



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 59 OF 2019

(Being an appeal from conviction and sentence of Hon. V. Karanja

(SRM) In Kitale CMCR No. 1088 of 2015 delivered on 30th May, 2019).

ELIJAH KARIUKI WAMBOGO.....APPELLANT

VERSES

REPUBLIC.....PROSECUTOR

JUDGEMENT

1. The Appellant was charged with two counts of **causing death by dangerous driving contrary to Section 46 of the Traffic Act No. 403 of the Laws of Kenya**. The particulars of the charge were that **on the 27th day of June 2015 at about 6.30 pm along Kitale – Cheranganyi road in Transzoia county being the driver of KCD 820T make probox drove the said motor vehicle on a road recklessly and at a speed and in a manner which is dangerous recklessly and at speed and in a manner which is dangerous to the public having regard to all the circumstances of the case including the nature ,condition and the use of the road and the amount of traffic which is actually at the time and which might reasonably be expected to be on the road , failed to keep distance and knocked down a Motor Cycle Registration number KMDF 236 V make TVS Star and as a result of the accident caused the death of ERASTUS WANYONYI WANYIKA and DANIEL KIPKERING.**

2. The Appellant was convicted and sentence to serve three years' imprisonment hence this appeal. The substance of the grounds raised in the petition of appeal are generally that the trial court failed to take into consideration the fact that the case was not proved beyond the shadow of doubt and that the evidence of the Appellant was not taken into consideration. He further argued that the court ought to have granted the appellant an option of fine when sentencing.

3. The occurrence of the accident was not in dispute. The evidence of **PW1 SILVANOS KIPLAGAT** and **PW2 TIMOTHY BARASA** were basically routine in nature. PW1 was the son to Daniel Kipkering and he went to the scene where he found the body of his father and took it to the mortuary. PW2 identified the body during the post mortem exercise.

4. **PW3 SIMON KEMEI MUREI** stated that he was at the scene and saw the accident and that he assisted the injured driver and took him to the hospital. He said that the appellant hit the motor cycle.

5. **PW4 MARY CHEBET SANG** identified the body during the post mortem exercise and thereafter took the body for burial at home.

6. **PW5 P.C PHILIP MIKTOS** from Kitale police station went to the scene and drew the sketch plan which he produced and in his opinion the cause of the accident was the appellant whom he appeared to have been over speeding.

7. **PW6 DR. ALEX WANYONYI BARAZA** produced the post mortem reports for the two deceased persons on behalf of **DR ODHIAMBO** who found that the cause of death were severe head and chest injuries as well as fractures.

8. When placed on his defence the appellant denied that he was the cause of the accident but he blamed the decease who was riding the motorcycle and who joined the main road without much attention and care. He further said that he was attacked after the accident and his money stolen. He concluded that though the accident occurred he was apologetic over the same.

ANALYSIS AND DETERMINATION

9. The court has read extensively the submissions by both the counsel for the Appellant as well as the learned state counsel. It is not disputed that the accident occurred and that the two persons died as a result of the same. The issue here is whether the Appellant was culpable.

10. There was no eye witness as such to the accident and although PW3 claimed to have witnessed, his evidence did not state as much how it occurred but were mere generalities. He only came to take the injured to the hospital.

11. The evidence of PW5, the Police Officer, was well captured and supported by the sketch map which he drew at the scene. He said that the appellant stopped about 90 metres from the scene of impact which suggested that he could have been on a high speed. He said that it was a culvert which actually stopped him.

12. In the opinion of this court and in analysing the evidence on board I am satisfied that the trial court as far as the cause of the accident was concerned properly found the Appellant culpable. There was no eye witness and the evidence by PW5 was sufficient to indicate that the Appellant was not necessarily driving at a moderate speed taking into account that this was a busy area with shops at the road side.

13. The issue which I find germane in this appeal is on sentencing and not on conviction. The Appellant was at liberty to call of course any defence witness if necessary. Nonetheless the trial court ought to have given the appellant an option of fine considering the circumstances.

14. There was no evidence to show that the Appellant was driving an unroadworthy vehicle or the same had any default and thus capable for the mechanical faults to cause an accident. Secondly there was nothing to suggest that the appellant was driving the said vehicle under any influence of alcohol or such other intoxicating substance that would impede his judgement. As submitted by the appellants counsel the Appellant in his defence appeared remorseful about the whole incident.

15. In the case of **ORWENYO MISSIONI VS. REPUBLIC (1976-80) 1 KLR 1446** at page 1453 the court citing the decisions of **Madan and Chesoni JJ** (as they were) in **GOVID VS REPUBLIC** where it was held that,

“the offence of causing death by dangerous driving is not an ordinary type of crime. While it cannot be given an aura of protection by putting it in a glass of its own, the people who commit this offence do not have a propensity for it, neither is it a type of crime committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving a custodial sentence does not necessarily serve the interest of justice as well as the interest of the public. There are of course cases where a custodial sentence is merited, for example, where there is compelling feature such as element of intoxication or recklessness.”

16. The Appellant ought to benefit from the above citation. In the absence of any evidence that the Appellant was intoxicated or not remorseful it may not serve the interest of justice to have him serve a custodial sentence. An option of fine ought to have been granted to the Appellant.

17. In view of the above authority and the remorsefulness shown by the Appellant the appeal is hereby allowed as follows, that is, the Appellant is hereby granted an option to pay an aggregated fine of Kshs. 200,000 and in default to serve the three years’ custodial sentence imposed by the trial court.

18. Orders accordingly.

Dated signed and delivered in open court at Kitale this 17th day of February, 2020.

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H. K. CHEMITEI

JUDGE

17/2/2020

In the presence of:-

Mr Omooria for Respondent

Mr Karni for the Appellant

Appellant present

Court Assistant – Kirong

Judgement read in open court.