



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO 74 OF 2017

CORAM: HON. R.E.ABURILI J]

ROBERT WANJALA SHIUNDU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment, conviction and sentence of Hon A.O. Oanda,

Ag. Principal Magistrate in Ukwala SRM Criminal Case No 40 of 2013).

JUDGMENT

1. This is an Appeal against judgment in respect of Ukwala Principal Magistrate's Court Criminal Case- Traffic Case No. 40 of 2013, Republic vs. **ROBERT WANJALA SHIUNDU** delivered on 27/7/2017.

2. The Appellant - **ROBERT WANJALA SHIUNDU** was charged with **four (4) counts of Causing Death by Dangerous Driving** contrary to Section 46 of the Traffic Act as read with Section 46(1) of the Traffic Amendment Act 2012, CAP 403 Laws of Kenya.

AND

3. Two (2) counts of Failing to report an accident contrary to Section 73 (3) as read with Section 75 of the Traffic Act, CAP 403 Laws of Kenya.

4. The facts as per the charge sheet respectively are that:

1. **ROBERT WANJALA SHIUNDU**: on the 26th day of June 2013 at about 6:30PM along Kisumu-Busia road at Sindindi Trading center in Ugunja District within Siaya County being the driver of motor Vehicle Registration No. KAV 506K make Toyota Matatu, drove the said vehicle recklessly or at a speed or in a manner which was dangerous to the public having regards to all circumstances of the case including the nature, condition and the use of the road and amount of traffic which might reasonably be expected to be on the road at that time, caused the death of **Benard Ochieng Ochieng**, a pedestrian.-

2. **ROBERT WANJALA SHIUNDU**: on the 26th day of June 2013 at about 6:30PM along Kisumu-Busia road at Sindindi Trading centre in Ugunja District within Siaya County being the driver of motor Vehicle Registration No. KAV 506K make Toyota Matatu, drove the said vehicle recklessly or at a speed or in a manner which was dangerous to the public having regards to all circumstances of the case including the nature, condition and the use of the road and amount of traffic which might reasonably be expected to be on the road at that time, caused the death of **PHILIP OTIENO OGOWA**, a pedestrian.

3. **ROBERT WANJALA SHIUNDU**: on the 26th day of June 2013 at about 6:30PM along Kisumu-Busia road at Sindindi Trading centre in Ugunja District within Siaya County being the driver of motor Vehicle Registration No. KAV 506K make Toyota Matatu, drove the said vehicle recklessly or at a speed or in a manner which was dangerous to the public having regards to all circumstances of the case including the nature, condition and the use of the road and amount of traffic which might reasonably be expected to be on the road at that time, caused the death of **MARY ATIENO OWINO**, a pedestrian.

4. **ROBERT WANJALA SHIUNDU**: on the 26th day of June 2013 at about 6:30PM along Kisumu-Busia road at Sindindi Trading centre in Ugunja District within Siaya County being the driver of motor Vehicle Registration No. KAV 506K make Toyota Matatu,

drove the said vehicle recklessly or at a speed or in a manner which was dangerous to the public having regards to all circumstances of the case including the nature, condition and the use of the road and amount of traffic which might reasonably be expected to be on the road at that time, caused the death of **PAUL OMONDI ODUOR**, a pedestrian.

5. While for the other two (2) Counts, the facts are that; **ROBERT WANJALA SHIUNDU**: on the 26th day of June 2013 at about 6:30PM along Kisumu-Busia road near Sindindi area in Ugunja District within Siaya County.

5. After full trial the Appellant - **ROBERT WANJALA SHIUNDU** was found guilty of all the charges that faced him and accordingly convicted under section 215 of the Criminal Procedure Code. The trial Court having considered mitigation in favour of the accused, the accused/ appellant was sentenced as follows; on counts 1- count 4, to serve one-year imprisonment for each offence and on counts 5 and 6, to pay a fine of kshs.1000/= in default be imprisoned for 30 days.

