REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NUMBER 105 OF 2018

APPELLATE SIDE

(Coram: Odunga, J)

STEPHEN KYALO NZIOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Mavoko Principal Magistrate's Court Traffic Case No. 1580 of 2017 delivered by Hon L Kassan, SPM on 21st October, 2018)

REPUBLIC .....PROSECUTOR

VERSUS

STEPHEN KYALO NZIOKI.....ACCUSED

JUDGEMENT

Introduction

1. The appellant, **Stephen Kyalo Nzioki**, was charged with four counts of the offence of causing death by dangerous driving contrary to section 46 of the new amendment 2012 of the ***Traffic Act*** CAP 403 Laws of Kenya. The particulars being that on 12th day of June, 2017 at around 11:40 pm along Nairobi – Mombasa road at Lukenya within Machakos County, the Appellant being the driver of motor vehicle registration No. KCJ 677D Toyota Land Cruiser did drive the said motor vehicle in a dangerous manner which was dangerous to the public having regard to all circumstances of case, including the nature, condition and use of the road and amount of traffic which was actually at the time, hence collided head on with motor vehicle Reg. No. KBX 360X Nissan Saloon causing the death of **Timothy Kyalo**, **Wilson Kioko Nguti**, **Dominic Mbuvi** and **Jacinta Muteti**.

2. After hearing the Learned Trial Magistrate found that the appellant guilty of the said offence and fined him Kshs 100,000.00 on each of the four counts and in default one year imprisonment.

3. Aggrieved by the said decision the appellant has appealed to this Court against the said conviction and sentence on the following grounds:

1. The learned trial magistrate erred in law and in fact when he convicted the appellant based on circumstantial/uncorroborated evidence contrary to the law of evidence.

2. The learned trial magistrate erred in law and in fact by finding that the appellant's motor vehicle registration no. KCJ 677D was overtaking.

3. The learned trial magistrate erred in law and in fact by not finding/holding that the evidence on record does not support a finding that the appellant drove Motor Vehicle registration no. KCJ 677 in a dangerous manner and caused the accident.

4. The learned trial magistrate erred in law and in fact by not finding/holding that the deceased and specifically the driver of motor vehicle registration no. KBX 360X was overtaking and/or substantially contributed to the occurrence of the accident

hence the most appropriate avenue for redress would be a claim for negligence under a civil suit where liability could be reasonably apportioned.

5. The learned trial magistrate erred in law and fact when he failed to consider evidence raised by the appellant and his eye witness hence leading to miscarriage of justice.

The Evidence for the prosecution before the Trial Court

4. At the trial, the prosecution called fifteen witnesses. According to PW1, PW2 and PW3, who were working with national Transport and Safety Authority (NTSA), on 12th June, 2017 at 2300 hours, they were travelling along Nairobi Mombasa Road when at Lukenya, they came upon an accident involving motor vehicles V8 Reg. No. KCJ 677D (V8) and Nissan Tida Saloon Reg. No. KBX 360X (Tida). According to their evidence, the said vehicles were on the right side of the road as one faces Nairobi from Machakos direction. It was their evidence, though they were not present when the accident occurred, that the V8 was travelling from Mombasa direction towards Nairobi while the Tida was being driven from Nairobi direction towards Machakos direction. According to them there were guard rails on the left side of the road as one faces Nairobi while on the opposite side was a ditch. At the place where the accident occurred there was a curve and a continuous yellow line. When they arrived at the scene they found all the four occupants of the Tida dead while the appellant who was driving the V8 was crying incoherently at the scene. While the Tida was extensively damaged, the V8 had very minor damage. They then called the traffic police officers.

5. PW4, **Maurice Muteti**, was called on 12th June, 2017 and informed about the accident and he confirmed that his wife, **Jacinta Muteti**, died. Similarly, PW5, **John Bosco**, was on the same day at 10am called and informed that his cousin, Jacinta, was involved in an accident and had died.

6. PW6, **Raphael Mbuvi**, was present when a post mortem was done on the body of his son, **Dominic Mbuvi** on 15th June, 2017. PW7, **Benjamin**, on 12th June, 2017 identified the body of **Timothy Kyalo** for the purposes of post mortem examination. The said Timothy's employer, **David Sonko**, PW8 testified that on 12th June, 2017 he was informed that the said **Timothy**, who was his driver had passed away. He relayed the information to his wife and according to him the post mortem was conducted on 17th June, 2017. PW11, one **Mutua**, also identified the body of **Wilson Kioko** who passed on as a result of the said accident for the purposes of post mortem examination.

