Murage v Republic (Criminal Appeal 39 of 2020)
[2021] KEHC 118 (KLR) (6 October 2021) (Judgment)

Neutral citation: [2021] KEHC 118 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL 39 OF 2020

DAS MAJANJA, J

OCTOBER 6, 2021

BETWEEN

CYRUS KABUCWA MURAGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.E. Olwande, SPM dated 16th July 2020 in Traffic Case No. 296 of 2018 at the Magistrates Court at Limuru,)

JUDGMENT

1. The Appellant, CYRUS KABUCWA MURAGE, was charged with the offence of causing death by dangerous driving contrary to section 46 of the *Traffic Act* (Chapter 403 of the Laws of Kenya). It was stated in the particulars of the charge that on 4th May 2017, at Muregeti area along Nairobi-Naivasha highway within Kiambu County, the Appellant, being the driver of motor vehicle registration number KCE 031Q, Toyota ISIS, drove the said motor vehicle along the said public road in a manner which was dangerous to the public having regards to all circumstances of the case including the road, nature and amount of traffic at the time or reasonably expected hence knocked and fatally injured a pedestrian namely Henry Chogo Mulehi("the deceased").

2. The trial magistrate found convicted the Appellant and imposed a fine of KES 100,000.00 and in default, he was to serve one-year imprisonment. In addition, the Appellant's driving license was suspended for a period of three years. The Appellant has appealed against the conviction and sentence. The Appellant relies on his Petition of Appeal dated 29th July 2020 and written submissions which were briefly highlighted by his counsel. The Prosecution has opposed the appeal through its written submissions

3. It should not be lost that this is the first appellate court and as such, it must reconsider the evidence, evaluate it itself, and draw its own conclusions (see *Okeno v Republic* [1972] EA 32 and *Pandya v*

Republic [1957] EA 336). However, it is not enough for the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions. It is incumbent on this court to make its own evaluation of the evidence, so as to satisfy itself that no failure of justice has been occasioned by the defects in the trial court's judgment (see *Ngui v Republic* NRB CA CRA No. 135 of 1981 [1983] eKLR). With the above guiding principles, I now proceed to determine the Appellant's appeal which is premised on eight grounds.

4. The Appellant submits that the learned trial magistrate erred by ignoring the evidence of the investigating officer to the effect that the investigating officer could not establish who was to be blamed for the accident. The Appellant states that the evidence of the investigation officer was crucial to inform the court of what had taken place and help the court to make a conclusive finding. The Appellant also faults the trial court for holding that the deceased was hit by the front side of the car when the evidence that had been placed before the court did not satisfy that assertion

5. I reject the Appellant's submission that it is only the investigating officer who could conclusively establish who was to be blamed for the accident. Since the was direct witness to the accident, the investigating officer's testimony could only be corroborative and complimentary to that of the direct witness who testified how the accident occurred. It is from the direct evidence and the investigating officer's testimony that the court could deduce who was to blame. As the court in *Daniel Kipyegon Ng'eno v Republic* NKR CRA No. 267 of 2013 [2018] eKLR held:

> Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution.
>
> .....
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> 47. In any event, it is established law that a conviction can be based on the testimony of a single witness, a position that was ably captured in Anil Phukan vs State of Assam as follows:-
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> > "A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone"
>
> 48. A similar position was reiterated by the Court of Appeal of Tanzania in Ahmad Omari vs The Republic. Also discussing the same issue, the Court of Appeal of Uganda in Okwang Peter vs Uganda held as follows:-
>
> > "Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error"

> 49. It is always competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect. The law is also clear that there is no particular number of witnesses required for proof of any fact.

6. I do not find any fault in the trial magistrate's decision to deduce that the accident according to the account given the direct witness, PW 1, and the Vehicle Examination Report which confirmed the damage on the motor vehicle. The trial magistrate was satisfied that PW 1's testimony was truthful and consistent with the post-accident damage of the car. This is conformity with what the Court of Appeal stated in *Francis Amukune Obwina v Republic* NRB CA CRA No. 82 of 2016 [2017] eKLR that "... the testimony of a single witness must be examined with considerable circumspection to ensure that it cannot but be true before a conviction is founded on it."

7. The Appellant further submits that PW1's testimony was contradictory as to whether they were together with the deceased on the same side of the road or not when the accident happened. Having considered the record, I find that PW1's testimony was consistent that he was on opposite sides of the road with the deceased and that both of them were facing the road towards Nairobi. It was also consistent with that of the Appellant himself and Vehicle Examination Report that the deceased had been hit from the motor vehicle's right side.

8. If anything, it is the Appellant's testimony which was contradictory as he reported to the police as having hit a motor cyclist but then informed the court that he did not know what he had hit and was only informed by the police that he had hit someone. Thus, the Appellant cannot submit with finality that he hit a motor cyclist when in actual sense, he did not know what he had hit.

9. From the evidence on record, the trial magistrate's findings considered that the facts and concluded that the Appellant hit the deceased from the right side of the motor vehicle and he was not on his lane or on the road at all when he hit the deceased who was himself off the road. I also find that the trial magistrate interrogated whether the deceased was involved in the said accident and whether he died out of injuries sustained in the said accident. In this respect, the Investigating Officer, PW 4, produced the Post Mortem Report which show that the deceased died from head injuries due to blunt force trauma consistent with the road traffic accident.

10. As to whether the Appellant was driving dangerously, I borrow the findings of the court in *Joseph Kahonoki Njoroge v Republic* NKR HCCRA No. 46 of 2004 [2006] eKLR that:

> '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:
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> > "... 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."

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 is 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.'

11. The evidence on record can only lead to the conclusion that the Appellant was driving dangerously and that is why he was not on his lane and on the road and hit the deceased who was not even on the road. There is no evidence of any blame that can be apportioned on the deceased in the circumstances and I have little difficulty agreeing with the trial magistrate that the Appellant was driving in a dangerous and reckless manner., I therefore affirm the conviction.

12. The Appellant submit that the sentence is harsh and excessive in the circumstances. The Prosecution on the other hand submitted that it was lenient. Section 46 of the *Traffic Act* provides that a guilty offender is liable to imprisonment for a term not exceeding ten years. The Appellant was sentenced to a fine of KES 100,000 and in default, imprisonment of one year. Considering the circumstances of this case and the Appellant's mitigation, the sentence was not harsh or excessive. In fact, it was lenient.

13. I affirm the conviction and sentence. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KIAMBU THIS 6TH DAY OF OCTOBER 2021.

M. KASANGO

JUDGE

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.

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