6. Aggrieved with the judgment, the Appellant filed a Petition of Appeal through his advocates Ashioya and Company Advocates and raised the following grounds;

1. *That the trial magistrate erred in law and in fact in convicting the appellant without sufficient evidence.*

2. *That the trial magistrate erred in law and in fact in convicting the appellant when the evidence produced against him was contradictory.*

3. *That the trial magistrate erred in law and in fact in convicting the appellant when there was no proof on the element of the charge sheet.*

7. In determining this Appeal, this court as the first appellate court must fully understand its duty as espoused in the case of **Pandya vs. R (1957) EA 336 and Ruwala vs. R (1957) EA 570**. which is to subject *“the evidence as a whole to a fresh and exhaustive examination* and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

8. On what transpired before the trial court, **PW1- KENNEDY OTIENO OGOLA** testified and recalled that on 26/6/2013 while in the market selling maize at about 6:30 pm he heard people shouting and screaming. That he was hit by a vehicle and he ran off when this happened. That he fell off and did not know what happened. That he later came to find himself in the hospital and found that he had a fractured right leg and a cut on the hand and head, that he also had blunt injuries on the chest and he stayed in hospital for 11 days. that later he reported the matter at Ugunja police station, there he was issued with a P3 form, he also stated that he did not know who was driving the motor vehicle hence did not know the accused.

9. On cross-examination he stated that he gained consciousness after 3 day.

10. **PW2-ISAAC OPONDO OGOLLA** testified that on 26/6/2013, he was at Sidindi market at 6:30pm when he heard screams and when he arrived he found a vehicle behind him. That he was hit and he fell down. The Vehicle was christened “Redemption” registration no. KAV 506K. That he fell down and he found himself at Inuka Hospital at 1:00PM, and that he was later transferred to Busia District Hospital where he was admitted for 3 days. He also stated that he knew the driver and pointed at the accused in the dock. PW2 was never cross examined.

11. **PW3-JOHANESS NELSON OMOLLO OPIYO** testified that on 27/6/2013 he got a report at 7.00AM that Benard Ochieng had been hit by a vehicle at Sindindi and that the body was at Inuka Hospital. That he got there and a post mortem for Benard Ochieng was done. There was no cross examination or re-examination for PW3 too.

12. **PW4-CONSOLATA ANYANGO** testified that on 26/7/2013, she sent her son Ochieng to Sidindi but he never came back. That the next morning, her brother came back and told her of the accident that happened at Sidindi and people were killed. That her son was one of them and that he was dead and his body placed at Inuka Hospital. That she went there and saw the body and later a post mortem was done. She also averred that she did not know the accused. There was no cross examination or re-examination for PW4 too.

13. **PW5-MARGARET ADHIAMBO OGOWO** testified and recalled that on the 28/6/2013, she went to Inuka Hospital mortuary and found the body of her son Philip Otiemo Ogowo who was crashed by a motor vehicle at Sidindi market. That post mortem was conducted on the body of the deceased. She averred that she did not know the driver. There was no cross-examination or re-exam for this witness too.

14. **PW6- NO. 56672 SGT MATILDA MUTHAMI** testified that on 26/6/2013 at around 1850hrs she got a call from AP of Simenya who informed her of an accident at Sidindi Market along Kisumu- Busia road. That the accident happened at 6:30PM involving motor Registration No. KAV 506K Toyota Matatu. That she proceeded to the scene together with PC Mwangi and PC Kirathi and found that the vehicle had already driven off and there was a motor vehicle Registration No. KMC 362M TVS Star. That they found that the driver of the offending motor vehicle lost control and veered off the road and in the process knocked 7 pedestrians and a motor cycle. Further that the vehicle was going towards Busia.

15. It was also her testimony that out of the 7 knocked down, 4 died on the spot and the injured were then taken to Inuka Hospital. That she did her investigation and found that the vehicle was being driven at excessive speed. She then charged the driver of the motor vehicle, drew a sketch plan and the vehicle taken for inspection, which inspection report and sketch plans were produced in court. She also stated that she did not know the accused before. This witness was not cross examined.

