehicle involved was traveling at some speed. The sketch plan prepared by PW11 equally shows that motor vehicle KAD 663P skidded a total of 29 meters before it finally came to rest completely off the road. If the skid marks left by the Appellant's vehicle were evidence of speeding, the skid marks left by motor vehicle KAD 663P were equally evidence of considerable speed just before impact.

14. The unfortunate thing in this case is that PW11 never investigated the part that may have been played by the driver of the third motor vehicle, the Toyota Starlet. Its driver was never called to testify. It is not readily apparent why he was not called. The Appellant blamed him for the first impact, which he said led to the second, fatal impact.

15. It is possible for vehicles which are travelling at some speed to lose control if they come into contact with each other, particularly where their trajectories are in opposite directions. It was therefore incumbent upon PW11 to investigate the contact or impact between the Appellant's motor vehicle and the third motor vehicle, and to take a statement from its driver and call him to testify. Only then could the lingering doubt be removed, that the chain of events that resulted in the death of the two people was triggered not by the Appellant as alleged by the prosecution, but by the driver of the third motor vehicle as alleged by the Appellant.

16. Upon my own evaluation of the evidence, I am not satisfied that Counts I and II were proved against the Appellant beyond reasonable doubt. The convictions are not safe and cannot be allowed to stand.

17. As for Counts III and IV, the submissions of the learned counsel for the Appellant amply demonstrate that the Appellant was charged under non-existent provisions of the law. He should have been charged under the relevant provisions of the substantive Act of Parliament, the Traffic Act, Cap 403, not under non-existent provisions of the statute that amended the substantive Act, the Traffic (Amendment) Act, No 38 of 2012. The convictions in Count III and IV are thus erroneous and cannot be allowed to stand.

18. In the event, the Appellant's appeal will be allowed in its entirety. All convictions are hereby quashed and the sentences imposed set aside. The Appellant shall be forthwith set at liberty unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 7<sup>TH</sup> DAY OF JULY 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 8<sup>TH</sup> DAY OF JULY 2021**