



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 29 OF 2018

JOSPHAT MALALU BOYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani in Traffic Case No. 20829 of 2016 delivered by Hon. E. Riyan (SPM) on 25th January 2018)

JUDGMENT

1. The Appellant, **Josphat Malalu Boyi** was charged with three (3) counts of various offences under the **Traffic Act, Cap 403 Laws of Kenya**. In count 1, he was charged with causing death by dangerous driving contrary to **Section 46**. The particulars of the same were that on the 22nd day of August, 2016 at around 9.22pm along General Waruinge Street within Nairobi County being the driver of motor vehicle registration number KCG 326T make Toyota Fielder drove the said vehicle along the said public road at a speed which was dangerous to the public and other road users and without due care and attention hit and knocked down one male adult pedestrian namely **Erastus Ouma Oguna** killing him on the spot.

2. In count 2, he was charged with failing to report an accident contrary to **Section 73 (3)**. The particulars of the same were that on the 22nd day of August, 2016 at around 9.22 pm along General Waruinge Street within Nairobi County being the driver of motor vehicle registration number KCG 326T make Toyota Fielder failed to report an accident after hitting one male adult pedestrian namely **Erastus Ouma Oguna**.

3. In count 3, he was charged with failing to stop after an accident contrary to **Section 73 (1)**. The particulars of the same were that on the 22nd day of August 2016 at around 9.22 pm along General Waruinge Street within Nairobi County being the driver of motor vehicle registration number KCG 326T make Toyota Fielder failed to stop after hitting a male adult pedestrian namely **Erastus Ouma Oguna**.

4. The Appellant pleaded not guilty to the three offences. Upon conclusion of the trial, he was convicted on all the three counts and sentenced as follows: in count 1, he was fined Kshs. 100,000/= in default to serve 2 years imprisonment; in counts 2 and 3, he was fined Kshs. 2,000/= in default to serve one (1) month imprisonment in each count. The said sentences were to run consecutively. Being dissatisfied with that decision, he preferred the instant appeal against both the conviction and sentence.

5. The Appellant raised six (6) grounds of Appeal in his Petition of Appeal filed on 15th February 2018. He was aggrieved that the learned trial magistrate erred in law and fact by: convicting him purely on circumstantial evidence which did not conclusively point at him; failing to find that the prosecution did not prove that he was the one driving the motor vehicle at the time of the accident; convicting him despite the glaring contradictions and inconsistencies in the prosecution's case; failing to consider his strong defence; convicting him in the absence of evidence linking him to the accident; taking into account irrelevant and extraneous considerations that did not form part of the evidence tendered.

Summary of Evidence

6. This being a first appeal, this court is enjoined to reanalyze and re-evaluate the evidence adduced before the trial court afresh and arrive at its own independent verdict. (See **Njoroge v Republic [1987] KLR 19 at P.22**)

7. The prosecution's evidence can be summarized as follows: **PW6, Barnabas Asembo Oketch** was in his house at Pumwani Hospital staff quarters on 22nd August, 2016 at about 9.00 pm when the watchman whom he had sent to the shop, came back and informed him that someone had been hit by a vehicle on the road. Later, his son Rodgers telephoned him and asked him to get an ambulance to assist the person who had been knocked down. PW6 went to the scene and discovered that the said person was his neighbour, the deceased herein. His body was lying off the road on the left pavement. PW6 went to the deceased's house and informed his family.

8. The deceased's wife **PW1, Gowety Achieng Oketch** had met him in town earlier. She went to the scene near Starehe boys and confirmed that indeed it was her husband who had been knocked down by a motor vehicle while crossing the road. He had already died by then and there were police officers at the scene. They took his body to city mortuary and thereafter proceeded to record a statement at Pangani police station. On 24th August 2016, PW1 and the deceased's son **PW2, Edwin Oduor Ouma** went to city mortuary to identify his body for post mortem purposes.
9. The post mortem on the deceased's body was conducted on 24th August, 2016 by **PW5, Dr. Peter Ndegwa**. Upon examination, he noted that the deceased had bloody clothes. He had multiple compound fractures on both the tibia and fibula. He also had bruises on both chins, left hand, fore head and a fractured skull. PW5 formed the opinion that the cause of death was multiple injuries due to blunt force trauma. He produced the post mortem report in evidence.
10. **PW3, Samuel Orenge Onkware** was a gazetted motor vehicle inspector who inspected the subject motor vehicle on 7th October, 2016 at Nairobi area. He noted that the vehicle had no pre-accident defects on the body works. The electrical system was also okay except that the left head lamp had notably been replaced as it did not have a labeling of the number plate yet all the other three had. He formed the opinion that there must have been a damage that necessitated the replacement. He concluded that accident damage to the body may have been concealed by repairing due to the delay in availing the vehicle for inspection.
11. The case was investigated by **PW4, PC Paul Maundu**. He stated that he was on traffic standby duties at Pangani Police Station on 22nd August, 2016 at around 2120 hours when he was informed about an accident along General Waruinge area. He went to the scene and found the body of the deceased lying on the edge of the road near Starehe Boys. He also met a male adult called David Ouma at the scene who informed him that he knew the victim who had been hit by a vehicle that failed to stop. He said that the victim was crossing the road when he was hit and died on the spot. PW4 drew a sketch plan which was availed in court and took the deceased's body to City mortuary.
12. The following day, he went to ICT to review the CCTV footage of the scene and discovered that the vehicle that hit the deceased was KCG 326T Toyota fielder. The vehicle was therefore black listed. On 26th September, 2016, they managed to intercept the vehicle along Juja Road while being driven by one Stephen Muthiani. Upon being asked about the accident, he said it is a taxi which had a driver who was called to the police station. The Appellant was the said driver. PW4 arrested and charged him accordingly. He stated that the fact the deceased died instantly meant that the driver was over speeding.
13. The Appellant gave a sworn statement in his defence and called one witness. He stated that on 22nd August, 2016 at around 9.22 pm, he had removed the subject motor vehicle from the road, returned it to the owner and was at home. While at home in Huruma, he met his friend Francis with whom they watched football until 11.00 pm and then went their separate ways. He denied being involved in any accident and/or having the subject motor vehicle at the time of the accident. He stated that the next day after the accident, he was not at work but in Thika. Later on, police stopped him at St. Teresa'sa claiming that the vehicle had been involved in an accident but failed to stop. On cross examination, he stated that he handed over the vehicle to the owner between 8-9.00pm. He denied handing it over to the owner after the accident. He also denied telling the owner that he had hit a dog. In re-examination, he turned and stated that he returned the vehicle at 6.00 pm
14. **DW2, Francis Wanyaga Muraya** informed the court that he knew the Appellant in Huruma. He stated that on 22nd August, 2016 at about 8.30 pm, he was at Manyoa pub relaxing when the Appellant joined him. They relaxed together up to around 10.30-11.00 pm. In cross examination, he stated that he met with the Appellant around four (4) times a week but the next time he saw the Appellant after their meeting of 22nd August 2016 was about one month later.
15. In the judgment delivered by the trial court, the learned magistrate held that the prosecution proved its case beyond reasonable doubt.

Submissions

16. The appeal was disposed of by way of both written and oral submissions. The Appellant was represented by Mr. Ogado whilst learned State Counsel, Ms. Akunja represented the Respondent. The Appellant's written submissions were filed on 19th November, 2018 whilst those of the Respondent on 12th March, 2019.
17. Counsel for the Appellant submitted that the prosecution did not prove that the Appellant was the driver of the motor vehicle at the time of the accident since none of the witnesses called by the prosecution placed him at the scene of the accident. He challenged PW4's testimony which linked him to the offence as being largely hearsay. It was further submitted that the evidence on record did not prove the ingredients of the offences in counts 1, 2 and 3. The Appellant also faulted the prosecution for failing to avail the CCTV footage which he argued would have established who was driving the vehicle and how it was being driven.
18. The Appellant also faulted the prosecution for failing to call crucial witnesses. In this regard, he referred to one Stephen Muthiani who was driving the vehicle when it was intercepted and David Ouma whom PW4 allegedly found at the scene of the accident. He therefore urged this court to draw an inference that their testimonies would have been adverse to the prosecution's case. Further, the Appellant was of the view that his alibi defence created doubt on the strength of the prosecution's case and that he did not have to establish that the same was reasonably true.
19. It was the Appellant's submission that the prosecution did not prove its case beyond a reasonable doubt and urged the court to quash the conviction, set aside the sentence and order for the refund of his fine.
20. On the part of the Respondent, it was submitted that from the evidence on record and the inconsistencies that arose during the Appellant's defence, it was apparent that the Appellant was indeed the driver of the vehicle on the night of the accident. Counsel argued that the different timelines stated by the Appellant regarding the time he returned the vehicle to the owner leads to the conclusion that he was not