16. **DW1- ROBERT WANJALA SHIUNDU** testified that he comes from Kitale but stayed at Sega and averred that he is a driver. It was his testimony that he was from Kisumu headed to Busia then while at Sidindi, a motorcycle crossed the road and in an effort to avoid it, he

swerved and hit an oncoming lorry then his vehicle went off the road and he hit the people. That he did not like that to happen. He also stated that people were angry and wanted to beat him so he ran away. That he went to hospital and later reported the matter to the police and prayed that the parents of the dead people do forgive him.

17. On cross examination by the prosecution counsel, he reiterated that he was coming from Kisumu, and that he was moving at 80km per hour, and that people were there. He again prayed for forgiveness.

Judgment of the lower court

18. The trial court reiterated the charges that faced the accused/ appellant and the particulars thereof and stated that the Accused/Appellant's defence captured the events of that fateful day. The court stated that the Accused/ Appellant was coming from Kisumu to Busia. And on reaching Sindindi area, a motorcyclist suddenly crossed the road and to avoid him, the accused/ Appellant swerved. However, there was an oncoming lorry and the Accused/ Appellant's vehicle went off the road and hit the people. The court noted that the accused stated that he did not intend for the accident to happen and that he also stated that people were angry and bayed for blood so he decided to flee the scene.

19. That he later went to hospital and also reported the matter to the police and further, he pleaded with the relatives of the dead to forgive him. Noting that he again on cross-examination pleaded to be forgiven.

20. The court then proceeded to summarize the facts of the case as presented by the prosecution witnesses. Further, the trial court also observed that the doctor who conducted the postmortem was never called to testify and questioned itself as to whether the failure was fatal to the prosecution case.

21. The trial court further noted that the accused/appellant never cross-examined any of the witnesses and as such the court took it as an admission of what the witnesses were saying. It further noted that the accused/appellant admitted to there being an accident and that he indeed hit some people, some of whom died and others got injured and he finally asked for forgiveness.

22. The court thus found the accused guilty of all the charges that faced him and accordingly convicted him under Section 215 of the Criminal Procedure Code. Having had the mitigation tendered, the court sentenced the accused/appellant on each of the first four (4) counts to 1 year imprisonment to run consecutively and on each of the other two (2) counts, to pay a fine of Kshs. 1000/= and in default to serve 30 days in prison.

Appellant's submissions

23. The Appellant filed his written submissions through his advocates Ashioya & Company Advocates on 3rd October, 2018 but the said submissions are neither signed nor dated hence they are of no consequence to this appeal as an unsigned document or pleading is not owned by any body and therefore the court cannot rely on such submissions.

24. Section 35 (1) Cap 16 provides:

“Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in Section 34 (1) shall at the same time endorse or cause to be endorsed thereon his name and address, or thereon his name and address, or the name and address of the firm of which is a partner.....”

25. Breach of this section makes the affidavit, or any other documents stated in Section 34, incurably defective and such failure invalidates or declares such document or instrument in question to be defective. The relevant words in Section 35 (1) are *“Shall ...endorse or cause to endorsed thereon his name and address”* The word endorsement in Chambers 21 Century Dictionary is defined as: -

“An act of endorsing or confirming, a signature or other mark endorsing a document.....”

26. In **Regina Kavenya Mutuku & 3 Others vs. United Insurance Company Limited Nairobi (Milimani) HCCC No. 1994 of 2000 [2002] 1 KLR 250 Ringera, J** (as he then was) held that:

“An unsigned pleading has no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity”. See also **Onyango Otieno, J's** decisions (as he then was) in **National Industrial Credit Bank Limited vs. Albert Gacheru Kiarie Nairobi (Milimani) HCCC No. 1863 of 1999** and **Jane W Kamau vs. Kenya Ports Authority Nairobi (Milimani) HCCC No. 1575 of 1999.**

27. In **Atulkumar Maganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 13 of 2001** consolidated with **Vipin Maganlal Shah Vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 19 of 2001 [2001] 1 EA 274; [2001] KLR 190** the Court of Appeal was of the following view:

