



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 26 OF 2018

NICHOLAS MUNGE KASUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Traffic Case No. 3482 of 2017 delivered by Hon. E. Riany, SRM on 19th October, 2017).

JUDGMENT

1. The Appellant was charged with careless driving contrary to **Section 49(1) of the traffic Act Cap 403 Laws of Kenya**. The particulars were that he on the 12th of February, 2017 at about 2000 hours along Kenyatta-Moi avenue Junction in Nairobi within Nairobi County being the driver of motor vehicle registration no KBH 223C make Nissan UD bus, drove the said motor vehicle on a public road without due care and attention to the other road users and thereby failed to give way by jumping red traffic lights and hit motor vehicle KBX 821Q Toyota Corolla driven by one Ms. Dolphina Achieng who sustained slight injuries as a result of the accident.

2. At the conclusion of the trial, he was convicted accordingly and sentenced to pay a fine of Kshs. 50,000/- in default serve 6 months imprisonment. He was aggrieved with the decision of the court and preferred the present appeal. He grounded his appeal on the fact that the case was not proved beyond a reasonable doubt.

Summary of evidence

3. I am minded that this is the first appellate court whose duty is to reevaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu & Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

4. **PW1, Dolphina Achieng Odhiambo** the complainant and a Human Resource manager at Indra Limited testified that she was driving KBX 821Q from Kenyatta Avenue heading towards Moi Avenue. She entered the junction after the lights turned green ushering her to proceed. She was then hit on her right by the Appellant who was driving a City Bus Shuttle vehicle registration KBH 223C. Her vehicle was dented on the right door, her windscreen was shattered and the dashboard was also damaged. This was corroborated by **PW2, Samuel Orenge Onkware** a gazetted Motor Vehicle Inspector. It was his testimony that on inspecting the vehicle he observed that the right wing front panel was dented, the front windscreen was damaged and that the dashboard was dislodged due to the impact.

5. **PW3, Anthony Kyambi** of Central Police Station was on duty as accident-standby with PC Chemitei when they received the alert that an accident had happened. He visited the scene of accident and confirmed the accident. It was further his testimony that traffic lights were operational at the time he visited the scene of accident.

6. PW1 suffered personal injury to her thigh and arms. She also suffered back injuries. This was corroborated by **PW4, Dr Joseph Maundu** of Police Surgery. It was his testimony that the complainant suffered injuries to her arms and limbs. He further filled a P3 Form in line with his findings.

7. **PW5, Millicent Aluoch** of Central Police Traffic was the investigating officer in this matter. It was her testimony that courtesy of CCTV footage she confirmed that the Appellant jumped a red light. However the CCTV was never adduced into evidence.

8. After the prosecution its case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave a sworn statement. It was his defence that the traffic lights allowed him to enter the junction thus, that it was the complainant who jumped a red light. Further, he stated that **DW2 John Maina** was present in the vehicle. It was DW2's defence that the lights were green when they entered the junction.

Analysis and determination

9. The Appellant was represented by learned counsel, Mr. Ngome whilst the Respondent by learned State Counsel, Miss Kimaru. After considering the evidence adduced and the respective submissions I have arrived at a conclusion that the issues arising for determination are whether the charge sheet was defective and whether the case was proved beyond a reasonable doubt.

10. As regards the issue of a defective charge sheet, Mr. Ngombe submitted that the court erred in finding that the Appellant was duly convicted under Section 49 of the Traffic Act and that he ought to have been charged under Section 47 of the Traffic Act. It was his submission that the charge of careless driving could not be supported under a charge of lack of due care and attention. This was because the particulars of the offence related to the Section 49 of the Traffic Act. As such, the defect is incurable.

11. Miss Kimaru admitted that the Appellant was improperly charged under Section 49 of the Traffic Act as the provision had already been repealed at the time of charging the Appellant. She argued that on this ground, the prosecution ought to have amended the charge sheet and that the failure to do so violated Section 214 of the Criminal Procedure Code. In that regard, it was her view that the Appellant was charged with an offence not known in law. She urged the court to grant an appropriate remedy in this regard.

