REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL NO. 113 OF 2013

SAMUEL GITHUA GITONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the judgment of the Hon.V.O.Nyakundi Resident Magistrate, Nyeri delivered on 26th August, 2013 in C.M.Criminal Case No.2 of 2013)

JUDGMENT

1. The Appellant was charged in the with the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap. 403 of the Laws of Kenya.

2. The particulars of this offence were that on 30th September, 2012 at about 7.30pm along Kiriko Road in Nyeri County, the appellant being the rider of motor bike registration number KMCQ 949C make Simba rode the motorcycle in a manner that was dangerous to the public and having no regard to the nature conduct and condition and the use of the road and as a result, caused the death JORAM GICHUKI.

3. The prosecution called five witnesses to prove its case; upon the evidence, the appellant was convicted and sentenced to eight (8) years imprisonment; being aggrieved by the decision he filed this Petition of Appeal on the 4th September, 2013 against both the conviction and sentence; there are seven (7) grounds of appeal that have been raised which are summarized inter alia;

(i) The trial court erred by relying on evidence that was not cogent or adequate to form the basis of a conviction;

(ii) The prosecution did not prove the offence to the desired threshold;

(iii) The lower disregarded the defence evidence without giving good reasons; and

(iv) The sentence meted out was excessive and did not take into account the circumstances of the case and the appellant's mitigation.

4. At the hearing hereof the appellant was represented by Learned Counsel Mr Gori; the Prosecuting Counsel for the State was Mrs Gicheha and both counsel made oral presentations; hereunder is a summation of their respective submissions;

APPELLANTS SUBMISSIONS

5. Counsel for the appellant argued that; the prosecution called five (5) witnesses; one of the witnesses was a doctor; one of the other four witnesses was a pillion passenger; there was no evidence on record to support the charge and the finding that at the time of the accident, the appellant was riding the motorcycle in a dangerous manner as provided by Section 46 of the Traffic Act; the section was read verbatim;

6. Counsel submitted that the evidence of **PW2**, **PW4** and **PW5's** evidence was hearsay; and that the only credible witness was **PW3** who was a pillion passenger and was at the scene and saw how the accident occurred; she testified that the accident occurred along the foot-path and that the deceased was a pedestrian who was staggering and moving in reverse and that he was the one who hit the motor cycle; her evidence was that the appellant was not driving at an unreasonable speed otherwise both the passenger **PW3** and the appellant would have also been injured; the trial court relied on this evidence of **PW3** as a basis for conviction and sentenced the appellant to eight (8) years imprisonment;

7. The judgment of the trial court raised two issues for determination; whether the appellant caused the death of the deceased; and whether it was as a result of dangerous driving; the trial court formed an opinion that there was no traffic on the foot-path and the accident could have been avoided; by being circumspective the trial court shifted the burden of proof as the appellant was enjoined to taking care of other road users; whereas the deceased also had a duty of care whilst on the road; that there was no urban or rural Traffic Act and that persons in rural

areas were no exception; that there was misapprehension of the law and that trial court was determined to convict;

8. The appellant contended that the sentence was harsh and excessive; and relied on the case of **Samuel Karanja Kimani vs Republic Cr.Appeal 73 of 2012;** which held that the accused can be given non-custodial sentence;

9. In this instance the appellant was not intoxicated and there was no evidence of recklessness; that the trial courts opinion was selective and it ought to have given the appellant a non-custodial sentence;

10. Counsel also referred to the case of **Gilbert Kiptoo Ngetich vs Republic;** and submitted that the trial court failed to analyze the evidence; that the accident occurred due to the fault of the deceased; and reiterated that the evidence did not support the conviction and sentence;

11. For those reasons the appellant prayed that the conviction be quashed and the sentence be set aside;

RESPONDENTS SUBMISSIONS

12. The State opposed the appeal. Prosecution counsel argued that recklessness had been proved; that the accident occurred on a foot-path; the evidence of PW2 was that there were homes along the foot-path; that the accident occurred at 7.30pm; she was in her house that was situate ten (10) metres from the road; that she heard a big bang;

13. Though this witness may not have witnessed the accident; but she heard the bang and immediately went out and found the deceased lying down and the rider standing by;

14. As for PW3 counsel for the appellant had misled this court by submitting that the pillion passenger had no injuries; that her evidence was that she sustained injuries and visited the hospital for treatment; and that it was the motor cycle that hit the deceased;