“Where a pleading is not signed the same would be struck out rather than being dismissed...A pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognized agent and this is meant to be a voucher that the case is not a mere fiction...The failure to sign the service copy of the statement of claim if the original is signed is not fatal...The position in England is that a pleading must be signed either by counsel or the party in person or the party's recognized agent...In Kenya where a record of appeal is signed by a suspended advocate who is an unqualified person is incurably defective and struck out...The position in India is that the failure to sign a plaint is merely a matter of procedure and the Court may allow a plaintiff to amend the plaint by signing the same...The object of the legislature in requiring that a plaint be signed by either the

counsel or the party suing is to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or the pleading...In Kenya a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law.”

28. From the foregoing, it is clear that the position in Kenya as regards unsigned pleadings is the same whether in the High Court or in the Court of Appeal. Consequently such pleadings are rendered incompetent and are for striking out.

29. I will therefore strike out the appellant’s written submissions and rely on the oral submissions made in open court by the appellant’s counsel Miss Kituyi.

30. Counsel for the appellant Miss Kituyi submitted orally on 3/10/2018 that the prosecution did not bring evidence of speed of the vehicle. Further that on the charge sheet, it shows that 4 people died yet no testimony was adduced on the alleged death of Mary Atieno and that no post mortem reports were produced to prove death.

31. The Senior Prosecution Counsel Mr Okachi for the State on the other hand opposed the appeal submitting that careless and reckless driving does not necessarily involve speed and on the issue of the post mortem he concurred with the trial court.

32. Miss Kituyi for the appellant in her rejoinder further insisted that proof of death is important in causing death by dangerous driving and that the sentences were harsh.

DETERMINATION

33. With all the grounds raised on appeal, and this court having had the advantage of reading through the trial court’s record in its entirety and after re-evaluating the whole record and considering the grounds of appeal and submissions for and against the appeal, I find the issues flowing for determination emerge from the grounds of appeal as filed to be:

i. Whether the case against the appellant was proved beyond reasonable doubt and therefore whether the prosecution adduced sufficient evidence to prove the offence or elements of the charges against the appellant as required by law.

ii. Whether there were material contradictions in the evidence adduced by the prosecution witnesses at trial.

iii. Whether sentence meted out on each count was excessive

34. **On issue 1**, which is the backbone of the Petition of Appeal, Sections 107 – 109 of the Evidence Act (Cap 80 of the Laws of Kenya) are clear that the burden of proof lies on the prosecution throughout the trial to lead evidence that points to the guilt of the accused person beyond reasonable doubt unless there is statutory provision that shift that burden to the accused, or unless the accused has admitted, unequivocally, that he committed the offence charged.

35. The question therefore is whether in the instant case, the prosecution has discharged the burden of proof of beyond reasonable doubt against the appellant and in so doing, this court will consider the ingredients of the offences charges *vis avis* the evidence adduced. In the case of **Oketh Olale vs Republic (1965) E.A.C.A. 555 on page 557** it was held:

“...a conviction should be based on the weight of the evidence adduced and it is dangerous and inadvisable for a trial judge to use a theory of his/her own canvassed evidence.”

36. Thus, a court exercising criminal jurisdiction must satisfy itself on the chain of events and statements thereto must be such as to rule out a reasonable likelihood of the innocence of the accused. The court has to judge the total cumulative effect of all facts before it which reinforce the conclusion of the guilt of the accused person and should the combined effect of evidence adduced be conclusive in establishing the guilt of the accused, the conviction would be justified.

37. However, it should be noted that it has been stated that reasonable doubt’ is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence received in at trial. It is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it.

