



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 86 OF 2020

NICODEMUS MARTIN SIMATWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the conviction and sentence by Hon M. Munyekenye (P.M) in original Webuye P.M.C.C Traffic Case No. 236/2020 delivered on 1st September, 2020]

JUDGEMENT

The appellant was charged in the subordinate Court with 3 counts. In count 1, he was charged with the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act, the particulars were that on the 28th day of August 2020, at around 1000 hrs at Pan Paper Area along Webuye-Eldoret Road in Webuye East Sub County within Bungoma County, being the driver of Motor Vehicle Registration Number KBU 828K/ZD 0821 Mercedes Benz Axor drove the said motor vehicle along the said road in a manner that was dangerous to the public having in regard to all the circumstances of the case including the nature, condition and use of the road and the amount of traffic which was actually at the time or which might reasonably be expected to be on the road and thereby caused the death of ROSE NANYAMA JOSEPH who was a pillion passenger on Motor Cycle Registration Number KMEJ 930H.

In the second count, he was charged with the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act, the particulars being that on the 28th day of August 2020, at around 1000 hrs at Pan Paper area along Webuye-Eldoret Road in Webuye East Sub County within Bungoma County, being the driver of Motor Vehicle Registration Number KBU 828K/ZD 0821 Mercedes Benz Axor drove the said motor vehicle along the said road in a manner that was dangerous to the public having in regard to all the circumstances of the case including the nature, condition and use of the road and the amount of traffic which was actually at the time or which might reasonably be expected to be on the road and thereby caused the death of JOHN NJEMU KHAEMBA who was the rider of Motor Cycle Registration Number KMEJ 930H.

The third count was driving under the influence of alcohol contrary to Section 44(1) of the Traffic Act. The particulars were that on the 28th August 2020, at around 1000 hrs at Pan Paper area along Webuye-Eldoret Road in Webuye East Sub County within Bungoma County being the driver of Motor Vehicle Registration Number KBU 828K/ZD 0821 Mercedes Benz Axor drove the said motor vehicle on the said public road while under the influence of alcohol to wit 0.93 Mg/l which is above the allowed 0.00Mg/l for commercial vehicles.

The Appellant was convicted on his own plea of guilty and sentenced to serve 20 years imprisonment in each of the first 2 counts and 2 years on the third count.

Dissatisfied, the appellant preferred this appeal on the following grounds:-

- 1. The honourable learned trial magistrate erred in both law and fact when she convicted the appellant on a plea that was not unequivocal hence occasioning a miscarriage of justice.**
- 2. The honourable learned trial magistrate erred in law and fact when she failed to indicate the language the appellant understood hence occasioning a miscarriage of justice.**
- 3. The proceedings amount to a nullity due to the fact that the honourable trial magistrate failed, ignored and or refused to obtain the consent of the appellant to conduct the proceedings electronically hence occasioning a miscarriage of justice.**
- 4. The sentence meted out to the appellant was harsh, excessive and unlawful.**

5. **The entire proceedings were conducted in total violation of the provisions of Article 50 of the Constitution hence occasioning a miscarriage of justice.**

6. **That the charge sheet that was the basis of the plea before the trial court was instituted by the National Police Service in total contravention of Article 157(6)(a) of the constitution hence occasioning a miscarriage of justice.**

The appeal proceeded by way of written submissions.

The appellant submits that the language used in the court is not indicated. The language in which the plea was taken, when the facts were read out as well as during conviction. Counsel submits that the record does not show whether all the counts were read out to the appellant. In support of this proposition, counsel relies in the cases of *Simon Vundi Mwaniki vs Republic (2021)eKLR* and *Elijah Njihia Wakianda Vs Republic (2016)eKLR*.

Counsel submits that the appellant's mitigation where he blamed external forces altered the plea and the court ought to have changed his plea to that of not guilty. He cites the case of *John Mwendo Musau Vs Republic (2013)eKLR*

As regards ground 4, it is submitted that the sentence meted out was excessive citing the authority in *Francis Karioko Muruatetu & another Vs Republic [2017] eKLR*.

