



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL CASE NO. 94 OF 2013

ROBERT MURIITHI NJOGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

Being an appeal from the judgment of the Senior Resident Magistrate's Court (M. Onkoba), Gichugu Traffic Case Number 169 of 2011 delivered on 22nd April, 2013)

JUDGMENT

1. **ROBERT MURIITHI NJOGU**, the appellant herein was charged with a traffic offence of careless driving contrary to **Section 49 (1)** of the **Traffic Act Cap 43 Laws of Kenya** through Gichugu Principal Magistrate's Court Traffic Case No. 169 of 2011. The particulars of the charge presented to that court were that on the 20th July, 2011 at about 4.00 p.m., the Appellant being the driver of motor vehicle Registration No. KBB 271D Toyota Platz drove the said motor vehicle along Githure-Kibai Murram road in Kirinyaga County, a public road, without due care and attention and knocked down a pedestrian named Jane Wanja Muchira injuring her seriously. The appellant did deny the charge but after trial, he was found guilty and fined Kshs.5000/- or 1 month imprisonment in default. He felt aggrieved by the conviction and preferred this appeal.

2. Before I consider the grounds upon which this appeal has been preferred there is need to look at the evidence tendered at the trial court and relied upon by the learned trial magistrate in finding of conviction against the Appellant.

3. There is no dispute that the complainant at the trial **Jane Wanja Muchira** (P.W.1) was injured on 20th July, 2011 at around 5 p.m. as she reportedly headed home walking on foot. It was her evidence that she was knocked down by a motor vehicle driven by the Appellant at a T-junction along road known as Githure. It was her evidence that the said motor vehicle moved into the main road from Githure direction without stopping at the T-junction and strayed into her path and knocked her down and pushed her making her to land on a tree stump which was beside the road. It was her evidence that she was injured and taken to hospital. The injuries sustained were confirmed by **Dr. Mercy Wanjiku Ndirangu** (P.W.5) who treated her at the then Embu Provincial General Hospital. The said doctor testified that the patient (P.W.1) had two scars on her left leg near the ankle joint and also fracture of tibia and fibula bones. The degree of injuries were classified as grievous harm as per the medical evidence tendered (P. 3 Prosecution Exhibit 1).

4. The evidence tendered by the complainant on how the accident occurred was largely corroborated by the evidence of **Johnson Njue Gitonga** (P.W.2) and **Alfred Njeru Ngari** (P.W.3). It was their evidence that the Appellant's car was driven at high speed and that it swerved and knocked down the complainant

who according to them was standing by the roadside. **P.C. Stanley Kosgey** (P.W.6) who was investigating officer tendered evidence and produced a sketch plan of the scene of the accident (Prosecution Exhibit 2) and blamed the Appellant for careless driving causing the accident where the complainant was seriously injured.

5. In his sworn defence, the Appellant stated that on the material date and time, he was driving a saloon car Registration No. KBB 271A and that when he reached the T-junction, he slowed down in order to turn to the left on the main road and that he saw two women on the far side of the road at the T-junction. It was his evidence that a motor cycle carrying grass which was headed the opposite direction could have caused the accident as he saw it swerve and heard a scream immediately thereafter. He further stated that he stopped and on coming out he found the complainant injured around her ankle. He denied hitting the complainant with his car.

6. At the close of the trial, the learned trial magistrate found that the Appellant's motor vehicle was involved in the accident that caused injuries to the complainant and that the Appellant was guilty of careless driving and convicted him as indicated above.

7. The Appellant has listed the following grounds in this appeal namely:-

(i) That the learned magistrate erred in law and fact in making judgment against the weight of evidence.

(ii) That the learned magistrate erred in law and fact in disregarding the contradictions and inconsistencies in the evidence adduced by prosecution witnesses.

(iii) That learned magistrate erred by misinterpreting the provisions of Section 50 of the Traffic Act (Cap. 403 Laws of Kenya).

(iv) That the learned magistrate erred in law by disregarding the legal authorities cited by the Appellant.

(v) That the learned magistrate erred by shifting the burden of proof to the Appellant.

(vi) That the learned magistrate erred in law by unfairly dismissing the Appellant's defence.

8. The Appellant through submissions made through his counsel **M/S Magee Wa Magee Advocates** summarized some of the above grounds and combined others and I will consider them as presented.

