REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO 3 OF 2017

BENJAMIN MWIKYA MUSYOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an Appeal from Original Conviction and Sentence in* ***Kitui Principal Magistrate's Court Traffic Case No. 191 of 2009*** *by* ***Hon. B. M. Kimemia S R M*** *on* ***12/01/11)***

J U D G M E N T

1. **Benjamin Mwikya Musyoki,** the Appellant was charged with **two (2)** counts.

Count 1 – Causing death by dangerous driving contrary to **section 46** of the **Traffic Act, CAP. 403, Laws of Kenya.**

Particulars of the offence being that on the **11th** day of **April, 2009** at about **6.30pm** along **Kabai-Katheka** road at **Kasue** area in **Kitui District** within **Eastern Province** being a driver of a motor vehicle Registration Number, **KBG 007F Toyota Corolla Station Wagon** drove the said vehicle along the said road at a speed or in a manner 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 the traffic which is actually at the time or which might reasonably be expected to be on the road thereby causing the death of one pedestrian namely **Joseph Kakuvi Kavoi.**

Count 2 - Failing to Stop after an Accident contrary to **Section 73(1)** of the **Traffic Act Cap 403 Laws of Kenya.** The particulars of the offence being that on the **11th** day of April, **2009** at about **6.30 p.m.** along **Kabati-Katheka Road** near **Kasue** in **Kitui District** within **Eastern Province** being the driver of a motor vehicle Registration No. **KBG 007F Toyota Corolla Station Wagon** failed to stop after an accident.

2. Facts of the case were that on the **11th** day of **April, 2009** at about **6.00 p.m.** the deceased and others were walking along **Kabati-Kitheka** Road when he was hit by a motor vehicle Registration No. **KBG 007F** which did not stop. He was rushed to Kitui District Hospital where he was pronounced dead on arrival. The following day the appellant reported to the police, **PW5 No. 67912 Corporal Farah Mohamed** visited the scene, investigated the case and charged the Appellant.

3. When put on his defence, the Appellant stated that he was driving motor vehicle Registration No, **KBG 007F Toyota Corolla** having left **Kabati** at **6.45 p.m.** On reaching **Mutindea** he encountered a lorry, a stone hit his windscreen which cracked. He swerved and lost control of the motor vehicle and hit a signpost for **Mutendea School** and managed to get back to the road but it was drizzling. On reaching home he realised the windscreen had chattered, the side mirror was missing and the bumper had cracked. He notified his insurance company and was advised to report to the police which he did the following day. While at the police station some people reported an accident where their relative was hit, as a result his motor vehicle was impounded. After the motor vehicle was inspected he was charged. He denied having caused the accident.

4. The learned trial magistrate considered evidence adduced, convicted him on both counts and sentenced him to pay a fine of **Kshs. 60,000/=** and in default to serve **three (3) years imprisonment.** In addition, his driving licence was cancelled for a duration of **two (2)** years.

5. Aggrieved, by both the conviction and sentence he now appeals on grounds that the learned magistrate erred and misdirected herself when, she failed to consider what constitutes an offence under **Section 46** of the **Traffic Act,** she advanced her own theories and relied on facts that were not part of the evidence tendered; failed to give a balanced analysis of the evidence for the prosecution *vis-à-vis* the evidence for the defence, when she gave a global sentence of a fine of **Kshs. 60,000/=** in default three (**3) years** imprisonment a sentence that was excessive under the circumstances; ordered cancellation of the driving licence. He prayed for setting aside the conviction to be substituted with an order acquitting him, to quash/set aside the sentence on the fine and the order cancelling the driving licence.

6. The appeal was canvassed by way of written submissions.

7. Learned counsel **Mr. Mulinga Mbaluka** for the Appellant urged that the prosecution failed to prove that the driver was careless and excessively drove the motor vehicle. That the prosecution failed to call a witness who saw how the motor vehicle was controlled and/or managed in the circumstances and that there was some fault on the part of the driver. By arguing that the onus was on the prosecution to prove that it was the Accused's dangerous driving that the accident resulted in the death of the deceased, he cited the case of **Gabriel Wambua Kitili vs. Republic Cr. App. No. 328 of 2005** and **Gerald Mwaniki Maina Cr. App. No. 30 of 2018**.

8. He contended that there was no evidence that the driver failed to exercise due care and diligence so as to cause the accident; witnesses did not give a detailed account of how the accident occurred and their evidence was riddled with inconsistencies.