On ground 5, counsel submits that the trial magistrate ought to have informed the appellant of his right to legal representation and the gravity of the sentence that was to be imposed considering the seriousness of the charges. Counsel relies on the provisions of Article 50 of the Constitution, Section 43 of the Legal Aid Act and the case of *Adams Mbithi Vs Republic (2021) eKLR, Joseph Kiema Philip Vs Republic (2019)eKLR, Jared Onguti Nyantika Vs Republic (2019)eKLR, David Njoroge Macharia Vs Republic (2011)eKLR* and *Karisa Chengo & 2 others Vs Republic (2015)eKLR*.

On the 6th ground, counsel submits that the Constitution under Article 157 vests the Director of Public Prosecutions with the power to prosecute whereas in the instant case the charge sheet was preferred by the OCS Webuye. Counsel urges the court to find that this contravenes Article 157 of the Constitution.

For the respondent, it is submitted that the proceedings were procedurally conducted virtually in the wake of the Corona Virus pandemic. That the charge sheet was validly prepared and the subsequent the unequivocal plea by the appellant was made in certain terms signifying admission of guilt and finally that the conviction and sentence was regular.

This being a first appeal, the duty of this court is as was espoused in *David Njuguna Wairimu Vs. Republic (2010) eKLR* where the court held;

..... 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."

Having scrutinized the record the submissions by the parties, this court's duty is to determine whether the plea was equivocal and whether the sentence meted out on the appellant was excessive in the circumstances.

On whether the plea was equivocal, the law relating to the taking and recording of pleas of guilt is found in Section 348 of the Criminal Procedure Code which states;

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

The procedure was stated in the celebrated case of *Adan v Republic(1973) EA 445 at 446* where the procedure was set out as follows;

i. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

ii. the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

iii. the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

iv. if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

v. if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

The holding therein was restated by Ngugi J. in *Simon Gitau Kinene v Republic [2016] eKLR* where the learned judge held;

When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded.

The record shows that the appellant was presented in court on 1/9/2020 and the charges read out to him. The record shows that there was English to Kiswahili translation. The response recorded therein was;

Count I- "Ni Ukweli "

Count II: Ni ukweli

Count III Ni ukweli.

Subsequently, the plea of guilty was entered.

The record also shows that the facts were read over to the appellant, the then court put the question; **"Are the facts correct?"**.

His response was; **"the facts are true"**.

The court entered a plea of guilty on the 3 counts and the appellant tendered in his mitigation in the following terms;

I did not know where the accident occurred. I went to Nzoia and went for a short call. I stood there for about ten minutes. I left and went to Kaburengu. I stopped that is when I was told I had caused an accident. My motor vehicle does not show anywhere that I had hit the people. I pray for forgiveness.

The submission by the appellant's Counsel that the mitigation negates the plea of guilty is not correct. The court has read the appellant's mitigation which is more less a narrative of the occurrences of the day. He also pleaded for forgiveness. His mitigation relates well with a person who was aware of the charges levelled against him.

Taking all the evidence in totality, the court is satisfied that the plea of guilty was properly entered. The accused seemed to have known what was at stake.

On sentence, the appellant was charged under Section 46 of the Traffic Act in respect of the first 2 counts. The section provides;-

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.

The third count is in contravention of Section 44(1) of the aforesaid Act. Section 46 of the Act provides for a prison term not exceeding ten years while Section 44 provides for a fine not exceeding One Hundred Thousand Shillings or to imprisonment for a term not exceeding two years or to both.

Quite clearly, the sentence meted out by the trial court was excessive and not supported by the law creating the offence and it is prudent that this court interferes with the same.

In the circumstances, the sentence of 20 years imprisonment is hereby set aside and is hereby substituted with a prison term of 5 each years in respect of Counts I and II and a prison term of 1 year or a fine of Kshs 50,000/= in respect of count III. The sentences shall run concurrently from the date of conviction.

Orders accordingly.

DATED at BUNGOMA this 5th day of November, 2021.

S. N. RIECHI

JUDGE