15. PW1 who was the pathologist stated that deceased had a fracture to the head; deceased also had external head injuries and internal bleeding; the post-mortem report did not reveal whether the deceased was drunk; this issue was raised by the appellant so as to shift the blame onto the appellant; the appellant was riding on a foot-path and the accident could have been avoided if he had taken care;

16. In his defence the appellant did not controvert evidence of prosecution witnesses; and did not dispute the prosecution's evidence on facts of what had taken place;

17. The sentence meted out was eight (8) years and he would have been liable to imprisonment to a term of not more than ten (10) years imprisonment; that term of eight (8) years was within the term prescribed by law; and was not excessive;

18. Prosecution Counsel argued that the sentence of eight (8) years was both lenient and lawful; and asked the court to dismiss the appeal and prayed that the conviction and sentence be upheld.

REJOINDER

19. This being the first appeal this court has a duty to re-evaluate the evidence and arrive at its own independent conclusion; the appellant used the evidence of PW3 that the deceased was reversing or walking backwards; that this was not permissible in law;

20. Counsel reiterated his prayer that the appellants conviction be quashed and sentence set aside; and that the appellant be set at liberty;

ISSUES FOR DETERMINATION

21. After hearing the rival submissions made by counsel the issues framed by this court for determination are;

(i) Whether the prosecution proved its case to the desired threshold;

(ii) Whether the trial court disregarded the appellants defence without giving good reasons;

(iii) Whether the sentence was harsh and excessive in the circumstances.

ANALYSIS

22. When considering this appeal, this court is alive to its duty as the first appellate court to reconsider and re-evaluate the evidence on record and make its own independent findings, bearing in mind that it did not see or hear the witnesses. Therefore, it will not interfere with the findings of fact of the trial court unless they are based on no evidence or on misapprehension of the evidence or the trial court acted on wrong principles in reaching its findings. (See Okeno v R [1972] EA. 32

Whether the prosecution proved its case to the desired threshold;

23. It is for this appellate court to determine whether the appellant was riding his motor cycle in the manner prohibited by statute and whether the prosecution proved its case so as to justify a conviction of causing death by dangerous driving.

24. The offence of causing death by driving is provided for under Section 46 of the Traffic Act, 2011 as follows-

46. 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 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.

25. The fact of the occurrence of an accident which results to the death of a person is not on its own sufficient to impute liability on the driver; for a person to be convicted for he offence, there must be evidence that he was culpable at the time. This court is persuaded by this finding by the holding of Torgbor, J, in Kariuki vs Republic f19881 KLR 456, where he held-

> "The offence of dangerous driving was not an absolute offence and to justify a conviction, there must not only be a situation which, when viewed objectively, was dangerous but also some fault on the part of the driver causing the situation... Fault involved a failure, a failing below the care and skill of a competent and experienced driver in relation to the manner of the driving and to the relevant circumstances of the case."

26. In terms of Section 46 above, the prosecution had the burden to prove that the appellant rode the motor cycle "dangerously or in a manner which is dangerous to the public."

27. The prosecution case was that the appellant was riding the motorcycle in a reckless manner on a foot-path. PW3 was an eye witness to the accident; she was a pillion passenger and her evidence was that she saw the deceased was in front of them as he walked or staggered backwards; it is noted that her evidence makes no mention of any evasive action that was taken by the appellant;

28. The evidence of PW2 was that her house is located close to the scene of the accident about ten (10) metres from the road; that she did not witness the accident but heard a big banging sound made by the impact; she came out of her house and found the deceased lying on the ground in a critical condition and that he was not breathing; she saw the appellant standing next to the motorcycle and that was in upright position;

29. During cross examination, she testified that the road as a murram road and that there were homes near the road though it did not have a lot of human traffic;

30. PW5, the investigating officer, upon receiving a report on the 1/10/2012 of the accident from the family members of the deceased he then went to the scene on the 2/10/2012 which is two (2) days from the date of the accident; the place of the accident was a murram foot-path and he found traces of blood on the road and deduced that this was the point of impact; he then proceeded to make a sketch plan which he produced as PExh.2; he also issued a Notice of Intention to Prosecute ('PExh.3') to the appellant; the motor cycle was taken for inspection and the report indicated that the foot guard panel was broken and the right rear view mirror was ripped off; the report was also produced as an exhibit; that the DPP then decided to charge the appellant the offence of causing death;

31. PW1 who prepared post mortem report found that the head had linear fractures and that there was bruising on the head and face and found dry blood in the nasal orifices, face and ears; he formed the opinion that the cause of death was traumatic head injury secondary to blunt force trauma;

32. The appellant gave an unsworn defence; and the facts proferred by the prosecution were not disputed by the appellant; he told the court that the postmortem report failed to take into account that the deceased was drunk at the time the accident occurred;

33. The prosecution primarily relied on the opinion of PW2 on account of the big loud banging sound that was made by the motor-cycle; the trial court agreed with the submission of the prosecution and found as a fact that the road being a foot path and had the appellant been more cautious and having seen the deceased could have easily evaded the accident.

