



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 47 OF 2017

EMILIO NJAGI M'MIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. The appellant was charged with causing death by dangerous driving contrary to **Section 46 of the Traffic Act Cap 403**. He faced a second charge of riding a motor cycle on the public road without a valid driving licence contrary to **Section 103B (5) as read with Section 103B (7) of the Traffic Act**.
2. The appellant was further charged and acquitted with the charge of failing to stop and report after an accident contrary to **Section 75 of Legal Notice No. 38 of 2012**.
3. The trial court convicted him and sentenced him to pay a fine of Kshs. 50,000/= or serve imprisonment for 12 months on the 1st Count. In Count II, he was ordered to pay Kshs. 5,000/= or serve 3 months' imprisonment.
4. The appellant preferred an appeal against his conviction and subsequently filed a memorandum of appeal on the 13th October 2017 on 8 grounds that can be summarized as follows:
 - a) That the learned Senior Principal Magistrate erred in law and fact and seriously misdirected herself in holding that the prosecution had proved its case beyond reasonable doubt whereas it was merely circumstantial as there was no eyewitness.*
 - b) That the learned Senior Principal Magistrate erred in law and fact and seriously misdirected herself in failing to find that there were glaring contradictions on the part of the prosecution witnesses.*
5. The parties consented to argue the appeal by way of written submissions.

B. Appellant's Submissions

6. The appellant submitted that PW1 who was the only eyewitness and he did witness the accident as his testimony revealed that he only heard a bang after which he ran to the scene. As such the prosecution did not prove its case beyond reasonable doubt. He further submitted that PW1 could have been a witness for hire as it is the deceased's family that urged him to be their witness.
7. He further submitted that the trial magistrate erred in law when he convicted him whereas there was no clear direct evidence to prove that he caused the accident as the deceased was riding his bicycle downhill.
8. He submitted that the prosecution did not prove and/or establish the ingredients of the crime he was charged with and as such he ought to be acquitted. He relied on the case of **High Court of Kenya at Bungoma Criminal Appeal No. 124 of 2009 – Mohammed Khan Kanif v Republic and High Court of Kenya at Machakos Criminal Appeal No. 170 of 2006 – Joseph Mwanzi Mututa v Republic**.

C. Respondent's Case

9. The respondent submitted that the testimony of PW1 was corroborated by all other prosecution witnesses and there was no contradiction as alleged and further that the prosecution was not mandated to call a particular number of witnesses as provided in **Section 143 of the Evidence Act**.

10. It was further submitted that there was no contradiction on the evidence adduced but conversely it was the appellant who contradicted himself as the nature of injuries he sustained could not have come from a fall as he alleged.

11. The respondent further submitted that the trial court did consider the testimony of the appellant but disregarded it as it amounted to lies and half-truths and it was not corroborated.

12. Finally, it was submitted that the ingredients required to sustain a conviction under count 1 had been proved and that the appellant had conceded to not being in possession of his driving license thus establishing commission of the offence in count 2.

D. Analysis of Law

13. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that: -

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

14. The appellant pleaded that the trial court convicted him whereas the prosecution had not proved their case beyond reasonable doubt as the evidence the prosecution relied on was insufficient. He stated that there were no eyewitnesses and thus his conviction was based on circumstantial evidence.

15. I have perused the court record. PW1's testimony was clear and detailed and stood firm on cross examination. His testimony was corroborated by that of PW3, a motor vehicle inspector who inspected the appellants motorcycle as well as PW4, the medical officer who carried out the postmortem on the deceased and ascertained the nature of the injuries he sustained as consistent with those sustained in a traffic accident.

16. The defence on the appellant's part was that he had stopped on the road when the appellant (motorcyclist) hit him. This is not consistent with his testimony that he was admitted to hospital for 10 days as a result of the accident. It is also clear from the evidence before the trial court that the appellant had encroached on the deceased's lane resulting to the accident.

17. The appellant further stated that the prosecution did not satisfy the ingredients to sustain a conviction on causing death by dangerous driving. In **Gabriel Wambua Kitili –vs- Republic [2006] eKLR**, Makhandia J (as he then was) held that in such cases the onus was on the prosecution to establish that it was the accused's dangerous driving that caused the accident that resulted in the death of the deceased persons. Upon re-evaluation of the evidence adduced by the prosecution witnesses and the defence offered by the appellant, it was clear to this court that the prosecution indeed established to the required standard of proof that the appellant drove the suit motor cycle in such a reckless and dangerous manner that he caused the death of the deceased person.

18. It was apparent from the evidence adduced that the appellant was driving on the wrong side of the road at a high speed. Taking into consideration the nature of injuries sustained by the deceased as revealed in the post-mortem, the length of time the appellant stayed in hospital as well as the report from PW3 the motor vehicle inspector the trial magistrate reached the conclusion that the was to blame for the accident.

19. The appellant further stated that there were material contradictions in evidence of the prosecution witnesses. He specifically pleaded that PW5 had stated that there were no dents on the motor cycle apart from the left side mirror. This was contradicted by PW3's evidence that the knee guard of the motor cycle was damaged and the bar bent on the front. The appellant was not truthful in his defence.

20. I have looked at the testimony of the aforementioned prosecution witnesses and note that the contradictions are minor and not sufficient to impeach the testimonies of the prosecution witnesses. In **Erick Onyango Ondeng' v Republic [2014] eKLR** the Court of Appeal stated that not every contradiction would cause the evidence of witnesses to be rejected.

21. The Court cited with approval the findings in Court of Appeal case **Twehangane Alfred vs .Uganda, Crim. App. No 139 of 2001, [2003] UGCA**. As noted by the Uganda Court of Appeal in **Twehangane Alfred vs. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** it is not every contradiction that warrants rejection of evidence. As the court put it:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

22. I find that the contradictions pointed out by the appellant did not point to any deliberate untruthfulness on the part of the witnesses.

23. The appellant further pleaded that the prosecution deliberately omitted material witnesses to cure the contradictions of some of its witnesses. I am not persuaded by this. In the case of **Criminal Appeal No 31 of 2005 Julius Kalewa Mutunga v Republic**(unreported), the Court of Appeal held that:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was

influenced by some oblique motive.”

24. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of *Ogalo s/o Owuora 1954 24 EACA 70*. It is well set out that:

“This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice”

25. I have perused Sections 46 and 103 and not that the sentences imposed were within the law. The applicant has not established any reason for this court to interfere with the sentences.

26. It is my finding that the appellant has not satisfied this court on grounds of appeal. The conviction was based on cogent evidence and it is hereby upheld.

27. I find no merit on this appeal and hereby dismiss it.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Maina for Kathungu

Ms. Mati for the Respondent