



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO 77 OF 2019

AMOS ODHIAMBO OKOTH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the judgment of Hon. T.M Olando Senior Resident Magistrate delivered on 13.09.2019 and thereafter the sentencing by Hon. Lester Simiyu PM on the 3.10.2019 in Siaya P.M.C Traffic Case No. 65 of 2019)

JUDGMENT VIA SKYPE

1. The appellant herein **AMOS ODHIAMBO OKOTH** was charged with the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act Cap 403 of Laws of Kenya. Particulars of the charge were that on the 11th day of November 2018 at about 1930 hours along Ndere Madeya – Marram road at Ndere center in Gem Sub county within Siaya county, the Appellant being the driver of motor vehicle registration number KBS 566 U a Nissan AD salon drove the said motor vehicle in a manner which is dangerous to the public by driving to the right side without due care and hit an oncoming motorcycle Registration No. KMEN 083M make Boxer which led to the death of a pillion passenger namely **JAMES OMONDI ORIARO**.

2. The appellant person who is now the appellant denied the charge and the prosecution called six witnesses to establish a prima facie case against the appellant person. Place don his defence, the appellant testified on oath and called one witness.

3. The trial of the appellant was heard and concluded by Hon. T.M. Olando, SRM prior to his transfer from the station. After he delivered the judgment on 13/9/2019 convicting the appellant, the trial magistrate called for a probation report but was transferred before sentencing the appellant. Sentence was pronounced by Hon Lester Simiyu, PM after considering mitigation and probation report. The appellant was sentenced to pay a fine of Kshs 200,000 in default to serve three years imprisonment. The sentencing court also cancelled the appellant's driving licence for three years should he pay the fine. This was on 3/10/2019.

4. Aggrieved by the judgment, conviction and sentence imposed on him, the appellant herein filed his memorandum of Appeal dated 16th October, 2019 setting out the following grounds of appeal:

- 1. The trial court failed to consider, evaluate and analyze the evidence on record thereby coming to a wrong conclusion on both law and fact.***
- 2. The court went beyond evidence on record to find a basis which to convict and subsequently sentence the Appellant.***
- 3. The trial court failed to safeguard the interest of the Appellant (Appellant) to secure a fair trial.***
- 4. The court based its finding on wrong principles of the law.***
- 5. The trial court failed to consider the Appellant's Defence as the trial thereby shifting the evidential burden of proof.***
- 6. There is no evidence on record to support the charges levelled against the Appellant.***
- 7. The sentence imposed by the court was excessive in the circumstances.***

5. The appellant urged this court to allow his appeal, quash his conviction and set aside the sentence imposed and set him at liberty.

6. This being a first appeal, I must as required by Law re-evaluated the entire evidence adduced before the trial Court, reassess it and arrive at my own independent conclusion bearing in mind that I neither heard nor saw the witnesses as they testified. See **Okeno v Republic 1972**]

E.A. 32.

7. Appraising the evidence before the trial court, **PW1 James Onyango Oluoch** testified that on 11/11/2018 at about 7.30 pm he was riding a motor cycle carrying two pillion passengers, Donald and Omondi and it was drizzling. He saw a salon vehicle whose registration number he could not tell, coming from the opposite direction so he left the road and the vehicle went and hit them while off the road and they sustained injuries. He stated that had the motorcycle headlights on and so was the offending motor vehicle. The injured were taken to Siaya Hospital for treatment. He further testified that the vehicle hit them on their right side of the road, and that James Omondi died as a result of the accident. He later reported to Yala Police Station where he was issued with a P3 form. He fractured his leg and had a cut wound.

8. In cross examination the witness stated that he did not have a licence and that the motorcycle was supposed to carry one passenger and that it was wrong to carry two passengers but denied that the road was slippery or that it was difficult to control the motorcycle when one is carrying two pillion passengers. He stated that he saw the vehicle 50 meters away and moved off the road but that the driver left his side of the road and hit them on the opposite side of the road. In reexamination he stated that he was on his right (correct) side of the road.

9. **PW2 Donald Otieno** testified that on the material night and time he was with PW1 as a pillion passenger when they were hit by the vehicle from the opposite direction and which vehicle left its side of the road and hit them on their opposite side.

10. In cross examination by Miss Odoyo he confirmed that they were three people on the motorcycle and that a motorcycle only need to carry one pillion passenger. He stated that he was unwell that is why he accepted to be carried.

11. **PW3 George Odhiambo** and **PW4 William Okoth** both testified that they were called and told that James Omondi Oriaro had an accident and they went and confirmed that he had died. The deceased was their brother.