truthful. The learned state counsel further argued that the failure to avail the CCTV footage was not fatal as the same only helped in identifying the vehicle that knocked the deceased. It was further submitted that the CCTV footage revealed that the motor vehicle did not stop upon hitting and killing the deceased on the spot and further, that there is no record of any report of the accident by the driver of the motor vehicle at any police station.

21. Further, the learned state counsel stated that the prosecution proved the case to the required standard. She argued that DW2's alibi testimony did not dislodge the strong and consistent evidence tendered by the prosecution as alleged by the Appellant. In the Respondent's view therefore, the Appellant's conviction was safe and urged the court to uphold it.

Analysis and Determination

22. After carefully re-evaluating the evidence on record and considering the parties respective submissions, I narrow down the issue for determination to be whether the prosecution proved its case beyond a reasonable doubt.

23. It was apparent from the facts of this case that the deceased was hit by motor vehicle registration number KCG 326T Toyota fielder along General Waruinge Road and died on the spot. It is also not in doubt that the driver of the motor vehicle did not stop after the accident. There was also no report of the accident made to the police by the person who was driving the vehicle at the time. The issues for determination are therefore, whether the Appellant was the driver of the motor vehicle at the time of the accident and second, whether the accident was caused by the Appellant's manner of driving.

24. There was no eye witness that saw and/or identified the Appellant as the driver of the motor vehicle at the time of the accident. The only link between him and the accident was the fact that he admitted that he had the motor vehicle on the day of the accident even though he denied driving it at the time of the accident. It is therefore not in doubt that the trial court convicted the Appellant on the basis of circumstantial evidence. It is trite law that for a conviction to stand on the basis of circumstantial evidence, the evidence adduced by the prosecution must irresistibly point to the guilt of the Appellant and no one else as the person who committed the offence. This was aptly established in the case of **Sawe V Republic [2003] KLR 364** at page 372 where the Court of Appeal held that:

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

25. The registration number of the subject motor vehicle was obtained by **PW4, PC Paul Maundu** upon reviewing the CCTV footage of the scene of the accident. Thereafter, the vehicle was black listed and eventually located along Juja Road on 26th September, 2016 while being driven by one Stephen Muthiani. Upon being asked about the accident, he said it is a taxi which had a driver who turned out to be the Appellant. On inspection of the vehicle by PW3, it was discovered that its left headlamp had noticeably been replaced as it did not have the vehicle number plate markings like the other three. PW3 formed the opinion that the replacement may have been occasioned by an accident which was concealed through repairs on the body of the vehicle. Notably, the sketch plan produced in evidence by PW4 indicates that the deceased's body was found lying on the left pavement on the side heading back to town.

26. The Appellant denied being involved in any accident and/or having the subject motor vehicle at the time of the accident. He stated that at the time of the accident, he had already removed the subject motor vehicle from the road and returned it to the owner. He was at home in Huruma where he met his friend, DW2 with whom they watched football until 11.00 pm and then went their separate ways.

27. However, the Appellant gave contradictory timelines in his testimony regarding when he returned the vehicle. During his evidence in chief, he stated that he returned the vehicle by 9.22 pm. In cross examination, he stated that he handed over the vehicle to the owner between 8.00-9.00 pm. In re-examination, he changed his earlier testimony and stated that he returned the vehicle at 6.00 pm. The inference that can be drawn from the apparent contradictions is that he was the one driving the motor vehicle at the time of the accident.