7. PW9, **Dr Waithira**, carried out post mortem examination on the bodies of **Jacinta Muteti**, **Domnic Mbuvi** and **Timothy Kyalo** and produced the post mortem reports for the deceased. **Dr. Okinyi Fredrick**, PW12, also testified regarding the post mortem examination of the body of **Timothy Kyalo**.

8. PW10, **Evans Kiplangat**, produced motor vehicle inspection reports in respect of both motor vehicle reg. nos. KCJ 677D Toyota Land Cruiser and KBX 360X Nissan on behalf of one **Masika** who had since retired. The said vehicles were inspected on 15th June, 2017. According to him, the said vehicles were extensively damaged and it was a head on collision. Though reg. no. KCJ 677D had no pre-accident defaults, the accident was, in his opinion caused by over speeding.

9. PW13, **Paul Mutua**, an employee of Machakos County Fire Department, was on 12th June, 2017, assigned of going to rescue the people involved in the said accident. When he arrived there he found the two vehicles on the left side of Nairobi-Mombasa Road. While no one was in motor vehicle reg. no. KCJ 677D, the 4 occupants in motor vehicle reg. no. KBX 360X were dead and their vehicle was extensively damaged.

10. PW14, **Cpl. Isaac Chege**, testified that when he visited the scene on 12th June, 2017 at 11.00 am he found the Tida facing Nairobi around 3.5 metres from the road while the V8 was 2 more metres away facing the bush. The point of impact, according to him, was on the left lane facing Machakos. On the opposite side were guard rails. According to his evidence, at the scene the road bends to its left facing Nairobi and there is a yellow continuous lane but when going to Machakos it is dotted meaning that one could overtake. It was his evidence that while there were scratch marks, there were however no skid marks. According to him, the right side of the Tida was extensively damaged while the V8 was damaged on the left. It was his view that a car hitting the guard rail could not veer off completely to the other lane. According to him when a car on head on collision is forced to turn to face the other direction then it must have been on speed. According to him, when you are overtaking a vehicle in front, the vehicle tilts and it is likely that your left side would be hit. It was his evidence that only the accused was the surviving eye witness. According to him, if the V8 had hit the rail, the damage ought to have been on the left side. However, in this case only the front of the V8 was damaged.

The Defence/Appellant's case before the trial court

11. After being placed on his defence, the appellant testified that on 12th June, 2017 at 11.40pm he was alone driving motor vehicle reg. no. KCJ 677D Land Cruiser from Machakos to Nairobi. At Lukenya before reaching Simba Cement, he was on his left side while facing Nairobi when he saw an oncoming vehicle motor vehicle reg. no. KBX 360X at extremely high speed overtaking a pick up KCA. He swerved on his left to avoid head on collision, hit the guard rails and bounced back to the extreme right facing Machakos. By that time KBX was returning to its lane and so the two vehicles collided on the road with the exact point of impact being at the extreme right facing Nairobi.

12. It was his evidence that from Machakos the road was clear with a bit of traffic and the Tida overtook a pick up at a high and causing the pick up to swerve to the right side facing Machakos and avoided the accident. After the accident, the pick-up stopped and displayed its hazard. From the point of impact to where the vehicles rested (10 metres away) the pick-up was on the right hand side facing Machakos. It was his evidence that the pick-up avoided the accident by overtaking the scene on the right hand side. According to him he was driving at 80kph and that the damaged guard rail was 13 metres and from the start of the damaged rail to the final resting point is around 32 metres. It was his calculation that at his speed the 32 metres in 2 seconds was correct.

13. The appellant further testified that after the accident, the NTSA officials arrived and found him in a shock and he told them what happened. It was his evidence that the 5 people who were in the Tida died and the NTSA officer who was manning the road called **Maweu** (PW1) identified the deceased gentleman and lady as his colleagues. It was his evidence that though an eye witness told the said officials that the deceased was trying to overtake him, PW1 dismissed him and refused to listen to him.

14. The appellant insisted that he was not overtaking since had he been doing so the point of impact would have been both on the drivers' side since he could only have overtaken on his right side. It was the appellant's case that there were five people who were being overtaken by the deceased who stopped and informed PW1 what happened that the appellant was not to blame but PW1 did not listen to them.

