



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 31 OF 2017

BETWEEN

EDWIN NAMUSASI WAFULA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the sentence in Traffic Case Number 220 of 2012 in the Chief Magistrate's Court at Bungoma by Hon. R.B.Ngetich (CM) on 11.2.15)

JUDGMENT

The Trial

1. The Appellant herein **EDWIN NAMUSASI WAFULA** has filed this appeal against conviction and sentence on 9 counts of causing death by dangerous driving contrary to section 46 of the Traffic Act (hereinafter referred to as **the Act**), one count of reckless driving contrary to section 47(1) of **the Act** and one count of driving an roadworthy motor vehicle contrary to section 58(1) of **the Act**. The brief particulars of the charges are that:-

On 2nd March, 2012 at about 6.00 pm at Marakaru area along Bungoma-Chwele road, the appellant being driver of motor vehicle KAW 286P Mitsubishi Canter drove the said vehicle, which was roadworthy, dangerously and recklessly as a result of which he caused the death of 9 pedestrians and injuries to 33 others

Prosecution case

2. The prosecution called twenty three (23) witnesses in support of its case. From the totality of the evidence, it was proved that the appellant drove off the road where the victims who were primary school children were lawfully walking as a result of which he caused the death of 9 as of them and injured 34 others.

3. The unroadworthiness of the accident vehicle was confirmed by an inspection report marked **PEXH. 6**; the deaths by the 9 post mortem forms marked **PEXH. 8 (a) to 8 (i)** and the injuries by the 34 P3 forms tendered in evidence and marked **PEXH. 9 to 40**.

3. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. The Appellant gave an unsworn defence and though not denying the accident stated that the victims were walking on the road and that his attempt to avoid the accident was unsuccessful because the brakes of his vehicle had failed.

4. *In a judgment delivered on 11th December, 2015*, appellant was convicted and sentenced to serve 2 years for count 1 to 9. The sentences were o run concurrently. In count 10, the appellant was fined Kshs. 50,000/- in default 1 year imprisonment whereas he was fined Kshs. 200,000/- in default 2 years imprisonment in the 11 count.

The appeal

5. Aggrieved by sentence, the appellant lodged the instant appeal on 20th March, 2017. From the grounds of appeal and written submissions filed on 6th November, 2018, the appellant urged the court to order that all sentences run concurrently.

6. When the appeal came up for hearing on 6.11.18, appellant chose to wholly rely on the grounds of appeal and also on his written submissions in which he reiterated the grounds of appeal.

7. Mr. Oimbo, Learned Counsel for the state opposed the appeal and submitted that the sentences were lawful. He however did not oppose the application that the sentence in counts 10 and 11 runs concurrently with the sentences in counts 1 to 9.

Analysis and determination

8. On first appeal, the high court is called upon to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

9. 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 **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No.135 of 2016** (unreported) held at Page 25 of its judgment as follows:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle, ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000 this Court 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. (See also Wanjema v. Republic [1971] E.A.493.”

10. Before I delve into the main issues for determination it is important that I point out that in a charge of causing death by dangerous driving, no matter how many deaths are occasioned, if they occur in the same accident, the accused ought to be charged with one count of causing death by dangerous driving. In the single count the deceased passengers or persons should then be named. The framing of more than one count where the deaths occur in the same accident implies that there existed several accidents in which the deaths were occasioned. In so doing, the ultimate result is that it impacts on the sentence imposed on the accused; which shall depend on the number of counts in which the accused is convicted. This is highly prejudicial to the accused and occasions him injustice especially where the trial court passes consecutive sentences.

In arriving at this decision, I am fortified by the decision in the case of **Atito v. Republic [1975] EA 278**, where the then East African Court of Appeal held:

“No man is to be punished twice for the same offence, the offence in this case being dangerous driving and causing death. The number of deaths caused is immaterial.”

11. This scenario obtains in the instant case. The Appellant was charged with 9 counts of causing death by dangerous driving yet the deaths were occasioned in the same act of dangerous driving thereby rendering the second to eighth counts duplicitous.

12. The foregoing notwithstanding, the appellant in this case was in my humble view not prejudiced by the 2 years sentences in respect of counts 1 to 9 because they were ordered to run concurrently. That in essence means that he is liable to serve 2 years sentence for the 9 deaths. The maximum sentence for the offence of causing death by dangerous driving is 10 years. By handing the appellant 2 years imprisonment, the trial magistrate was in my humble view reasonable and fair. The sentence does therefore not meet the test of being harsh and excessive.

13. As concerns the offence of reckless driving in count 10, the maximum sentence for a first conviction, is a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding two years. The appellant was fined Kshs. 50,000/- and in default 1 year imprisonment.

14. With reference to the 11th count of driving an unroadworthy motor vehicle, the maximum sentence is a fine not exceeding Kshs. 400,000/- or to imprisonment for a term not exceeding two years or to both. The appellant was fined Kshs. 100,000/- in default 2 year imprisonment.

15. The sentences imposed upon the appellant on counts 10 and 11 though lawful are to run consecutively with the 2 year sentence in counts 1 to 9. The net effect of this is that the appellant will have served a cumulative total number of 5 years which is in excess of the lawful sentence in counts 10 and 11.

DISPOSITION

16. For the foregoing reasons, the appeal succeeds to the extent that the sentence of fine imposed in respect of counts 10 and 11 is set aside and substituted with a 1 year imprisonment term in each of the counts which shall run concurrently with the sentences in counts 1 to 9 from

the date of conviction.

DELIVERED AND SIGNED AT BUNGOMA THIS 9th DAY OF November 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Ribba & Diannah

Appellant -

For the State - Mr Oimbo