REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 34 OF 2020

KEVIN OMONDI NDEDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentencing by Hon. S. Abuya SPM

at Meru Law Court in Traffic Case No. 172 of 2019 delivered on 8/4/ 2020)

JUDGMENT

1. The appellant herein was charged with two counts of causing death by dangerous driving contrary to **Section 46 of the Traffic Act Cap 403 Laws of Kenya** The particulars of the charge were that on the 8th day of November 2018 at around 0800 hours along Meru-Nanyuki road, being the driver of motor vehicle registration number KCB 788U BMW did drive the said motor vehicle in a manner which was dangerous to other motorist thus caused the deaths of TABITHA KAIMURI and JULIUS MURIUNGI who were a pillion passenger and a rider respectively of motor cycle registration number KMDT 972F.

2. The appellant pleaded not guilty and after a full trial, he was convicted on both counts and sentenced to pay a fine of Kshs. 30,000 in default to serve 2 years jail term on each count. Aggrieved by both the conviction and sentence, he filed a petition of appeal on 1/4/2020 raising five grounds. He prayed that the appeal be allowed, the conviction and sentence be quashed and he be set free.

3. In his submissions filed on 13/05/2021, the appellant submitted that the prosecution failed to prove the elements of the offence of dangerous driving. He faulted the investigating Officer for failing to establish carelessness or recklessness on his part, as there were no eyewitnesses to the accident. He contended that the drunken rider was the one to blame for the accident. According to him, the evidence adduced was inconsistent and contradictory as evidenced by PW4 and the Investigating Officer. He relied on **Gabriel Wambua Kitili v Republic [2006] eKLR, Richard Munene V Republic [2018] eKLR, Atito v Republic 1975 E.A** and **Hassan Illo Bwanamaka & Another v Republic [2018] eKLR** in support of his submissions on the burden and incidence.

4. For the prosecution as respondent in the appeal. It was submitted that the case had been proved beyond reasonable doubt by tendering sufficient and consistent evidence, which corroborated the particulars of the charge sheet. They viewed the sentence meted out to the appeal as having been fair and lenient and prayed for the dismissal of the appeal. They relied on **Robert Wanjala Shiundu v Republic [2018] eKLR, Samuel Karanja Kimani v Republic [2016] eKLR, Erick Onyango Ondeng' v Republic [2014] eKLR** in support of the position that it is the duty of the trial court to consider all the evidence tendered, deal with any inconsistencies noted and that the speed of over 60kph at a market center was unreasonable and dangerous thus proved the offence charged.

5. From the onset, the court reminds itself of the duty of a first appellate court to re-appraise. Reevaluate and reexamine the entire evidence afresh and reach an independent decision as to whether to uphold the conviction or not. It must however be born in mind that this court neither heard nor saw the witnesses testify ***(see Okeno v Republic [1972] EA 32).*** In seeking to discharge the task, I shall outline the evidence before the trial court in summary and on the pertinent areas.

6. Wilfred Mwenda and Cyrus Mwiti Kiruja, **PW1 & 2,** testified that they were never at the scene of the accident but were present at the post-mortem of the two deceased persons purposely to identify same. During cross examination, both confirmed that although they never witnessed the accident, both later went to the scene only to find both rider and the pillion passenger dead. Neither saw any a helmet nor reflective jackets at the scene. I not that the relevance of the evidence is limited to identity of the deceased persons but avails very little on how the accident occurred and whose fault it was.

7. Corporal Susan Muchemi**, PW3** testified that on the material day, she learnt of the accident between motor vehicle registration number KCB 788U and a motor cycle registration number KMDT 972F tiger, both heading to Meru from Nanyuki. She visited the scene in the

company of her colleague. The motorcycle was hit from behind and both the rider and pillion passenger were not wearing reflective jackets or helmets. The length of the skid marks at the scene indicated the motor vehicle was moving at a high speed. She produced a rough sketch plan, a fair sketch plan and legends and measurements.

8. In cross examination she averred that she could not ascertain if the motorbike was defective or not, as it had been extensively damaged. She also confirmed that there were no eye witnesses at the scene. Although she reiterated that the motor vehicle was at high speed, she did not confirm if the speedometer had locked at a particular speed or not. The essence of this evidence must be limited to the opinion that, based on length of skid marks, the vehicle must have been doing a high speed. He did not offer to approximate such speed nor was he challenged to make such approximations.

9. Kenneth Muthuri, **PW4** a doctor at Meru Level 5 hospital produced the post mortem in respect of both deceased persons, on behalf of his colleague. The cause of death for Julius Muriungi was head injury secondary to trauma. The death of Tabitha Kaimuri was caused by severe spinal column C-3 and C-4 and intracerebral hemorrhage. As said of the other previous witnesses, the doctors evidence went towards proof of death but very little on the causation of the accident.