12. On whether the prosecution discharged its burden of proof, Mr. Ngome submitted that the court allowed reference to CCTV footage by PW3 and PW5 which was never produced. This, according to the counsel, violated the Appellant's right under Article 50 of the Constitution to receive evidence that would be used against him so as to allow him prepare his own defence. Further, that there was no vehicle inspection report. It was his submission that this would have aided to rule out any pre-accident defects.

13. Secondly, it was the submission of the counsel that the trial court erred in discrediting the manner of cross examination that counsel employed. He submitted that the court observed that the counsel switched strategy of cross-examination whereas the purpose of cross-examination is to test the weight of evidence and the truthfulness of witnesses. Thirdly, that the court erred in failing to give due regard to the evidence of the defence. It was his submission that the defence was uncontroverted throughout the entire trial.

14. On sentence, counsel submitted that the fine of Kshs. 50,000/- with a default sentence of six months imprisonment was excessive. He argued that the Appellant was a first offender. Therefore, he ought to have benefitted from a more lenient sentence.

15. The Appellant was charged under **Section 49(1) of the Traffic Act** with the offence of careless driving. The statement of offence read:

"careless driving contrary to section 49(1) of the Traffic Act CAP 403 Laws of Kenya"

16. Section 49(1) of the Traffic Act however is worded as follows:

"49. Driving without due care and attention

(1) Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable—..."

17. It is evident that the statement of offence and particulars are at variance. What this implies is that the Appellant was charged with a non-existent offence under the Traffic Act. Further, the prosecution adduced evidence in proof of an offence that did not exist as the Act has no provision for the offence of careless driving. The learned State Counsel having admitted that Section 49(1) of the Traffic Act had been amended as at the time the charge was framed, automatically implored upon the prosecution to amend the charge sheet so as to reflect the correct offence. This cardinal procedure was omitted, again implied that the Appellant was tried and convicted for a non-existent offence.

18. This court was faced with a similar situation on appeal in the case of **Bernard Opiyo Ouma v Republic [2018] eKLR** and had the following to say:

"While the substantial elements of the offence in question were not amended, I opine that the amendment to the statement spelling out the offence was occasioned by the fact that careless driving cannot be equated to driving without due care and attention as the element of careless driving involves a level of negligence that surpasses a failure to take due care and attention. This is informed by definition accorded to word "careless" in the Black's Law Dictionary, 9th Ed. as an action or behavior engaged in without reasonable care comparable to being reckless. It also defines reckless conduct as much more than mere negligence and a gross deviation from what a reasonable person would do. In my view, the amendment was necessary because an offence with elements similar to the offence of careless driving is set out under Section 47 of the Act, namely reckless driving."

19. I cannot say more save to hold the entire trial was therefore a nullity. What I need to grapple with in the circumstances is whether the case is suitable for a retrial.

20. The finding of whether a retrial is necessary is anchored, amongst other authorities, the case of **Ahmed Sumar vs. R (1964) EALR 483** which gave the following guidance:

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause

an injustice to an accused person.”

21. There is no doubt that the prosecution was squarely to blame for the premature death of the case. It failed to seize the earliest opportunity to salvage the case by amending the charge sheet. It must shoulder the responsibility of its mistake. It is not a case that I am inclined to order a retrial.

22. In any case, the evidence offered by the prosecution fell far short of proving the case to the required standard. The charge leveled was that the Appellant jumped red traffic lights, entered a junction and hit another vehicle. However, the only evidence presented before this court is a P3 Form and vehicle inspection report. These do not, per se, demonstrate the culpability of the Appellant. On the other hand, PW5, the investigating officer purported to rely on a CCTV footage allegedly showing the Appellant jumping the lights. However, the footage was not adduced in court. It begs then how the trial court relied on the testimony of the investigating officer to found a conviction. Furthermore, the Appellant himself gave a plausible defence that was supported by a witness that he did not jump the traffic lights. This ought to have cast a doubt in the mind of the learned trial magistrate as to the culpability of the Appellant. It is then safe to conclude that an order for a retrial would be tantamount to aiding the prosecution to fill up gaps in their case. It would occasion an injustice to the Appellant.

23. In the upshot, I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. The fine he paid should be forthwith refunded to the payee.

Dated and Delivered at Nairobi This 9th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Mr. Mkele or the Appellant.*
2. *Miss Chege for the Respondent.*