REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 131 OF 2016

SAMSON KIPKOECH CHERUIYOT……..……...…….APPELLANT

VERSUS

REPUBLIC ……..……..……..…….… RESPONDENT

(Being an appeal from the chief magistrates court, Milimani, Traffic Case No. 15652 of 2011, against a ruling delivered on 8.9.2016, by Hon. Nzakyo SPM).

JUDGMENT

The appellant herein ***SAMSON KIPKOECH CHERUIYOT*** was charged before the chief magistrate's court on 23.8.2011 with the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act, Cap 403, Laws of Kenya. The particulars were that on 16.5.2011 at about 5:45AM along Haile Selassie Avenue, Nairobi, being the driver of motor vehicle Registration No. KBA 377Z, Toyota matatu, he drove the said public service vehicle recklessly by failing to give way to another motor vehicle registration No. KBL 475D Nissan Matatu, which was dangerous to the public thus causing a collision thereby causing the death of 1 male adult passenger in motor vehicle registration No. KBA 377Z namely RONALD KIPNG'ENO MUTAI.

The appellant was also charged on Count II, with careless driving contrary to section 49(1) of the Traffic Act, Cap 403, Laws of Kenya. The particulars are as per contained on the charge sheet presented to the court on the date of plea.

From the record of the proceedings, the prosecution's case was closed on 31.5.2016. Thereafter, upon considering the evidence on record and the submissions made, the court, on 8.9.2015 ruled that the accused had a case to answer and put the appellant to his own defence.

Aggrieved of the said ruling of the court, the appellant filed this appeal against the same on 26.9.2016. The Petition of Appeal (dated 22.9.2016) lists upto 11 grounds of appeal. In the appeal, the appellants pleads with this court to analyse, re-evaluate and subject the prosecution's case to a fresh and exhaustive scrutiny and find that the appellant has no case to answer in the traffic case in the court below. Some is opposed by the state.

This appeal has been canvassed by way of written submissions. On the appellant's side, the appellant first submitted on the role of the 1st appellant court. Reliance was made on various cases including ***Stephen Muturia Kinganga Versus Republic (2013)eKLR***, ***Okeno Versus Republic (1972)EA 322***, ***David Njuguna Wairimu Versus Republic (2010)eKLR,*** and ***Paul Kobia Mibaya Versus Republic (2007)KLR.***

The appellant also submitted on whether or not the prosecution had indeed established a prima facie case against the appellant. The court was referred to the cases of ***Republic Versus Abdi Ibrahim Oul (2013)eKLR,*** and ***Ramanlal Trambaklal Bhatt Versus Republic (1957)EA 332.***

The appellant has in the submissions proceeded to analyse the evidence of the 7 prosecution witnesses. A number of authorities were cited to support the case of the appellant including;-

i) ***Mburu Njoroge Versus Republic,*** that conviction for driving without due care must be founded on fact.

ii) ***Republic Versus Peter Kaithaka Kugeria, Meru HCCR 39/2010,*** on failure to call vital witnesses.

iii) ***Mbogo Versus Shak & Another (1968)EA 93,*** on exercise of discretion by the court regarding orders of interior courts.

The Respondent, on the other hand, only made short submissions that the court ought to exercise caution so that the avenue of appeal at interlocutory stage is not abused with effect of derailing the cause of justice. Counsel relied on ***Joseph Nduvi Mbuvi Versus Republic (2019)eKLR***, in which Justice G. V. Odunga held that the supervisory jurisdiction mechanism should only be invoked where there are glaring

acts or omissions in the proceedings in the trial court. The respondents urged the court to dismiss this appeal.

This appeal is an appeal against the orders of the lower court made midway the trial under section 210 of the Criminal Procedure Code. The orders sought at the relief section of the petition of appeal filed are otherwise orders of revision i.e ***"that the appellate court be pleased to review and or quash the ruling of the trial court."***

In the submissions of the appellant, the appellant has given a detailed analysis of the evidence that the prosecution witnesses gave in court at the trial ending with the submissions that the evidence, taken in totality would not be sufficient to establish a prima facie case against the appellant. What is clear however, is that the learned trial magistrate, did not in ruling aggrieved of subject the said evidence to any detailed consideration. The court simply stated.