12. In cross examination, PW4 stated that he went to the scene at about 7pm and found the deceased on the ground, injured and he was on the left side of the road facing where they were going and that it was raining.

13. **PW5 Audry Apiyo** a Clinical Officer at Yala Sub County Hospital testified and produced the P3 form for Donald Otieno Oduor who was treated at the hospital with the history of having been involved in a traffic road accident and he confirmed that PW1 and PW2 were injured as a result of the accident.

14. **PW6 Corporal Simon Koech** from Yala police station also testified and stated that he went to the place where the accident took place and found the driver of motor vehicle KBS 566U Nissan AD and motor cycle KMEN O83M that he found the vehicle on the right side of the road and he produced the sketch of the scene of accident. He also produced the post mortem report to prove that the deceased died as a result of the accident.

15. Placed on his defence the appellant stated that he was driving from Madeya to Ndere when he saw two motor cycles coming and he went off the road on the left side and one of the motor cycle hit his vehicle and fell on their side of the road into the bush and that the passengers were injured and he later came to learn that one of the passengers on the motor cycle had died.

16. He stated that his vehicle was found on the right side since the people who went to the scene told him to turn the vehicle and take the victims to hospital.

SUBMISSIONS

17. In support of the appeal, counsel for the appellant Ms. Peres Odoyo filed written submissions which she highlighted orally on 12/2/2020 whereas the Respondent's counsel Mr. Okachi Senior Principal Prosecution Counsel submitted orally, opposing the appeal and urging this court to dismiss it.

18. In her written submissions as highlighted orally by Mr. Ochanyo Advocate on her behalf, counsel for the appellant submitted that there was no evidence of dangerous driving as PW1 testified that he was riding on the right side of the road which was the wrong side of the road and that this evidence was confirmed by DW1 and DW2. Further submission was that PW1 was carrying two passengers instead of one hence he was in breach of section 20 of the Traffic Act.

19. Counsel further submitted that the appellant's defence was not considered and that the sentence imposed was manifestly harsh and excessive considering that the appellant was a first offender hence cancelling his driving licence was so punitive. Counsel urged the court to review sentence on cancellation of driving licence should it find that the conviction was sound, since section 76 of the Traffic Act that imposes that penalty of cancellation of driving licence is permissive.

20. It was further submitted that at the time of the accident, PW1 was not a qualified motor cyclist as he had no driving licence and that is the reason for riding on the wrong side of the road as a result of which he collided with DW1 on the side of the appellant.

21. On the part of the Respondent, Mr. Okachi submitted opposing the appeal and relying on evidence on record, he contended that the charges facing the appellant were proved to the required standard. He maintained that the evidence on record was properly analyzed by the trial court before arriving at the decision that she did and that the defence was considered. He urged this court to find that the sentence imposed was appropriate and dismiss the appeal.

DETERMINATION

22. I have considered the evidence adduced by the prosecution witnesses in the lower court, the grounds of appeal by the appellant and the

submissions for and against the appeal herein. In my humble view, the main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt and if so, whether the sentences meted out were lawful or manifestly excessive.

23. On whether the prosecution proved its case against the appellant beyond reasonable doubt on the charge of causing death by dangerous driving, from the evidence adduced, there is no dispute that there was an accident involving the motor vehicle KBS 566N which was being driven by the appellant and the motor cycle KMEN 083M, being driven by PW1 James Onyango Oluoch, and that the deceased James Omondi Oriaro died as a result of the accident.

24. The burden of proof lies with the prosecution throughout the trial and does not shift to the accused person. According to the prosecution witnesses, PW1 was coming from the opposite direction of the appellant when the appellant while driving fast lost control of his vehicle and veered off his side of the road and knocked PW1 and his pillion passengers who were on their right side of the road. This evidence was consistent and the Sketch plan to shows the point of impact to be on the side where PW1 and PW2 were coming from and off the road not middle or on the side of the appellant. It is therefore not true as submitted by counsel for the appellant that the "right side" of the road was the appellant's side of the road but to his right which was the opposite side and the side where PW1 was coming from. In my view, counsel for the appellant was adducing contrary evidence via her submissions in a bid to confuse the court to believe that the right side of the road meant the appellant's side of the road which I refuse to accept as submissions are not evidence.

