REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 125 OF 2018

STANLEY MOBISA MARIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of Hon. W. Oketch SRM Kisii, dated 6/12/2018, Traffic case no. 1422 of 2018 at Kisii)

JUDGMENT

1. **Stanley Mobisa Mariga** the appellant herein was charged before the Chief Magistrate's court on the 6.12.2018 with the offence of , careless driving contrary to section 49 (1) of the Traffic Act Chapter 403 of the Laws of Kenya. The particulars of the offence are that; on the 21st day of November 2018 at about 1200Hrs along Kisii- Milimani road near Christamariane Hospital area, within Kisii county the appellant being the driver to a motor vehicle Reg. No.KBA 389 E make Toyota Carina did drive the said motor vehicle without due care, attention and consideration to other road users, in that he hit a pedestrian namely James Mugambi Njururi aged 32 years slightly injuring him.

2. The appellant appeared in court on the 6.12.2018. The court record shows that, the charge was read to him and he pleaded, "True". The facts were read by the prosecutor and his reply was "It is true". The record shows that the Court proceeded to convict the appellant on his own plea. After mitigation the appellant was sentenced to a fine of Kshs.50, 000/- in default to serve six months imprisonment. He was informed of his right of appeal within 14 days.

3. On the 20th December 2018 the appellant filed his petition of appeal being dissatisfied with the judgment and / sentence of Hon. W. Oketch SRM. His appeal is against the conviction and sentence. The appellant's grounds of appeal are that;

i. The appellant was convicted on an unequivocal plea

ii. The sentence of Kshs. 50,000/- and in default six months imprisonment was manifestly excessive.

iii. The sentence was unlawful.

4. The appellant prays that the appeal be allowed, the judgment be quashed and the sentence of Kshs. 50,000/- fine and or 6 months imprisonment be set aside and the appellant refunded the fine so far paid.

5. At the hearing Mr. Anyona submitted that the plea taken by the court was equivocal and the sentence was unlawful. That after reading the charge to the appellant the trial court did not enter a *"plea of not guilty or not guilty"*. That this is contrary to the provisions of the Criminal Procedure Code ('the CPC') and the manner which a plea is to be taken. That since there was no plea entered of guilty or not guilty this was unlawful and the sentence too. That the appellant despite the illegality proceeded to pay the fine of Kshs. 50,000/-. He sought to have the conviction quashed and sentence set aside.

6. Mr. Otieno for the State conceded that the plea of guilty was not entered as is required in law. That it was also not clear what language was used. The language was not indicated he sought to have the matter go for retrial as the matter was decided in 2018 and it's a traffic matter.

7. Mr Anyona in response submitted that it would be unfair to subject the appellant to a retrial and that a Senior Resident Magistrate should know how to take plea.

8. As a court of first appeal I am required to review the court proceedings of the day on how the plea was taken to find out if the conviction and sentence was proper

9. The court record of 6.12.2018 shows that the charge was read to the appellant. The court record is not clear on the language used. After the appellant responded "True", the trial court did not enter a plea of guilty or not guilty as required in law. Once an accused is informed of the

substance of the charge, the accused is called upon to plead. Section 207 of the CPC provides as;

> **207. Accused to be called upon to plead**
>
> *(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.*
>
> (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:
>
> Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.
>
> *(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided. (Emphasis mine).*
>
> *(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.*
>
> *(5) If the accused pleads—*
>
> > *(a) that he has been previously convicted or acquitted on the same factsof the same offence; or*
> >
> > *(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.*

10. The court is required to explain the charge and all elements of the offence to the accused in a language he or she understands (**see Adan V R [1973] EA 445; John Muendo Musau v R Court of Appeal at Nairobi Appeal No. 365 of 2011**). After the charge is read to the accused, he must either deny or admit the charge or opt to remain silent. Where an accused admits the charge and the particulars of the offence as happened in this case, a plea of guilty ought to have been entered. This was not done (see section 207 of the CPC). This is to ensure that the plea of guilty is unequivocal. This did not happen before the trial court. The plea of guilty was not entered as required in law as per section 207 of the CPC. The record further shows that after the facts were read the court recorded, "**Accused is convicted on his own plea**". The court failed to record a plea of guilty as required in law and hence the conviction as stated on record too cannot stand. I find that the appeal has merit. I therefore set aside the conviction and sentence imposed. The fine of Kshs. 50,000/- paid by the appellant shall be refunded to him forthwith.

11. On the issue of retrial Mr. Anyona submitted that it would be unfair to order a retrial. Mr. Otieno submitted that the charge was a traffic one which was taken in December 2018. The principles to be considered for retrial are well known. Whilst considering whether to order a retrial having set aside the conviction and sentence am guided by the facts and circumstances of the case. The ultimate test has to be whether the interest of justice demand a retrial **(see Benard Lolimo Ekimat v R Court of Appeal at Eldoret Criminal Appeal No. 151 of 2002; Dennis Leskar Loishiye vs R Court of Appeal at Nairobi Criminal Appeal No.24 of 2015)**. A re-trial would be ordered when it would be in the interest of justice to do so, or where an injustice has been caused by an irregularity or illegality during **trial (see Samwel Ngare Kayaa & Another v R [2000] KLR 552).**

12. The appellant was charged with the offence of careless driving contrary to section 49 (1) of the Traffic act Cap. 403. It is alleged in the particulars of the offence that he hit a pedestrian slightly injuring him. There is an allegation that a person was slightly injured. In my view no injustice will be caused to the appellant if the plea is taken again. The matter is one of December 2018, about 6 months ago. I therefore order a re-trial before the Chief Magistrate's Court, Kisii Law Court.

13. The appellant shall present himself before the **Chief Magistrate Kisii Court** for plea on the **29th July 2019**.

Dated,signed and Delivered at Kisii this 18th day of July 2019.

R.E.OUGO

JUDGE

In the presence of;

Mr. Kerosi h/b for Mr. Anyona For the Appellant

Appellant In person

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Ms Rael Court clerk