28. Further and in any event, the Appellant stated that he did not go to work the next day as he went to Thika. His friend DW2 also told the court that after their meeting of 22nd August, 2016, the next time he saw the Appellant was about one month later yet they would normally meet around four (4) times a week. In addition, it emerged during trial that upon returning the motor vehicle, the Appellant informed the owner that he had knocked a dog. He also did not attempt to give any explanation as to why the left headlamp of the motor vehicle was different from the rest. The circumstantial evidence hereinabove points to the Appellant as the person who was driving the motor vehicle at the time of the accident.

29. As to whether the Appellant drove the vehicle in a dangerous manner, under **Section 46** of the **Traffic Act**, a driver is said to have caused death by dangerous driving when he drives recklessly or at a speed or in a manner which is dangerous to the public. The provision encompasses the elements of the offence as;

“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 circumstances of the case, including the nature, condition and use of the road and amount of traffic which is actually at the time or which might reasonably be expected to be on the road.”

30. The definition of what constitutes dangerous driving was further set out in **R v. Gosney (1971) 3 All ER 220**, thus:

“In order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also

have been some fault on the part of the driver, causing that situation. '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 a failure; a falling below the standard of car or skill of a competent and experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case."

31. Similarly in **Atito vs. Republic [1975] EA 278**, the Court of Appeal held as follows regarding the offence of dangerous driving:

"The question in this case is whether the Appellant took avoiding action at all, or in good time, and whether by not taking this action, or delaying taking it unduly, he caused a dangerous situation to arise for whose consequences he is criminally liable."

32. From the foregoing, it is evident that an accident by itself is not conclusive proof of careless driving or dangerous driving because ordinarily, no driver sets out to cause an accident and particularly one that leads to death. There must be evidence showing that there was element of fault on the part of the Appellant which led to the accident that caused the death of the deceased.

33. It was the prosecution's case that the driver drove at a high speed thus causing the death of the deceased on the spot upon hitting him. There was no eye witness to the accident. The sketch plan produced in evidence indicates the position of the deceased's body as being on the pavement. This attests to a high likelihood that the deceased was knocked when he had already finished crossing the road thus placing the fault on the part of the driver. In the premises, I find that the Appellant not only drove the motor vehicle recklessly but also drove at a high speed thus killing the deceased instantly upon hitting him.

34. As regards count 2 and 3, it is evident that the Appellant failed to stop after the accident to check the condition of the deceased so as to take whatever action would be necessary. He simply sped off as if nothing had happened without even bothering to report the accident to the police which is an offence. **Sections 73 (1) and (3) of the Traffic Act** provides that:

(1) If, in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby injury or damage is caused to any person, vehicle, dog or cattle, the driver of the motor vehicle shall stop, and if required to do so by any person having reasonable grounds for so requiring give his name and address, and also the name and address of the owner and the identification marks of the vehicle.

(3) If in the case of any such accident as aforesaid the driver of the motor vehicle for any reason does not give his name and address to any such person as aforesaid, or if any injury has been caused to any person, dog or cattle, the driver shall report the accident at a police station or to a police officer as soon as reasonably possible, and in any case within twenty-four hours of the occurrence

35. The Appellant took issue with the failure to avail the CCTV footage in evidence. However, I note that this was not fatal as it only helped in identifying the registration number of the subject motor vehicle. I have already determined that he was the driver at the material time.

36. The Appellant also challenged the prosecution's failure to call crucial witnesses namely Stephen Muthiani and David Ouma whom PW4 allegedly found at the scene of the accident. However, the prosecution advanced a strong case that ousted his alibi defence. I cannot therefore draw an adverse inference from the failure to call the two as witnesses. In any event, I am alive to the fact that the witnesses to be called is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it is shown that the prosecution was influenced by some oblique motive. (See **Mwangi vs. R, [1984] KLR 595**).

37. In view of all the foregoing, I find that the prosecution established the case against the Appellant beyond a reasonable doubt. His conviction on the three counts was therefore safe. On sentence, the same was legal and very lenient. I will not disturb it in the hope that it will serve as deterrence to the Appellant.

Dated and delivered at Nairobi This 20th Day of May, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.
2. Miss Sigei for the Respondent.