9. The State through learned State Counsel **Mr. Mamba** opposed the appeal. In his submissions he defined what constitutes an offence under **Section 46** of the **Traffic Act**. He alluded to the holding in the case of **Dickson V Republic [2002] eKLR** where the Court of Appeal held that:

> ***"offence under Section 46, is in actual fact a charge of manslaughter in connection with driving of a motor vehicle by an accused. The section does not create more than one offence, but does sets out different ways of managing a motor vehicle which give rise to the offence. The different modes of driving are themselves offences under different provisions of the Traffic Act."***

10. That the evidence tendered by witnesses was consistent and the sentence meted out was not biased.

11. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

12. In the 1st count the Appellant was accused of contravening the provisions of **section 46** of the **Traffic Act** that provides thus;:

> ***"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."***

13. The Appellant was stated to have driven the motor vehicle in a manner dangerous to the public having regard to all circumstances of the case, the nature, condition and use of the road and the amount of traffic that was reasonably expected to be on the road.

14. In the case of **Timothy Orwenyo Missiani v Republic [1979 KLR 285** the court states that:

> ***"As regards the first question, it is relevant to consider the degree of blame worthlessness in the part of the driver which has to be proved by the prosecution before he can be convicted of the offence of causing death by dangerous driving."***

15. In **Republic vs Gosney 11971[All ER 220** it was held by the Court of Appeal, Criminal Division, that in order to justify a conviction there must have been a situation which, viewed objectively, was dangerous and also some fault on the part of the driver. In regard to this element of fault, **Megaw L.J.** reading the judgment of the court, said **(at page 224):**

> ***"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 on 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."***

16. PW1, **Zakayo Mutinda** heard and saw a speeding motor vehicle prior to it hitting the deceased and it did not stop, it sped off.

17. PW2, **Anthony Mutunga** was pushing a bicycle 4 metres behind the deceased and three others. He noticed a vehicle that was moving very fast. He heard a band and saw three items fly in the air, shoes and a side mirror. He took note of the registration number. It was his evidence that they were off the concrete road.

18. PW3 **Alex Nzioka Mutinda** heard the sound of a motor vehicle. He turned, heard noise and saw the deceased being hit. He saw the vehicle speeding off. He also saw the side mirror that dropped at the scene and the colour of the motor vehicle.

19. The accident occurred at **6.30 p.m.** and there were five lads walking, two (2) of them were pushing bicycles. The motor vehicle's electrical system was serviceable for witnesses saw lights on. This means that prior to the accident the driver of the motor vehicle must have seen other road users who were walking off the concrete road. In the case of **Republic vs Evans (1963) 46** it was held that:

> ***"if a man infact 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 in attentive or even doing his***

incompetent best."

In the case of **Atito vs. Republic [1975] EA 281** the Court of Appeal stated that:

"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 the situation."

20. In his defence the Appellant stated that he hit a sign post and only realised the windscreen had cracked after reaching home. He denied having been driving a blue motor vehicle. He stated that his motor vehicle was silver in colour. The fact that he did not notice a windscreen that was shattered as noted in the inspection report is evidence of having been inattentive.

21. The rear view minor (*side mirror)* was also missing at the point of inspection. The mirror was recovered at the scene of the accident. Witnesses identified the motor vehicle by its registration number. Although he denied having caused the accident the only explanation as to why the side mirror was at the scene of the accident was because he was the one who caused the accident. Failure to look out for other road users and by hitting one of them under an impression that he was hitting a signboard was dangerous. Consequently there was fault on his part. Therefore the trial Magistrate did not fall into error by reaching a verdict of guilty in respect of the Appellant.

22. Regarding the second count, it is obvious that the Appellant failed to stop after the accident. It is the duty of a person who is involved in an accident where there is damage to a person to stop and report to the police. Failure to do so is an offence.

23. As correctly pointed out it was erroneous on the part of the trial magistrate to impose a global sentence for the two (2) counts. The Appellant was charged with two (2) counts that were set out separately. The appellant pleaded to each offence separately. After being taken through full trial a verdict of guilty was returned on each count. Having convicted on each count, procedurally the trial magistrate was obligated to pass sentence on each count. This was not the case in the instant case which was a misdirection on the part of the trial magistrate.

24. It is argued that he sentence imposed was harsh and excessive. The sentence provided for the offence is "a term not exceeding ten (10) years imprisonment" and the court has the discretion to cancel a driving licence of the offender. **(See Section 76 of the Traffic Act).**

25. The trial Magistrate exercised her discretion in imposing the sentence. Therefore I affirm the conviction but set aside the sentence and substitute it with orders as follows:-

i) **Count 1** – the Appellant is fined **Kshs. 60,000/=** or in default to serve **one (1) year imprisonment.**

ii) **Count 2** – he is fined **Kshs. 5000/=** or in default to serve **three (3) months imprisonment.**

iii) Sentences to run consecutively from the date of conviction by the trial Court.

26. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **9th** day of **January, 2019.**

L. N. MUTENDE

JUDGE