25. The rule of the road in Kenya is "**Keep Left unless overtaking another vehicle.**" Driving on the wrong side of the road on the face of an oncoming traffic is in itself a dangerous maneuver unless overtaking or directed by Traffic Police or unless there is clearance for such passage where the left side of the road is blocked. Even in such circumstances the road ahead must be clear and safe for one to drive to the right side of the road. In this case it was clear that the appellant had lost control of his vehicle and the sketch plan produced by PW6 was clear that the [point of impact was on the right side of the road which was the side of the PW1 and his pillion passengers one of whom died from the injuries sustained in the material accident as proved by the post mortem report produced as an exhibit.

26. Although DW1 stated that his vehicle was found to be on the right side of the road [PW1's side] after the accident because he was turning when it stopped, DW2 gave contrary evidence that after the accident, the vehicle could not move. I thus find the defence of the appellant not to have been truthful as concluded by the trial magistrate.

27. Though the defence advocate submitted that the rider of the motor cycle did not have a driving license and was carrying excess passenger, I find that this in itself did not cause the accident since the rider was hit while on his correct side of the road and there was no proven negligence on the part of the rider.

28. The appellant having left his side of the road to the motor cyclist's side, in the absence of any explanation, for doing so, the only plausible answer is that he was driving dangerously thereby causing the fatal accident wherein PW1 was also seriously injured.

29. In my humble view, the prosecution proved all the elements of dangerous driving as stipulated in section 46 of the Traffic Act when he drove into the right side of the road and knocked the motorcyclist and his pillion passengers fatally injuring one of them, subject of the charge. There was evidence that it was raining and the road was marred. There is no reason why the appellant was driving fast in the circumstances.

30. Further, the contentions that the motor cyclist was careless because he had no driving licence or that he was carrying excess passengers in my view does not take away the guilt of the appellant as the omissions by the motor Cyclist formed different offences under the Traffic Act and could not absolve the appellant from guilt. It is also worth noting that having a valid driving licence does not absolve the appellant from the offence of causing death by dangerous driving.

31. On allegations that the defence was not considered, I find no substance in the ground of appeal and submission as the trial magistrate considered the appellants' defence and dismissed it as not being truthful after weighing that defence against the prosecution witnesses evidence and the evidence of DW2 which latter's evidence contradicted the testimony by the appellant.

32. I therefore find that the conviction of the appellant was sound. The appeal against conviction is dismissed.

33. On sentence, Section 46 of the Traffic Act 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 be 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.

34. The principles applicable are that sentencing is in the discretion of the trial court and this court should be slow in interfering with that discretion. The Court of Appeal in **Thomas Mwambu Wenyi v Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra at paragraph 70-71** where the court held:

"Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have

evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

35. The trial court sentenced the appellant after considering his mitigation and the fact that he was a first offender. The trial court also considered the pre-sentence report dated 3/10/2019 filed by Mr. Nganyi. The sentences imposed were lawful considering the fact that precious life was lost. A fine of Kshs 200,000 which was paid, in default to serve 3 years imprisonment was lawful and lenient sentence as the maximum sentence for the offence of causing death by dangerous driving is ten years imprisonment. In **Wilkinson Mwanjara Mwamburi vs Republic HCCRA 57 of 2016** the court upheld a sentence of three (3) years and fined the appellant therein Kshs 200,000/=. I decline to interfere with the sentence imposed.

36. On the further order made by the trial court ordering for the cancellation of the appellant's driving licence, for three years, this was pursuant to section 76 of the Traffic Act. Cancellation is not mandatory as can be seen in Section 76 of the Traffic Act which uses the word "may". The same provides as follows:-

"1. Any court before which a person is convicted of any offence in connection with the driving of a motor vehicle may (emphasis court)—

a. if the person convicted holds a driving licence or provisional driving licence, suspend the licence for such time as the court thinks fit, or cancel the licence and declare the person convicted disqualified for obtaining another licence for a stated period."

37. However, the appellant being a first offender, and as the section is permissive and not mandatory, in my humble view, the trial Magistrate was too harsh in imposing a cancellation of driving licence on a first offender. From the presentencing report, the appellant is a social worker and it is possible that he uses a Motor vehicle to eke a living for his family. Cancelling his licence for three years might in my humble view, cripple him and others who depend on him for a livelihood. A life was lost but there is no evidence of deliberate killing of the deceased. In the premises, I set aside the order cancelling the appellants' driving licence for three years.

38. The appeal therefore partially succeeds on sentence as stated above. The appeal against conviction fails and is dismissed.

Orders accordingly.

Dated, signed and Delivered at Siaya this 5th Day of May 2020 via skype due to Covid 19 situation

R.E.ABURILI

JUDGE