REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.252 OF 2018

SULEIMAN KUNG'U MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Riany SRM delivered on 14th November 2018 in Nairobi CM Tr. Case No. 7616 of 2018)

JUDGMENT

The Appellant Suleiman Kung'u Macharia was charged with the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act. The particulars of the offence were that on 17th May 2018 at about 11.00 a.m. along Mwiki Road at Sunton Kamutiini Area within Nairobi County, the Appellant being the driver of motor vehicle registration number KCE 786Z Isuzu Lorry drove the said motor vehicle on the said public road in a manner which was dangerous to the public and other road users and thereby caused an accident by hitting a pedestrian namely Morris Katoyo who sustained fatal injuries. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to pay a fine of Ksh.400,000/-. In default of the same, the Appellant was to serve a custodial sentence of three (3) years. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition for appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the evidence adduced by the prosecution was not sufficient to sustain a conviction. He asserted that the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt. He faulted the trial magistrate for convicting him on the basis of assumptions that were not founded on the evidence on record. He was aggrieved that the trial magistrate failed to properly evaluate the evidence adduced by the witnesses. He complained that the trial court failed to consider his defence in arriving at its decision. In the premises, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submission made by Mr. Kamau for the Appellant and by Mr. Momanyi for the State. Mr. Kamau made oral submission to the effect that the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt. He cited the case of Gilbert Kiptum vs Republic [2015] eKLR which set out the threshold to be met in cases of causing death by dangerous driving. He asserted that the prosecution was required to demonstrate that there existed a dangerous situation which was caused by the driver. He pointed out that none of the prosecution witnesses witnessed the accident. PW1 stated that he came out of his shop and found the victim trapped under the vehicle. He averred that there was no evidence pointing to the fact that the Appellant was driving the motor vehicle at high speed.

Counsel for the Appellant further submitted that the investigating officer failed to conduct any investigations to determine culpability on the part of the Appellant. He asserted that the Appellant testified that the vehicle in front of him was being driven recklessly and was to blame for the accident. PW1 confirmed that there was a vehicle in front of the Appellant's vehicle. He averred that the trial court shifted the burden of proof to the Appellant. He relied on a case where it was held that the burden of proof never shifts to the accused person. He was of the view that the circumstantial evidence relied on by the trial court was not sufficient to sustain a conviction. He pointed out that the prosecution failed to adduce any evidence on how the weather was on the material day. He maintained that there were other parties who could have been responsible for the accident. In the premises, he urged the court to allow the Appellant's appeal.

Mr. Momanyi for the State opposed the appeal. He asserted that the Appellant was the driver of motor vehicle registration number KCE 786Z which knocked down the deceased person. The Appellant veered off the road and hit the deceased who was on the side of the road. The deceased was rushed to hospital where he succumbed to his injuries. Learned State Counsel submitted that PW1 witnessed the Appellant's vehicle veer off the road and hit a pedestrian. He was of the view that if the Appellant drove the vehicle cautiously, he would have avoided causing the said accident. He averred that DW2 testified that the Appellant was driving at a speed of 30-40 kph. The Appellant therefore ought to have exercised due care and attention to other road users. He maintained that the prosecution established its case to the required standard of proof beyond any reasonable doubt. He therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Samuel Wanjohi, stated that on 19th May 2018 at about 11.00 a.m., he was attending to a customer at his place of business where he sold beds. He went outside his workshop and saw a lorry veer off the road. The lorry was trying to avoid colliding with a school bus that was ahead of it. In the process, the lorry hit the deceased who was standing by the roadside near his workshop. The victim was trapped under the vehicle. He was rushed to hospital. The lorry was being driven from Sunton to the Mwiki direction. He told the court that the Appellant was the driver of the said lorry. He reported the accident at Kasarani Police Station. On cross-examination, PW1 stated that the Appellant was driving at a high speed. PW2, Dr. Bernard Midia, was a pathologist working at Kenyatta National Hospital. He conducted a post mortem on the deceased. He testified that the deceased sustained laceration wounds on his pelvic region. His pelvic bone was fractured and his blood vessels severely damaged. He had lost a lot of blood. After examination, he concluded that the deceased's cause of death was hemorrhage due to injury in the pelvic region caused by blunt force trauma that occurred during the road accident.

PW3, Nifueda Minaya Imiti, is the deceased's mother. On 17th May 2018 at about 11.30 a.m., she was informed that her son, Morris Katoyo, was involved in a road accident that occurred near Sunton. She rushed to the scene of the accident. She was told that her son had been taken to St. Francis Hospital. The vehicle that was involved in the accident had a registration number KCE 786Z. She thereafter rushed to the said hospital where she found the deceased in severe pain. He was oozing a lot of blood. The doctor referred the deceased to Kenyatta National Hospital. The deceased was able to talk while in the ambulance. He however succumbed to his injuries while at Kenyatta National Hospital. The deceased was eighteen (18) years old. On cross-examination, PW3 stated that the deceased informed her that he was on the side of the road when a lorry veered off the road and hit him. The lorry was trying to avoid colliding with a school bus.

PW4, Christopher Amasava, is the deceased's father. He stated that he did not witness the accident. He was called to identify the deceased's body at Kenyatta National Hospital. He stated that the deceased sustained severe injuries on his lower abdomen and was bleeding. He also visited the scene of the accident. He was informed by a good samaritan that the driver of the lorry which had caused the accident tried to flee the scene. The driver told the members of the public that he was going to report the accident at Kasarani Police Station. However, when PW4 went to Kasarani Police Station, he discovered that no such report had been made.

