REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 66 OF 2017

(From original conviction and sentence in Traffic Case No. 224 of 2016 of the Senior Resident Magistrate's Court at Wang'uru)

EPHANTUS KINYUA NJAGI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged with causing death by dangerous driving **C/Sec 46 of the Traffic Act** and careless driving **C/Sec 49(1) of the Traffic Act**. He was convicted on both counts and sentenced as follows;

Count 1 – Kshs.100,000/= fine or 1 year in jail

Count 2 – Kshs.20,000/= or 6 months in jail

The appellant has appealed against both the conviction and the sentence.

The appeal raises the following grounds:-

a) The Learned trial Magistrate erred in law and fact in setting the standard of proof too low that she convicted in a case where there was absolutely no evidence to support conviction.

b) The Learned trial Magistrate erred in law and fact in making conflicting findings in her Judgment, at one point finding that the motor cycle was outside the white line when the accident happened, and at another point making a finding that the bus being driven by the accused was overtaking when accident occurred while the bus was returning to its lane.

c) The learned trial Magistrate erred in law and fact in failing to find the contradicting evidence of the prosecution witnesses as to how the accident happened.

d) The learned trial Magistrate erred in law and fact in failing to make a finding that under the prevailing circumstances and when viewed objectively, PWI and the deceased were the ones to blame for the accident.

e) The Learned trial Magistrate erred in law and fact in not making a finding that the evidence of the accused was corroborated by the evidence of PW2, PW3 and the Investigating Officer.

f) The conviction was against the weight of the evidence adduced.

g) The sentence was far too excessive in the circumstances.

He prays that the appeal be allowed conviction be set aside, sentence be quashed.

2. Background:

The appellant Ephantus Kinyua Njagi was on 17/10/2016 driving a motor vehicle registration number KBE 190V Isuzu Bus which was a public service vehicle along Mwea/Makutano road in Kirinyaga County. On the way he hit a motor cycle registration Number KMDF 390C Skygo which was being driven by Patrick Mutuku and who at the material time was carrying a pillion passenger by name Ester Nziza. As a result of the collusion, Ester Nziza sustained fatal injuries while the motor cyclist sustained serious injuries. Police were called to the scene

and conducted investigations. Prosecution witness -5- Edward Kipruto Kandie of Wanguru Police Station who investigated found that the motor cycle KMDF 390 C was heading to White Rose Hospital with two pillion passangers while the bus was being driven behind them. The bus driver tried to overtake the motor cycle but in the process hit the motor cycle. The bus driver who was the appellant did not stop. Passangers in the bus prevailed upon him to stop. He then started reversing and in the process hit motor vehicle KAM 009A Toyota Corolla which was being driven behind the bus.

3. PW-5 concluded that the driver of the bus who is the appellant was to blame for the accident as he drove recklessly and overtook without due care and attention. The appellant was then charged.

4. When the appeal came up for hearing, the parties opted to argue the appeal by way of written submissions. For the appellant, it was submitted that the evidence of the Motor cyclist (PW-1) Patrick Mutuku and that of Nancy Muthoni Gitonga PW2 who was a pillion passenger was contradictory with the rider saying he was on the road while PW-2- said he was slightly off the road. That evidence by PW-5- is that the accident was off the tarmac road. That PW-3- a passenger in the bus testified that the motor cycle was on the while line. That the trial Magistrate erred in fact in taking two positions as to how the accident happened.

5. For the State it was submitted that the charge was proved to the required standard. That the driver of the bus was at fault. He relied on ***Orwenyo Missiani –v- R (1979) E. A 289*** where it was stated:

> ***"Fault" certainty does not necessary 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 a failure: a falling below the care or skill of a competent and experienced driver and to the relevant circumstances of the case.***
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> ***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".***

6. This is a first appeal. This court has a duty to consider the evidence tendered before the trial court, analyse it and re-evaluate it and come to its own independent finding. This is in line with the holding in the Case of **Okeno –v- R (1972) E. A 32.**

The appeal is on both conviction and sentence

7. Conviction

As per the evidence adduced by prosecution, the motorcyclist was riding in front of the motor vehicle. The motor vehicle attempted to overtake but there was an oncoming lorry and the vehicle rejoined its lane whereby it collided with the motorcycle causing the fatal accident.

8. The appellant on the other hand stated that the motorcycle was outside the white lane when he proceeded to pass it only to be alerted of the collision. PW 3 who was the conductor in his statement collaborated the prosecution's evidence but during evidence he attempted to shift the blame to the motorcycle for joining the road. The evidence tendered has minor contradictions. This does not however change the fact the motor cycle was moving properly before the bus passed it and in the process it hit the motor cycle. Fault was clearly on the bus driver. Where the driver is at fault, blame for the accident must inevitably be on him.

9. The trial court was able to peruse the damages on the vehicle which indicated the collision occurred on the near side door thus corroborated the prosecution's evidence. Therefore the appellant was rightfully convicted of the offences. The minor contradictions must be overlooked. The driver of the bus was at fault. He was trying to overtake and as he returned to his lane the collision occurred.

10. The appellant was alleged to have driven the bus dangerously. There is evidence tendered on the manner of driving. The appellant was trying to overtake and he collided with the cyclist as he went back to his lane. It is clearly the appellant who created a situation of danger in the manner he drove the motor vehicle at the time. The cyclist was riding his motor cycle when the appellant who came from behind him clashed with him and pushed him to a ditch**.** ***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.*

11. The prosecution proved that the appellant drove the motor vehicle at the time in a manner which was dangerous. The appellant failed to give due consideration to other persons using the road. A passenger in the bus PW-3- had seen the cyclist and realized there was collusion. PW-3- alerted the driver. This means that the appellant had not noticed the cyclist. He did not give due care and attention to other road users. **Section 49(1) of the Traffic Act** provides:-

> *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— for a first offence, to a term of imprisonment not exceeding one year or a fine not exceeding one hundred thousand shillings;*

12. The evidence tendered by the prosecution was sufficient and supported the charge. The contradictions cited were minor and do not

change the finding by the trial magistrate that it is the appellant who caused the accident which resulted in the death of the pillion passenger and serious injuries to the cyclist. The trial Magistrate considered the evidence and ignored the minor contradictions. She did not err.

13. Sentence

In **Bernard Kimani Gacheru V Republic [2002] eKLR**

On the issue of interfering with sentence the Court of Appeal had this to state;

> **On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.**
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> **The position was stated succinctly by the Court of Appeal for East Africa in the case of *OGOLA s/o OWOURA VS REGINUM (1954) 21 270 …….***

14. The sentence provided under **Section 46 of the Traffic Act** is a maximum of ten years, while under **Section 49(1)** the imprisonment for one year or a fine not exceeding Kshs 100,000/-. The appellant was fined Kshs 100,000/- for causing death. This was not in any way excessive. The Magistrate exercised discretion by giving the appellant the option of a fine. The sentence was not excessive. There are no grounds upon which this court can interfere with the sentence.

15. In conclusion:-

There was sufficient evidence tendered before the trial Magistrate to support the conviction. The sentence was not excessive. The appeal is without merits and is dismissed.

Dated at Kerugoya this 7th Day of February, 2019.

L. W. GITARI

JUDGE