38. In the instant case, the appellant was charged with 4 counts of causing death by dangerous driving. The witnesses who testified for the prosecution and who were civilians testified that they did not know the appellant prior to the date of accident and neither did they know that he was the driver of the ill-fated motor vehicle that caused the accident leading to the injuries that they sustained and to the death of 4 others. They did not even know the registration number of the motor vehicle that knocked them and or killed their kin. PW1 Kennedy Otieno Ogola testified that on the material day he was at the Sidindi Market selling maize at 6.30 pm when he heard shouts and screams from people and suddenly he was hit by a motor vehicle. He fell off and lost consciousness and later found himself in hospital with a fractured right leg among other injuries. He was in Hospital for 11 days and reported to Ugunja Police Station where he was issued with a P3 Form. He did not know the driver of the accident motor vehicle. He gained consciousness 3 days after the accident.

39. PW2 was at the said Sidindi market at about 6.30 pm and heard screams and as went to see what was happening he was hit by a vehicle behind him he fell down. He found himself at Inuka Hospital and was later transferred to Busia District Hospital. He stated that the vehicle was christened Redemption Registration No. KAV 506K. He stated that he knew the driver of the accident motor vehicle and he identified him in the dock.

40. PW3 Jahness Nelson Omollo Opiyo received a report of the accident and death of Bernard Ochieng and witnessed a postmortem of the deceased Bernard Ochieng..

41. PW4 Consoloata Anyango testified that on the material day she send her son Ochieng to Sidindi Market but he never returned and learnt that an accident had occurred and he was one of the dead. She witnessed the postmortem being done on his body at Inuka Hospital.

42. PW5 learnt of her son's death in the fateful accident. Her son was Phillip Otieno Ogowo who was crushed by a vehicle whose driver she did not know.

43. PW 6 SGT Matilda Muthami went to the scene of accident and found MV registration No. KAV 506 Matatu involved in an accident. She investigated and found that the driver thereof lost control, veered off the road and knocked 7 pedestrians four of whom died. That he drove at an excessive speed. She produced sketch plans, inspection report for the vehicle and stated that she did not know the driver before.

44. There was no evidence adduced on count 3 and 4 on the death of Mary Atieno and Paul Omondi Oduor respectively.

45. Equally, there was no evidence adduced tending to prove counts 5 and 6 of the charge.

46. The appellant testified on oath that he was the driver of the ill-fated vehicle and that on the material day he was driving from Kisumu to Busia when at Sidindi Market a motorcyclist crossed the road and as the appellant was trying to avoid hitting him he swerved and hit an oncoming lorry then his vehicle veered off the road and hit the people some of whom died and others were injured. As people were angry with him and wanted to beat him up he ran away, went to hospital and later reported to the police . he prayed for forgiveness from the parents of those people who died. On being questioned by the prosecution the appellant stated that he was driving at 80kilometers per hour and that people were at the Sidindi Market. He again prayed for forgiveness.

47. From the above summary of evidence on record both for the prosecution and the defence, it is clear that the appellant admitted that he was the driver of the accident motor vehicle at the material time and place and that he was driving at 80km/hr and that he rammed into the people who were at the market after veering off the road on hitting an oncoming lorry in a bid to evade a motorcyclist who crossed the road. That being the case, the question of the prosecution witnesses not knowing the driver of the accident motor vehicle does not arise. In addition, the question of 4 people not dying does not arise as the appellant testified and confirmed that some people died while others were injured and he even sought forgiveness from the parents of the deceased. he never questioned the investigating officer who testified that 4 people died and 3 others injured

48. Accordingly, I find and hold that the evidence of the prosecution witnesses remained uncontroverted particularly that of **PW6** who stated that they found that the driver lost control and veered off the road and in the process knocked 7 pedestrians. Further that she did her investigation and found that the vehicle was being driven at an excessive speed. In the case of **Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR** the court stated:

“as to what constitutes the burden of proof beyond reasonable doubt the case of Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373 provides as flows in a passage alluded to me considered the greatest jurist of our time Lord Denning:

“That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

49. The court in the above case of Republic v Silas Magongo Onzere further stated:

“In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person.[emphasis added]. So likewise at the close of the prosecution case under section 307 (1) of the Criminal Procedure Code the prosecution must satisfy by way of the evidence presented so far that a prima facie case exist to warrant the accused person to be called upon to answer.”