> ***"As per evidence adduced by the prosecution, it is the finding of this court that a prima facie case has been established against the accused hence he is required to make his defence."***

The appellant was charged before the lower court with offences under the traffic Act, Cap 403 of the Laws of Kenya. The original jurisdiction over the case of the appellant lies with the subordinate court (Magistrate's Court). And the magistrate's court, under Article 160 of the constitution enjoys independence in the discharge of its duties. Article 160(1) guarantees such independence thus;

> ***"In the exercise of Judicial authority, the Judiciary as constituted by Article 161, shall be subject only to this constitution and the law, and shall not be subject to the control or direction of any person or authority.***"

The effect of this is that the subordinate court, in discharging its duties, must be accorded the opportunity to act so independently. And that no authority or body should move in to interfere with such independence, not even the High Court. The issue therefore that this court must determine first before even venturing into the merits of the appeal is whether it would be proper for this court to intervene in this matter at this stage and in the manner urged by the appellant. Obviously from the aggrieved finding of the trial court, the court reserved its detailed opinion on the evidence tendered by the prosecution. Proof of this position is reflected in the rather terse ruling that was devoid of any form of analysis of the evidence of any single witness. An evaluation of the said ruling as urged would not be possible. Since the court did not in the first case consider specifically the evidence on record. It is for this reason, that I am of the firm view that it would be improper for this court to intervene in this matter in the manner pleaded in this appeal. The subordinate court, being the court with the original jurisdiction must be accorded the opportunity to independently exercise its jurisdiction, and the High Court must refrain from entertaining any invitation to micro manage the subordinate court while exercising its constitutional mandate.

And general jurisprudence from our courts are in support of this position. Just to mention but a few examples;

In the case of ***Frankline Muthoka Mumo Versus Republic (2019)eKLR,*** the Honourable Odunga J, held;

> ***"If every ruling of the lower court and which went against a party were to be subjected to the revisionary jurisdiction of the court, floodgates would be opened and the court would be innudated with such applications thus making it impossible for the lower courts to proceed with any case to its logical conclusions***."

In the case of Republic Versus Perry Kusangara and others, HCCR. No. 4/2020 (Naivasha), Justice R. Mwongo held,

> ***"A balance has to be struck in the exercise of constitutional jurisdiction to ensure there is no appearance that its objective is to micro-manage the trial court's independence in conduct and management of its proceedings and that supervisory jurisdiction should not be used as a short cut for an appeal."***

And none, other than the Court of Appeal has given the same direction. In the case of ***Thomas Patrick Gilbert Cholmondely Versus Republic (2008) eKLR,*** the court caution against the filing of interlocutory applications for revisions (read appeals) on matters that would very well be taken up at the conclusion of the trial, and which invariable have the inviable consequences of causing inordinate delays in the trial of cases.

There is no doubt that this appeal has caused the inordinate delay in the conclusion of the trial before the subordinate court, which commenced in 2011, about 10 years ago. It is only proper that the trial court be accorded the opportunity to make its independent determination of the case before it without any undue interventions by this court.

I accordingly find no merit in this appeal of the appellant dated 22.9.2016. I dismiss the same wholly. I otherwise order that the original trial filed be forwarded forthwith to the trial court (Chief Magistrate's court) for determination of the case in the normal manner. Order accordingly.

D. O. OGEMBO

JUDGE

10.11.2021.

Court:

Judgment read out in court (on-line) in the presence Ms. Korir holding brief for Mr. Arusei, the appellant and Ms. Ndombi for the Respondent.

D. O. OGEMBO

JUDGE

10.11.2021.

Court:

Matter to be mentioned before the Chief Magistrate's court for allocation of a court and a hearing date. Lower court file to be forwarded back. Mention 17.11.2021.

D. O. OGEMBO

JUDGE

10.11.2021.