10. Samuel Orenge Mukore, **PW5** a government motor vehicle inspector produced, with consent of the defense, inspection reports on behalf of his colleague, who had since proceeded on transfer. The findings were that much of the damage was concentrated at the front of motor vehicle, which had no pre-accident defects. Both the motor vehicle and the motor cycle were extensively damaged and therefore the pre-accident condition could not be ascertained. This was a witness whose evidence should have been probed further to give an opinion on how the collision took place but both sides did not adventure that far. I take not of the fact that no eye witness was availed and no meaningful effort was made to advance and pursue the case for circumstantial evidence. That notwithstanding, the appellant was put on his defense and he opted to give a sworn statement. In cross examination, however, he confirmed that the motor vehicle was in good condition before the accident.

11. In his defense, the appellant stated that he was travelling along Nanyuki-Meru road, it was dark and rainy and that at Mitoone-Kiirua area, he heard a loud bang on the front of his car, applied breaks and veered off the road rolling into a ditch. He then managed to inform his friend one Dr Paul Bundi, DW2, on phone of the accident, and requested him to report at the police station. He walked back to the scene to try and establish what had caused the accident, but he was met with a lot of hostility by the crowd which had already gathered. He averred that he was familiar with the road as he regularly used it and was certain that there was no road signage pertaining to speed in the area. He took himself to the police station, reported the matter and went back to the scene in company of the police. Prior to the accident never saw the motorbike nor any other obstacle on the road and formed the view that the cyclist and his passenger suddenly and without much regard joined his path from the side of the road without any headlights and he was unable to see then because both deceased were not wearing helmets or reflective jackets. He stressed that the motor cycle did not have an indicator light or head lights on and that he was driving at a speed of 60-70 km/hr. He denied being the cause of the accident, as he had never caused any major accident prior.

12. Paul Bundi, **DW2** corroborated the testimony of DW1 to the effect that both the deceased and the pillion passenger did not have reflective jackets and helmets. He then gave his opinion, based on the injuries he observed on the bodies and that postmortem reports, to the effect that the force was either frontal or sideways and not from the rear. I see that evidence for the defense to displace the position by the prosecution that the motorcycle was hit from the rear.

13. After re-evaluating the whole record and considering the grounds of appeal and submissions for and against the appeal, I find the issues flowing for determination emanating from the grounds of appeal as filed to be; whether the prosecution adduced sufficient evidence to prove the offence and its elements against the appellant beyond reasonable doubt and whether sentences meted out to the appellant on both counts were excessive.

Analysis and determination

14. The occurrence of the accident, the involvement of the appellant's and death of the two deceased persons in the accident are not in dispute but admitted by both sides. The only question is therefor, whether, the manner of driving by the appellant was proved to have been dangerous as defined by the statute.

15. As evident from the record at trial, there was never eye witness to the accident hence no direct evidence was availed to the court. It thus remained for the case to be dependent upon circumstantial evidence. The law on the kind of circumstantial evidence to support a conviction is that it must point to no other hypothesis than that of the guilt of the accused. That remains the judicially established threshold as said in a line of decisions of the court of appeal. For example, in **PON v Republic [2019] eKLR** the court of appeal said: -

> **"To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty"**

16. In this matter it is evident to this court that the trial court proceeded with the matter as if there had been direct evidence on how the accident occurred. That was erroneous for failure to appreciate the principles on how to treat circumstantial evidence and invites interference by this court. It was obligatory upon the prosecution to prove that the speed at which the vehicle was driven and demonstrate same to have been dangerous in the circumstances. In my assessment, as at the close of the prosecution's case, there was no proof how the accident occurred. That left the explanation by the accused that the cyclist and his passenger were not on the road but could have emerged from a side road without headlights or reflectors and onto the road and his path thus affording him no opportunity to maneuver. I find that to have been a reasonable doubt created and whose presence militated against any conviction. It is equally erroneous to hold that the accused offered no explanation on how the accident occurred. The law remains that the accused has a right to remain quiet and that cannot be a basis to hold him at fault. Here, however, as said before, the accused gave an account which I find plausible and it not supported by the record that no explanation was offered.

17. Accordingly, I do find that with the doubt left by the prosecution's case and built upon by the defense case, I find that the conviction was unsafe and I do quash it and set aside the sentence. Having done so, it would serve no meaningful purpose to consider the challenge on the sentence, which stands set aside.

DATED, SIGNED AND DELIVERED AT MERU VIRTUALLY BY MS TEAMS THIS 20TH DAY OF SEPTEMBER, 2021.

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Maina for the respondent/ODPP

MR. Mateli for the appellant

PATRICK J.O OTIENO

JUDGE