34. Having carefully considered the entire evidence adduced at the trial court, to prove that the Appellant was riding dangerously or over-speeding at the time of the accident it is this courts considered view that the evidence of PW1 on the injuries lends credence to the evidence of PW2 on the big loud bang she heard; and that the fatal injuries that were sustained by the deceased resulted because he was hit with a force which in turn offers a basis for the inference that the motor cycle was being driven at a high speed and without any due regard for other road users; and this court finds no reasonable explanation on the court record offered by the appellant as to why he was riding on a footpath that was not reserved for any vehicles;

35. This court is satisfied that the appellant rode his motor cycle in a manner that was dangerous to the public and that he caused the situation by failing to be cautious in the circumstances thereby causing the death of the deceased; this court finds no reason to interfere with the trial courts finding that the prosecution proved its case to the desired threshold;

36. This ground of appeal is found lacking in merit and is disallowed;

Whether the trial court rejected the appellants defence;

37. It is the duty of the trial court to look at the evidence as a whole and then consider whether or not the defence case casts any doubt on the prosecution's case.

38. The appellant's unsworn statement of defence was brief and reads as follows;

"I am a farmer. I stay at Ithekahuno. The evidence given is not bad. The problem was with the postmortem deceased was drunk but postmortem did not say so. That is all."

39. Upon perusing the judgment on record it is noted that the trial court considered the statement of defence raised by the appellant and made the following finding;

"The accused has admitted in defence that everything that witnesses said is correct except that the postmortem did not say the deceased was drunk."

40. This court concurs that the defence does not in any way controvert the evidence of the prosecution witnesses; and he did not dispute the prosecution's evidence on the facts of what had taken place; and this court is satisfied that the trial court analyzed the appellants statement of defence and made a finding that the defence amounted to an admission;

41. This ground of appeal is found lacking in merit and is disallowed.

Whether the sentence harsh and excessive;

42. The general principle is that an appellate court will not ordinarily interfere with the sentence imposed by the trial court unless it is evident that the trial court acted on a wrong principle or overlooked some material factor; or the sentence is manifestly harsh and excessive in the circumstances; these principles are well outlined in the case of **Wanjema vs R;**

43. The appellant's appeal is also against the sentence; the sentence prescribed by Section 46(2) is that of ten (10) years which is the maximum; and the sentence imposed by the trial court was within the one as provided by law and is found to be legal.

44. Nevertheless when sentencing the appellant the trial court ought to have taken into consideration that a lesser sentence should have been imposed with an option of a fine considering that the appellant was a first offender; this court is guided by the Court of Appeals holding in the case of Govid Shamji vs R; where it held that;

> ***"The offence of causing death by dangerous driving is not an ordinary type of crime……the people who commit this offence do not have the propensity for it, neither is it a type of crime committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interest of justice as well as the interest of the public. There are of course cases where a custodial sentence is merited, for example, where there is a compelling feature such as element of intoxication or recklessness."***

45. This court is guided by the above decision; as there was no compelling feature of the appellant being intoxicated; the circumstances therefore did not warrant a custodial sentence and that the trial court ought to have considered an option of a fine; the sentence prescribed by the trial court was indeed manifestly harsh and excessive in the circumstances; and this court finds good reason to interfere with the same; the sentence to be substituted with a fine of Kshs. 100,000/-; and the appellant shall serve a term of two (2) years imprisonment in default of payment;

46. This ground of appeal is found to be meritorious and is hereby allowed;

FINDINGS

47. For the forgoing reasons this court makes the following findings;

(i) The prosecution proved its case to the desired threshold;

(ii) The conviction is found to be safe;

(iii) The defence was not disregarded by the trial court and is found to be an admission;

(iv) The sentence is harsh and excessive in the circumstances and there are good reasons for interferance.

DETERMINATION

48. The appeal is found to be partially meritorious only on the issue of sentence;

49. The conviction is hereby upheld;

50. The sentence is hereby set aside and substituted with a fine of Kshs.100,000/-; in default the appellant to serve a term of two (2) years

imprisonment with effect from the 26/08/2013;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 12th day July, 2018.

HON.A.MSHILA

JUDGE