15. In cross-examination the appellant said that the visibility was clear and he could see oncoming vehicles number plate. He saw KBX overtaking his car at high speed and the accident occurred in seconds though he saw the number plates. According to the appellant, after the accident KCA was on the right side facing Machakos and KBX overtook a pick up after the accident while KCA was ahead of the accident scene. By the time he bounced back after the accident, KBX had already overtaken KCA and was trying to return to its lane hence the accident occurred ahead of KCA which was behind. KCA then swerved to the right to avoid being part of the accident. According to his evidence the cars left the road and rested 10 meters away because they were moving at high speed.

16. It was his evidence that he moved parallel to the rails and only the left side of his front hit the guard rail. He reiterated that the impact occurred on the extreme right side facing Nairobi after the guard rails pushed him and he met KBX when it was trying to return to its lane and hit the co-driver side of his vehicle.

17. DW2, **David Ndubi**, testified that pm 12th June, 2016 at 11pm he was travelling in motor vehicle reg. no. KCA 144 pick-up when at Simba Cement there was a vehicle, Nissan Tida KBX, which was overtaking him while another one, reg no. KCJ 399Z a V8, was on the way. According to him from the Nairobi towards Machakos there was a bit of traffic flow while from the opposite side there was none. He then saw the Tida overtake at 15 metres behind while the V8 was 30 metres ahead. When he saw the Tida overtaking him, he saw the V8 swerve to the guard rails, hit the rails and was thrown back onto the road. He slowed down to allow the Tida overtake him but the two vehicles collided in front of him about 5 metres ahead of him. Since he was going slower, he served to his right facing Machakos, put on emergency brakes and stopped less than 2 metres from the point of impact. The 2 vehicles rested 12 metres away from the point of impact which was 10 metres away off the road with V8 facing the fence while the Tida was facing Nairobi. When he went out, he saw the appellant get out of his vehicle shaken and 5-10 minutes later an NTSA arrived with 3-4 people.

18. According to DW2 he tried to explain to them what had taken place but upon recognising the deceased PW1 told him to leave the place. He then exchanged numbers with the accused's friend, one **George** and left. According to him, he was at the scene for 20 minutes and there were other 4-5 cars that had stopped and who witnessed the accident. Since he was chased away, he did not deem it fit to report. It was his evidence that he never knew the appellant before the date of the accident.

19. In his judgement, the learned trial magistrate expressed disappointment with the investigations and was of the view that the investigating officer did a poor job in his investigations since no photos of the scene were taken. In his view, the appellant raised a crucial defence that might make or break the case. It was the learned trial magistrate's case that the court was then called upon to decide as to whether the appellant hit the guard rails or not and if indeed he did so whether his explanation of what might have occurred holds water. The learned trial magistrate found as a fact that since the left front side of the V8 had more damage, that gave sense to the appellant's narration that he hit the guard rails because logically the guard rail was on his left side. According to the learned trial magistrate, the fact that the alleged impact on the guard rail threw the appellant's car to his right side made him conclude that the appellant was at high speed and not the 80 kph suggested by he appellant. He found that the appellant could have taken advantage of his car height and slowed down and swerved to the left but it appeared he di not do so. The fcat that the investigation officer felt that there were no skid marks at the scene might suggest a theory that the V8 just emerged behind a motor vehicle ahead of it and joined to the right when an oncoming car was zooming by and so there was no time to apply any brakes. According to the learned trial magistrate, lack of skid marks in an accident of that magnitude suggests that the drivers did not have any time to apply brakes because the impact was imminent in seconds or that the cars did not have any breaks particularly since the appellant stated that he was KBX 50 metres away. While the trial court found that both V8 and KBX were at very high speed based on the fact that there were no skid marks, it found that the V8 driver committed an additional crime of swerving to the side of KBX without due care. According to the learned trial magistrate, though there was no eye witness, the deceased spoke from the grave through the scene of the accident. It was on that basis that he found the appellant guilty as charged as the evidence against him was above the balance of probability.

Appellant's Submissions

20. It the submissions filed on behalf of the appellant reliance was placed on section 46 of the ***Traffic Act*** Cap 403 Laws of Kenya**.**

21. In support of his submissions, the appellant cited the case of **Ngure vs. Republic [2003] E.A.**, **Atito vs. Republic [1975] EA 278**, **Kariuki vs. Republic [1988] KLR 456**. It was submitted that none of the prosecution witnesses was an eye witness. The only prosecution witness who sought to link the appellant to the accident was PW14, **PC Isaac Too**, the investigating officer who visited the scene after the accident. It was submitted that though the prosecution's case is pegged only on the point of impact the appellant gave a plausible explanation in his defence as to how he found himself there, an explanation that was corroborated by DW2, an eye witness thus shattering the prosecution case. It was submitted that the investigations were poor and shoddy and cannot point to the appellant's guilt and this fact was noted by the trial court. Since the prosecution's case was that the appellant was overtaking, it was submitted that the prosecution's failure to avail an eye witness was questionable and doubtful. In this regard the appellant relied on **Peter Kinyanjui Nganga vs. R [2007] eKLR**. It was therefore submitted that the only logical conclusion is that the driver of KBX was overtaking and or substantially contributed to the occurrence of the accident. According to the appellant, the trial court's finding that both motor vehicles were to blame for over-speeding is an admission that the driver of KBX 360X contributed to the occurrence of the accident and so the most appropriate avenue for redress would be a claim for negligence under a civil suit where liability could reasonably be apportioned. In the appellant's view, the additional crime"" could not be the basis of conviction.

Respondent's Submissions

22. The Respondent, through the submissions of **Ms Lilian Mogoi**, set out the evidence and submitted that from the evidence on record, it is clear that the point of impact was on the far right side of the road facing Nairobi and that the two vehicles involved had veered off the road and rested on the side about 10-12 metres off. The foregoing is also admitted by the Appellant herein in his defence.

23. It was submitted that the evidence by the prosecution was that the Appellant was overtaking and had a head on collision with KBX and since both vehicles were in high speed and KBX being the smaller car, it suffered extensive damage and as a result, its 4 occupants lost their lived at the spot. The impact on KBX was so great that even body organs of other deceased persons had been moved from their position. This points out to the high speed that both the cars were on. The foregoing notwithstanding, it is worth noting that it is KCJ that left its lane and hit the oncoming KBX which was on its lane then both the cars landed on the left side of the road heading to Machakos. If indeed the point of impact was on the lane of KCJ, either both cars would have been found at that lane or the left side of the vehicle heading to Nairobi.

24. None of the KBX occupants survived to testify on what happened but from the circumstantial evidence from the scene, the evidence points at the possibility that the Appellant was over taking and was on very high speed. The fact that KCJ that was heading to Nairobi was found on the right side of the road heading to Nairobi, clearly demonstrates that it was the one that was on the wrong lane and the drive was the one who was wrong and careless in his driving leading to a loss of 4 lives.

25. It was the evidence of the Appellant in defence that he drove parallel to the rail but it is not clear on how he was not able to bring the vehicle to a stop or to slow it to prevent it from veering off to the far right and hitting KBX while at high speed and caused damages that caucused the death of all its occupants. According to learned counsel, the question that was left unanswered by the Appellant was whether he was thrown back to the road by the rail immediately after the impact or later. If he would have driven parallel to the rail for the distance as alleged, the impact on the rail would have slowed down his vehicle if indeed he was in manageable speed and he would not have veered off the road and go all the way to the right lane and collided with KBX, force it to make a 180 turn and push it off the road for about 10 -12 metres away.

26. The Appellant admitted that the point of impact was on the extreme right facing Nairobi meaning that it was not true that he met with KBX when it was swerving back to its lane because if that was the case, the point of impact would have been in the middle of the road and not on extreme right. The foregoing further demonstrates that indeed KBX was on its lane when the accident occurred.

27. It was the testimony of DW2 that on 12th June, 2016, he was in Machakos hence he was heading to Nairobi and if at all he was overtaken, he would have been overtaken by vehicles going to Nairobi and not one coming from Nairobi. In the instant case, it was the Appellant who was going to Nairobi while KBX was going to Machakos hence there is no way it would have been the one that overtook KCA as stated in the testimony of DW2. It was submitted that DW2 testified that KCJ had been damaged on the left side and that the door could not opened after the damage. This is despite the fact that the Appellant did not give evidence to that effect. This leaves one wondering if indeed DW2 witnessed the accident herein or he witnessed a different one.

28. It was submitted that the Trial court visited the scene and as such, was able to see for itself the point of impact and the surroundings very well a point that helped it have a clear picture of how the accident occurred and direct itself well while making decision on this matter which gives it an advantage over this Court. Accordingly, it was submitted that the Appellant did not exercise due care to the other road users on this particular case since he was overtaking on continuous yellow line which prohibited him from overtaking at that point and in very high speed and as a result of his carelessness and total disregard to other road users, he caused the death of the four deceased persons herein. To the Respondent, the defence by the Appellant is a mere denial and despite him having said that he called his friend one George to the scene and having taken the numbers of other purported eye witnesses, he only called one witness whose evidence did not corroborate his evidence. Further, the evidence of DW2 was not believable since he seemed not to have witnesses the accident because if he deed, he would have known that KCJ was not damaged on the left side and that the occupants of KBX were not all men.

29. It was contended that the prosecution's case as it is, remained unchallenged that the Appellant was overtaking at high speed and had caused the accident. The defence tendered did not create any doubt as to the happenings of the night of 12th June, 2017 which saw four individuals lose their lives due to the carelessness of the Appellant. According to the Respondent, the trial Court was correctly satisfied that the evidence tendered was sufficient to convict the Appellant as charged and the trial Court did not error in reaching its decision. To the contrary, the prosecution's evidence was consistent, direct, clear and without any doubt whatsoever that the appellant committed the offence as charged.

30. It was submitted that the trial Court in reaching its decision, did analyse and evaluate the evidence tendered by the prosecution and defence and after evaluation of the weight of the same, it formed an opinion that the prosecution had proved its case beyond reasonable doubt and that the defence evidence did not shake or create doubt on the prosecution's case hence the decision to find the Appellant guilty and sentenced him.

31. To the Respondent, the fine of Kshs. 100,000 for each count as given by the court and in default one year imprisonment, is reasonable and within the law. The court was not harsh in pronouncing the same, especially considering that the Appellant was charged with causing death of four individuals as a result of the accident.

32. In view of the foregoing, the Respondent urged this Court to uphold the conviction of the Lower Court and confirm the sentence.

Determination

33. I have considered the evidence adduced as well as the submissions made on behalf of the respective parties. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

34. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

35. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. We adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd vs. Uganda Railways Corporation [2002] 2 EA 634,** thus:

"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In *Sembuya v Alports Services Uganda Limited [1999] LLR 109* (SCU), Tsekooko JSC said at 11:

'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scruitinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"

36. It was therefore held in **David Njuguna Wairimu vs. Republic [2010] eKLR** by the Court of Appeal as follows:-

"The duty of the first appellate court is 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."

37. In the same vein the Court of Appeal in **Isaac Njogu Gichiri vs. Republic [2010] eKLR** expressed itself as hereunder:

'With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: *"I find that the defence of the 5th accused is not true."* We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: "*The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances."* We agree with this confirmation."

38. It was therefore concluded by the Supreme Court Uganda in **Odongo and Another vs. Bonge** Civil Appeal 10 of 1987 (UR), (**Odoki, JSC**) that:

"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

39. Section 46 of the ***Traffic Act. Cap 403 Laws of Kenya*** provides as follows:

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.

40. This provision and provisions couched in similar terms has been the subject of judicial pronouncements in this country and in other jurisdictions. A case in point is **Ngure vs. Republic [2003] E.A.** in which the Court of Appeal had the following to say:

> **"The mere occurrence of an accident alone is not enough to prove a charge of causing death by dangerous driving under section 46 of the Traffic Act. Evidence must disclose a dangerous situation and the driver must be shown to be guilty of a departure from the normal standard of driving which would be expected of a reasonably prudent driver."**

41. In **Atito vs. Republic [1975] EA 278**, the Court of Appeal dealt with a case in which the appellant had been convicted for the offence of dangerous driving resulting in the death of two persons. At page 280 the court said:

> **"The question in this case is whether the appellant took avoiding action at all, or in good time, and whether by not taking this action, or delaying taking it unduly, he caused a dangerous situation to arise for whose consequences he is criminally liable."**

42. The Court of Appeal went on to re-state the standard of proof and the test, as was laid down in **Kitsao vs. Republic MSA H.C.Cr. A. 75 of 1975 (unreported)** that to justify a conviction of the offence of causing death by dangerous driving there must not only be a situation which, viewed objectively, was dangerous, but there must also be some fault on the part of the driver causing that situation. The question therefore is not just whether or not there was a dangerous situation, but whether the appellant also played a part in causing the situation to be dangerous. The Court of appeal went on to make the following observation:

> **"In Kitsao's case the appeal was allowed, as the most the prosecution could show was an error of judgment on the part of the driver."**

43. In **Atito vs. Republic** (above cited), at page 281, the court said:

> **"The fact that the motor –cyclist may have been at fault in not passing safely in the three or four feet of tarmac available to him is, in our opinion, immaterial. It would not cancel out the appellant's fault, in not taking avoiding action in time, which fault, whether it should properly be described as careless or dangerous driving, was clearly more, in the circumstances of this case, then a mere error of judgment."**

44. 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:

> **"… 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."**

45. 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 in 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**.