The Appellant has faulted the trial magistrate for what he considers to be misinterpretation of **Section 50** of the **Traffic Act**. **Section 50** of the **Traffic Act** provides that for a person to be charged and convicted with a traffic offence he/she must be cautioned or warned about the intended prosecution for the traffic offence. The Section provides as follows:

“Where a person is prosecuted for an offence under any of the section of this Act, other than Section 46 (read causing death by dangerous driving or obstruction) relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving or to careless driving, he shall not be convicted unless;

(a) He was warned at the time the offence was committed the question of prosecuting him for an offence under some, one or other sections aforesaid would be considered; or

(b) Within 14 days of the commission of the offence a summons for the offence was served on him; or

(c) Within 14 days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed, was served on or sent

by registered post to him or to the person registered as the owner of the vehicle at the time of the commission of the offence.”

The law however, has a proviso that provides the following exceptions under **sub rule 1** as follows:

“(1) Failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that:-

(a) neither the name and address of the accused nor the name and the registered address of the registered owner of the vehicle could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or

(b) the accused by his own conduct contributed to the failure;

and

(c) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved.”

9. The Appellant has submitted that in his view there was no dispute that he was never served with summons or notice of intended prosecution as required by the above cited provision and has cited authority in the case of **Kioga -Vs- Republic (1982) eKLR** where the court found that a charge of careless driving against the Appellant in that case could not stand for non-compliance with the Traffic Act (read section 50 of the Traffic Act). He has also relied on a similar authority in this regard in the case of **Greene -Vs- Republic (1970) E.A. 62** where similar observations were made. The Appellant has submitted that the trial court did not make any references to the cited authority and as a result fell into error. He has further faulted the learned trial magistrate for relying on the proviso which excuses the Police for not serving an accused person with intention to prosecute when the accused by his own conduct contributes to such failure. The Appellant has argued that he did not report the accident to the Police because he was not involved and that the trial magistrate erred by shifting burden of proof to him to show or prove that he was not involved.

10. The Respondent through **E.P.O. Omayo** learned counsel for the Director of Public Prosecution on this ground has responded that the Appellant immediately after the accident left the scene without reporting the accident hence making it hard for the Police to comply with the cited provisions of the law (read **Section 50 (a) (b) and (c)**). It is contended that the Appellant by his own conduct contributed to the failure by the Police to serve him with the requisite notice of intention to prosecute and that the prosecution’s case against the Appellant fell among the exception under the cited proviso to **Section 50** of the **Traffic Act**.

11. It has been further submitted that the omission by the Police to comply with the cited section did not cause any prejudice or miscarriage of justice to the Appellant and in its view the omission was curable under **Section 382** of the **Criminal Procedure Code**.

12. On question of authorities cited by the Appellant, the Respondent has submitted that the facts in the cited authorities are distinguishable from the facts in this case and supported the trial magistrate’s decision to disregard them.

13. I have considered this ground at length and the cited provision. The learned trial magistrate found that the Appellant by his own conduct contributed to the failure by the Police to comply with the cited section of the law. The trial magistrate in fact found that the Appellant was lucky to escape sanction for failing to report an accident because the Police did not prefer any charges in that regard. It is true that failure to report an accident in an offence under **Section 73 (3)** as read together with **Section 75** of the **Traffic Act (Cap 403 Laws of Kenya)** and the Police should have preferred charges against the Appellant if he was not the person who wrongly reported the accident in Kibugu Police Patrol Base in Embu rather than Kianyaga Police Station under whose geographical and jurisdictional location the scene

of the accident fell. But because the evidence tendered did not clearly clear this doubt, there was basis for the trial court not to find any conviction based on the evidence tendered because the law allowed him to find a conviction if the evidence tendered disclosed another offence other than the one that was preferred against the Appellant.

14. I have considered the evidence tendered at the trial court in regard to failure by the prosecution or the Police to comply with **Section 50** of the **Traffic Act**. The evidence tendered clearly shows that a report concerning the accident was made to Kianyaga Police Station on 13th August, 2011 which indicates that the report was made late by a person who did so on behalf of the complainant. The late reporting can be explained by the nature of the injuries sustained by the complainant. The Appellant by his own admission did not report the accident and has claimed in this appeal that he did not report because he was not involved. I am however, not convinced that he was not involved. I am satisfied by the findings made by the learned trial magistrate in his judgment. I have re-evaluated the evidence tendered by the complainant (P.W.1), the eye witnesses (P.W.2 and P.W.3). In addition I have considered the evidence tendered by David Mutua (P.W.7) the motor vehicle inspector who testified and told the trial court that he noted a “dent on the bonnet” of motor vehicle Registration No. KBB 271D when he carried out inspection of the vehicle. This clearly corroborated the evidence tendered by the complainant, P.W.2, P.W.3 and P.W.6 (the investigating officer) that the Appellant was the one responsible for the accident. He did not report the accident and the trial magistrate was correct to find a conviction notwithstanding that the Police had not complied with the cited provisions of **Section 50 (a) (b) and (c)** of the **Traffic Act**.