50. Therefore, in the instant case, on the fact that the prosecution witnesses did not know who the accused or the driver of the vehicle was; or , the failure of the investigation officer to state how she identified the driver/ accused now appellant and failure by the doctor who performed the postmortem on the bodies of the deceased persons subject of the 4 charges to testify, it is the view of this court that PW2 identified the vehicle to be Redemption and even gave its registration number as KAV 506K and the appellant conceded to driving the said vehicle at the material place and time and causing the accident.

51. On the doctor's failure to testify, the case of **Bukenya & Others V Uganda [1972] EA 549** is relevant. In the said case, the court addressed itself thus:

“(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.

52. Thus, on the point that the presence of the doctor was crucial to shed light on the various facts of the case and produce the post mortem reports, I find and hold that had the accused /appellant given evidence in total variance to the prosecution case, then he would have had a different outcome. However, the record clearly shows that the appellant's evidence clarified what was initially not clear for example, at what speed he was driving the accident vehicle at the time of the accident and as the scene of accident was a market place where there were people, it was his duty to slow down to avoid an eventuality.

53. Therefore, it is clear that the evidence of the doctor who did the postmortem would only have been crucial had the accused/ appellant not placed himself at the scene of the accident and admitted liability thereto. As such, the doctor's absence did not vitiate the conviction of the appellant. The appellant by his evidence agrees that he hit the people and some died as others got injured and asked for forgiveness which is tantamount to the admission of liability alluded to in the case of **Republic v Silas Magongo Onzere** [supra].

54. Further in **NDUNGU -VS- REPUBLIC** cited in the Court of Appeal decision in **DORCAS JEBET KETTER & ANOR -VS- REPUBLIC** [2013] eKLR, the court noted that in some cases death can be established without medical evidence. The court in citing a decision in **REPUBLIC -VS- CHEYA (1973) EA 500** observed as follows:-

" of course there are cases for example where the deceased was stabbed through the heart or where the head is crushed, where the case of the death is so obvious that the absence of a post mortem report would not necessarily be fatal."

55. The court however added that at times evidence of medical experts on effect of such obvious and grave injuries should be adduced as opinion of experts support the evidence as to the cause of death.

56. The Court in the case of **Republic v Peter Kithaka Kiriga** [2017] eKLR Limo J held as follows:

"In this instant case, the prosecution failed to avail the evidence of the doctor who performed post mortem examination claiming that the doctor could not be traced. It is nevertheless my finding that with the admission by the accused person that he stabbed the deceased the result of which the deceased died, leaves no doubt in my mind that the element of actus reus has been proved beyond reasonable doubt notwithstanding the absence of post mortem report. It is my considered view that when an accused person admits committing an offence, the burden is discharged from the prosecution and a court properly directing its mind to the law and seeking to do justice cannot ignore such admission. The admission by the accused person that he stabbed the deceased with a knife, was to me a game changer in this case in so far as the element of actus reus is concerned. I find that the element has been proved beyond reasonable doubt by the prosecution."

57. From the evidence adduced, this court is satisfied that the prosecution proved that 2 people in count 1 and 2 died following the material accident. As demonstrated by evidence adduced by their relatives. I am equally satisfied that the ingredients of the offence of causing death by dangerous driving was proved to the required standard of beyond reasonable doubt, in counts 1 and 2. The appellant on his own accord conceded that he drove at 80km/hour at a place which was crowded with people being a market place and there was no evidence that he slowed down or swerved to avoid hitting the oncoming lorry and thereby veering off the road and ramming into the crowd thereby killing some people and injuring others. In the case of **SAMUEL KARANJA KIMANI V REPUBLIC** [2016] EKLR, on Appeal, the issue for determination by the court was 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. The court stated:

".....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 the suit motor vehicle when it veered off the road and knocked down the deceased persons causing them to sustain fatal injuries. The Appellant admitted as such when he testified in his defence. 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". [emphasis added].