46. In **Thoya vs. Republic [2000] eKLR**, **Waki, J** (as he then was) held that:

> **"On persuasive authority in the Tanzanian case of *Pyarali -vs- Republic* [1971] EA 169:**
>
> > **"the test of whether a piece of driving is dangerous is objective and if the manoeuvre itself is dangerous the degree of negligence or care of the driver is irrelevant".**
>
> **…..**
>
> **Again the prosecution does not have to prove that the dangerous driving was the sole cause of death if it was the substantial cause of it. The Court of Appeal in *Atito -vs- Republic* [1975] EA 281 also laid down the law on the standard of proof:**
>
> > **"to justify a conviction for the offence of causing death by dangerous driving there must not only be a situation which viewed objectively was dangerous but there must also be some fault on the part of the driver causing that**

situation".

"Fault" was defined in another Court of Appeal case *Orweryo Missiani - vs- Republic* [1979] KLR 285 at page 289:

> **"Fault" certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame ….. Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient."**

Those are the principles I have to apply. The evidence available and accepted by the learned trial magistrate was that the appellant was driving the *matatu* at speed. Five witnesses who were in the *matatu* testified so. One of them put the speed at between 90 - 120 Kmph. It was overloaded. It overtook several other vehicles on the same road and was in the process of one such overtaking manouvre when it hit a spot of spilled oil on the road. There is evidence, also accepted by the learned trial court that the oil-spill had been there for sometime. The appellant had passed through the same road three times earlier. There was evidence also that it had rained. Those are the conditions of the road the appellant had to contend with.

The police officer who visited the scene and drew a sketch produced as exhibit 6, showed that the vehicle rolled and came to rest 350 meters away. It had no pre-accident defects as proved by the vehicle examiner exhibit 7. The deceased's head was split into two upon impact according to the post mortem report exhibit 8. I agree with the learned trial magistrate in view of these circumstances and evidence on record that the appellant drove in a dangerous manner. I would dismiss the appeal on conviction and now do so."

47. In this case, the prosecution's case was that the appellant who was driving motor vehicle registration No. KCJ 677D Toyota Land Cruiser from Mombasa direction towards Nairobi direction on reaching Lukenya area attempted to overtake another vehicle on his continuous yellow line on a bend and collided with an oncoming motor vehicle Reg. No. KBX 360X Nissan Tida Saloon. On the other hand, the appellant's case was that he was driving along the said road when motor vehicle Reg. No. KBX 360X Nissan Tida Saloon which was attempting to overtake some other vehicles left its lane and went onto the appellant's lane. The appellant then swerved towards his left, hit the guard rails and the vehicle was thrown back towards the right where it collided with motor vehicle Reg. No. KBX 360X Nissan Tida Saloon.

48. It is clear that the only evidence of those who saw the accident were the appellant and DW2. According to DW2, though he was staying in Nairobi, that day he was in Machakos. On reaching Simba Cement, motor vehicle Reg. No. KBX 360X which was overtaking other vehicles attempted to overtake him notwithstanding that there was an oncoming vehicle KCJ 677D. As a result, KCJ 677D swerved to its left hitting the rail and was thrown back onto the road. He slowed down and allowed KBX 360X to overtake him and the two vehicles collided 5 metres ahead of him. As a result of the collision he swerved to the right and stopped 2 metres from the point of impact. In his evidence, the damage to the V8 was extensive on the front passenger side.