15. Besides the above this Court finds that this issue of compliance of Section 50 was not raised by the Appellant at the trial. This is because of the presumption of law (read **Section 50 (b) (ii)**) that was not rebutted during trial. The Appellant was obligated to raise and prove the fact that he was not served with notice of intention to prosecute him over the traffic offence. The Appellant was ably represented at the trial by counsel but did not raise this issue in cross-examining the investigating officer or by tendering evidence that the Police did not comply with the cited provisions of the law. It is not enough for the Appellant to submit that the issue of non-compliance is uncontested. He was bound by law to rebut it because the law is clear. It says as follows:

“the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved”.

16. On the question of authorities, I agree with the Respondent that the authorities cited can be distinguished from the facts in this case. In the case of **Kioga -Vs- R (Supra)** the court found that the Appellant had “succeeded” in showing that he was not served with a notice of intended prosecution and that he had “not contributed” to the failure by the Police to comply with the legal requirement. In this present appeal as I have already observed the Appellant first made no effort to establish that he was not served with notice of intention to prosecute him and secondly the evidence tendered clearly showed that he contributed to the failure by the police to comply with the statutory requirements prior to charging him with the aforesaid traffic offence in court. This Court finds that the ground raised by the Appellant in this regard is an afterthought and holds no water nevertheless. At best it was a procedural technicality/omission that was not fatal to prosecution case.

17. The Appellant has submitted that the learned trial magistrate disregarded what in his view were material contradictions in the evidence tendered by prosecution. I have revaluated the evidence tendered in relation to the alleged contradictions and find that the only inconsistency is whether or not Alfred Njeru Ngari (P.W.3) was tending to his coffee crop or plucking tea leaves which in my view is insignificant and does not go into the root cause of the accident or the prosecution case for that matter. This Court finds that both P.W.1 and P.W.5 both confirmed that the nature of the injuries suffered were fractures on the left leg. The evidence of P.W. 7 the motor vehicle inspector on the question of injuries suffered by the complainant was not material and therefore inconsequential. I further find that the Appellant has no basis at this stage to challenge the qualification, or the experience or the expertise of Dr. Mercy Wanjiku Ndirangu. When the witness testified at the trial, the Appellant had the chance and opportunity to question or challenge her competency but having failed to do so at that stage this Court finds that it is belated and incompetent for him to challenge or fault the evidence because the medical evidence was

properly tendered and admitted at the trial.

18. On the question of the position the complainant was standing prior to the accident, this Court finds that all the eye witnesses testified that the complainant was standing opposite Githure road. What is however, material and significant was the fact that the Appellant indeed entered a main road without first checking whether it was safe to do so and furthermore the evidence tendered shows that the learned trial magistrate was correct to find him guilty for careless driving.

19. On the question of the weight of the evidence tendered, this Court finds that the Appellant did not set out to commit the offence thus causing injuries to the complainant. The evidence tendered at the trial however, points to the fact that he committed the offence due to carelessness or recklessness. P.W.1, P.W.2 and P.W. 3 all testified that the complainant (P.W.1) was standing by the road when the Appellant emerged from a T-junction, swerved and knocked down the complainant. The doctor (P.W.5) confirmed the serious injuries suffered by the complainant. P.W.6 (investigating officer) after conducting investigations charged the Appellant with careless driving which in my view was the offence disclosed by the facts and evidence tendered. The Appellant confirmed that P.W.1 was standing on the roadside but blamed unknown motor cycle for her predicament. Purity Wawira Njeru (D.W.2) who testified on behalf of the defence conceded that she had left the scene facing the opposite direction when the incident occurred and that she was later called back after the complainant had been knocked down and found her injured lying on the embankment of the road. She did not witness the incident and her evidence in so far as negating the culpability of the Appellant in my view is insignificant. The weight of the evidence tendered therefore tilted heavily on the prosecution's side and this Court finds that the learned trial magistrate was correct to make or arrive at the conclusion he did that the Appellant was guilty as charged. I further find that contrary to the submissions and contention by the Appellant that his defence was not considered, the trial court duly considered his defence but upon due consideration arrived at the correct judgment in the traffic case before it.

In the premises, this Court finds no merit in this appeal. The same lacks in merit and it is dismissed.

Dated and delivered at Kerugoya this 12th day of January, 2017.

R. K. LIMO

JUDGE

12.01.2017

Before Hon. Justice R. K. Limo J.,

State Counsel Mr. Sitati

Court Assistant Naomi Murage

Appellant present

Interpretation English

Abubakar for the appellant present.

Sitati for the State present.

COURT: Judgment signed, dated and delivered in the open court

in the presence of Abubakar for the appellant and Sitati for the State.

R. K. LIMO

JUDGE

12.01.2017