58. The court further stated:

"Upon re-evaluation of the evidence adduced by the prosecution witnesses and the defence offered by the Appellant, it was clear to this court that the prosecution indeed established to the required standard of proof that the Appellant drove the suit motor vehicle in such a reckless and dangerous manner that he caused the death of the deceased persons. It was apparent from the evidence adduced that the Appellant was driving the suit motor vehicle at a high speed near or in the vicinity of a shopping Centre. The conclusion reached by the trial magistrate to the effect that the fact that the Appellant was driving at an unreasonable speed of between 70 – 100 kph in such an area cannot be faulted....The Appellant did not 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 suddenly stopped. Either way, 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 the suit 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."

59. From the foregoing, PW6 having stated that the accused/appellant was found to have driven at a high speed and having veered off the road thereby knocking 7 people which evidence was not controverted in defence or by way of cross examination, and the accident having occurred at a market which the accused admitted that at that point he was driving at 80km per hour in his defence and there being no evidence that he averted the accident, the prosecution in my view discharged their burden of proof beyond reasonable doubt that the appellant drove the subject vehicle dangerously having regard to the circumstances of the case, and bearing in mind the assistive evidence of the

appellant himself as reproduced above.

60. However, on counts 5 and 6 of the charge, the appellant testified that he reported the accident to the police after going to hospital as ran away since people were baying for his blood. The prosecution did not testify that he failed to report an accident. Accordingly, I find and hold that the charges of failing to report an accident and failing to stop after an accident were not proved. The said charges are hereby dismissed and the conviction and sentence quashed and set aside respectively.

61. In addition, the prosecution witnesses including the investigating officer did not testify as to the death of Mary Atieno owino in count 3 and the death of Paul Omondi in count 4. Accordingly, the convictions thereto were unsound. I would allow the appeal on conviction and sentence on the two counts of causing death by dangerous driving and quash the conviction and sentence thereof.

62. **On issue 2**, as to whether, there were contradictions, other than stating so in the grounds of appeal, the appellant in submission does not quite clearly elaborate this point. PW2 testified that an accident occurred and that it was the driver of Redemption Matatu that caused it. In my view, PW2 could not have given such testimony if he had not known the driver and the motor vehicle that caused the accident prior to the accident or immediately thereafter. However this does not make the prosecution case less plausible as it does not water down the fact that indeed an accident occurred at Sidindi market. Furthermore, minor inconsistencies and or contradictions in the prosecution case which do not go to the root of the case would not vitiate the trial of the appellant. In my view, the appellant has not laid out the basis for alleging that the prosecution evidence was riddled with contradictions and inconsistencies. That notwithstanding, in the case of *Erick Onyango Ondeng' vs. R [2014] eKLR*, the Court held as follows:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers.”

63. In the case in **DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR. APP. NO. 92 OF 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view I respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

64. Moreover in **TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA, 6** it is not very contradiction that warrants rejection of evidence. As the court put it:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

65. The upshot is that the evidence of speed by PW6 having not been disputed by the appellant’s defence in the lower court and adding that he was driving at 80km per hour in a busy place, in addition to having not cross-examined the Investigating Officer on the same, the evidence stands unchallenged. Other than that his admission of liability and having stated that some people died and others were injured, proof of death needed not be adduced.

66. The consequence thereof is that the appeal is dismissed on counts 1 and 2 and allowed on counts 3, 4, 5 and 6.

67. On the third issue of sentence, the sentence meted out on the appellant on counts 1 and 2 is lenient considering that the section under which he was charged for causing death by dangerous driving attracts 10 years imprisonment.

68. Accordingly, the appellant shall serve the full sentences as meted out in counts 1 and 2 of the charge. The same is lenient taking into account his remorse and mitigations and considering that such sentence cannot compensate for the lost lives. Accordingly, the appeal succeeds to the extent stated and dismissed on both conviction and sentence on counts 1, and 2 and allowed on counts 3, 4, 5 and 6 of the charge.

69. Dated, Signed and Delivered in open court at Siaya this 4th Day of December, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Miss Odumba PC for the State

Appellant present

CA: Brenda and Modestar