49. What makes the evidence of DW2 unbelievable as rightly noted by **Miss Mogoi**, is that motor vehicle Reg. No. KBX 360X was being driven from Nairobi towards Mombasa direction while the appellant's motor vehicle KCJ 677D was coming from the opposite direction. For motor vehicle Reg. No. KBX 360X to have been overtaking the appellant's vehicle reg. no. KCA 144, then DW2 ought to have been travelling in the same direction. However, from the evidence of DW2, he was living in Nairobi and on 12th June, 2016 (sic) at 11pm he was in Machakos. He did not explain how he ended up being overtaken by motor vehicle Reg. No. KBX 360X. In the premises his evidence has very little if any weight. As was held in **Ndung'u Kimanyi vs. R [1979] KLR 283.**

> **"The witness in a criminal case upon whose evidence the court is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence."**

50. In this case, DW2 by his evidence has created an impression that either he is not a straightforward person, or has raised a suspicion about his trustworthiness, or has through his evidence shown that he is an unreliable witness hence making it unsafe to accept his evidence. If his evidence is discounted, the appellant's culpability, if at all, must be based on the evidence of PW14.

51. As noted by the learned trial magistrate, PW14 did a very poor job in the conduct of the investigations. Accordingly, his evidence as to how the accident did occur cannot be the basis of convicting the appellant. In his judgement the learned trial magistrate seems to have relied on the appellant's evidence to prop up an otherwise weak prosecution case as to the manner in which the accident occurred. In my view that was an incorrect approach. In the absence of satisfactory evidence coming from the prosecution, the appellant's evidence could only be taken on its face value and based thereon, fault if any could only be found based on that evidence taken as the truth. As was held in **Sekitoliko vs. Uganga (1967) EA 53**:

> **"The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of he accused is depended upon the strength of the prosecution case and not the weakness of the defence case."**

52. In taking the approach it did, the learned trial magistrate seems to have shifted the burden of proof to the appellant. It is trite that even where the accused decides not to adduce any evidence, the burden is not lessened by that mere fact. This was the position of the Court of Appeal in the case of **Dorcas Jemutai Sang vs. Republic [2018] eKLR** where was faced with a similar case where the complaint by the Appellant was that the trial court and first appellate court had placed the burden of proof upon her to prove her innocence, the court stated as follows:

"In the present case we are satisfied that both the courts below appeared to or shifted the burden of proving innocence on the appellant. This we say in the light of the quotations we have reproduced above where the learned trial magistrate stated that the appellant:

"…did not call witness to support her defence,"

and the learned Judge remarked that:

"…it was a significant fact that the appellant did not call …any witness at the trial."

By these sentiments, both the courts below appeared to say that the appellant was obliged to call witnesses to prove her innocence. As stated above, that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground."

53. However, in a case such as this where the fact of death arising from an accident is not challenged, what the court is required to do is to find out if on the totality of the evidence, the appellant took avoiding action at all, or in good time, and whether by not taking this action, or delaying taking it unduly, he caused a dangerous situation to arise for whose consequences he is criminally liable. According to the appellant he was driving at 80kph. After hitting the guard rails, his vehicle moved along the rails up to 13 metres before it was thrown back onto the road. Taking that position to be correct, it would follow that the appellant did not take the necessary steps to bring the vehicle to a halt. According to the appellant's evidence, when he saw motor vehicle Reg. No. KBX 360X, he swerved to the left and it was only after he hit the rails that he attempted to apply the brakes. One would have thought that he would have applied the brakes before hitting the rails so as to avoid the impact with the rails. By not doing so, it is clear that he did not take the steps expected of him to avoid the accident. By not applying the brakes before hitting the rails, he did not take avoiding action in time, and it does not matter whether that inaction should properly be described as careless or dangerous driving. In my view, the appellant adopted a manner of driving which was dangerous in all the circumstances, and on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best. It may well be that the drivers of motor vehicle Reg. No. KBX 360X similarly contributed to the accident and had they survived would have been charged with a similar traffic offence. However, that does not mean that the appellant was not at fault since as stated above, "fault" does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving but involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient. The fact that in a civil suit, the court may well apportion liability as between the appellant and the driver of motor vehicle Reg. No. KBX 360X, does not mean that the appellant was not at fault. That however is a matter for the civil court to determine.

54. Having considered the material placed before me in this appeal, and having re-evaluated the evidence before the trial court, while I disagree with some of the findings of the learned trial magistrate, I find that he came to the correct conclusion when he convicted the appellant. The conviction was safe and the sentence proper in the circumstances.

55. Consequently, the appeal fails and is dismissed.

56. Judgement accordingly.

Judgement read, signed and delivered in open court at Machakos this 15th day of January, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Muumbi for Mr Mutavi for the appellant

Miss Mogoi for the Respondent

CA Geoffrey