PW5, Muigai Kagia, was a motor vehicle inspector. He adduced evidence on behalf of his colleague Bernard Cheruiyot who inspected the motor vehicle (KCE 786Z) subject matter of the present appeal. He produced a report of the findings in evidence. The report indicated that the vehicle's face panel was slightly scratched. The front bumper was slightly scratched. The vehicle had no pre-accident defect.

This case was investigated by PW6, PC Miriam Korir, stationed at Kasarani Police Station. She was instructed to investigate an accident that occurred at Sunton involving a Mistubishi Lorry registration number KCE 786Z and a pedestrian, Morris Katoyo. The Appellant was driving the said vehicle. He was driving towards Mwiki direction. The Appellant veered off the road and knocked down the deceased who was standing at the side of the road. The deceased was rushed to hospital but he unfortunately succumbed to his injuries. The vehicle was towed to the police station for inspection. A post mortem was conducted on 21st May 2018. PW6 later charged the Appellant of the present offence. He was the driver of the vehicle in question. PW6 asserted that if the Appellant had kept a safe distance, he would not have veered off the road. She produced a sketch map in evidence.

When the Appellant was put on his defence, he denied the charges against him. The Appellant admitted that he knocked down the deceased person with the vehicle he was driving. He however stated that he did so to avoid colliding with a school bus that suddenly stopped infront of him. He took evasive action by veering off the road hence knocking down the deceased. The Appellant testified that he rushed the victim to the hospital using a taxi. He afterwards went to the police station where he reported the accident. Police officers accompanied him to the scene of the accident. The lorry was towed to the police station. The Appellant's testimony was corroborated by DW2 who was in the vehicle with the Appellant when the accident occurred. DW2 stated that the Appellant was driving at a speed of approximately 30 - 40 kph.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge vs Republic [1987] eKLR**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect."***

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act** to the required standard of proof beyond any reasonable doubt.

From the evidence adduced by the prosecution witnesses, it was established to the required standard of proof beyond any reasonable doubt that it was the Appellant who was driving motor vehicle registration number KCE 786Z when it knocked down the deceased person causing him to sustain fatal injuries. The Appellant admitted as much in his defence statement. The post mortem report adduced in evidence confirmed that the deceased person's cause of death was fatal injuries sustained due to the accident. The issue for determination by this court is whether the prosecution established to the required standard of proof that the Appellant drove the said motor vehicle in a dangerous manner. According to **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, ***"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".***

In **Gabriel Wambua Kitili –vs- Republic [2006] eKLR**, this Court 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 person. In the present appeal, it was the prosecution's case that the Appellant was driving at a high speed when he veered off the road and hit the deceased person who was on the side of the road. PW1 testified that he was at his workshop when the Appellant's vehicle veered off the road and hit a pedestrian who was

standing next to his workshop. He stated that the Appellant was driving at high speed. He veered off the road to avoid colliding with a school bus that was ahead of him. The investigating officer asserted that if the Appellant had kept a safe distance from the vehicle in front of him, he would have comfortably applied his brakes and avoided veering off the road.

The Appellant on the other hand contends that the vehicle that was ahead of him made a sudden stop which caused him to take an evasive action and veer off the road hence hitting the deceased person. He denied the assertion that he was driving at a high speed.

The Court of Appeal observed as follows in the case of **Orweryo Missiani –vs- Republic [1979] eKLR;**

> ***"As regards the first question, it is relevant to consider the degree of blameworthiness on 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. In Republic –vs- Gosney [1971] 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 of Appeal, said (at page 224):***
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> ***"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 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."***
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> **PW1 told the court that the Appellant was driving at a high speed, a fact which was denied by the Appellant. However, this court notes that the Appellant told the court that the vehicle skidded off the road. The Appellant asserted that the vehicle that was ahead of him made a sudden stop hence causing him to veer off the road. Even if the vehicle that was in front of the Appellant caused him to veer off the road, from the evidence on record, it was clear that the Appellant was driving at a considerably high speed and was driving too close to another vehicle in front of him hence his vehicle veered off the road when he took evasive action. In addition, he failed to keep a safe distance between his vehicle and the vehicle that was ahead of him. The Appellant failed to drive at a safe distance which would have enabled him to safely bring his motor vehicle to a stop in the event the vehicle ahead of him stopped suddenly. He did not drive the said motor vehicle in a careful manner as to take care of other road users and those near the road.**

This court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the manner in which the Appellant drove his motor vehicle was reckless and dangerous that it established the essential ingredient of dangerous driving under **Section 46** of the **Traffic Act**. The Appellant's appeal against conviction therefore fails. It is dismissed.

As regard sentence, this court is aware that it cannot interfere with the exercise of discretion by the trial magistrate's court when sentencing the Appellant. The Court of Appeal in **Bernard Kimani Gacheru v Republic [2002] eKLR** stated thus:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the 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.***

In the present appeal, it was clear to the court that the sentence that was meted by the trial magistrate's court was harsh and excessive. While there may be an element of carelessness or recklessness on the part of the driver, this court notes that unless in exceptional circumstances, a driver does not set out to cause an accident which leads to death. The Appellant convinced the court that he did not have the intention of causing the death of the deceased. In the premises therefore, this court sets aside the sentence that was imposed by the trial magistrate's court and substitutes it by an appropriate sentence of this court. The Appellant is ordered to pay a fine of Kshs.200,000/-. In default of the same, he shall serve two (2) years imprisonment. The sentence shall take effect from the date the Appellant was convicted by the trial court. **It is so ordered.**

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE