



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 139 OF 2015

EDWIN PENDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction in Criminal Case No. 101 of 2012 in the Principal Magistrate's Court at Kapsabet by Hon. B. Mosiria (PM) and sentence by the Hon. G. Adhiambo (SRM) dated 7th July, 2015)

JUDGMENT

The appellant herein Edwin Pendi was convicted of 2 counts of causing death by dangerous driving Contrary to Section 46(1) of the Traffic Act, Cap 403, Laws of Kenya. On count III, he was convicted of carrying un-insured passengers Contrary to Section 5(b) of the Insurance Third Party Risks Act, Cap 405 Laws of Kenya. The particulars relate to the events of 20th February, 2012 of about 7:00p.m. along Kaiboi – Kapsabet Road involving motor vehicle Registration Number KAD 601H and trailer ZB 6016. He was convicted and sentenced to serve 2 years imprisonment on counts I and II and a fine of Kshs. 2,000/- or in default to serve 30days imprisonment, the sentences to run consecutively.

The appellant first filed Grounds of Appeal herein on 22.10.2015 listing at least 4 grounds: -

- (1) That the learned trial magistrate erred in law and fact in failing to observe e that the prosecution did not prove its case beyond any reasonable doubt.
- (2) That the learned trial magistrate erred in law and fact in failing to hold that the witness was not credible.
- (3) That the learned trial magistrate erred in law and fact in not appreciating and or rejecting the defence of the appellant.
- (4) That the learned trial magistrate erred in law and fact I failing to note that the offence of traffic would attract a conviction, sentence and fine, a fine was not granted in view of the sentence and 2 reasons were cited.

His prayers were that the sentence be quashed and set aside and or substituted with a fine or a probation term. Though the appellant placed on record an application on 14th June, 2016 for leave to amend the mitigation appeal grounds, there is nothing on record to show if this application was ever heard by the court. A look at the intended amended petition of appeal grounds (mitigation grounds) attached, however challenges the finding of the lower court on whether indeed the case before the trial court was indeed

proved as required by the Law, and whether the sentence meted out was proper and legal. Being the 2 issues raised by the appellant in the 2 pleadings he has filed herein, I will deal with them in that order.

During the hearing of the appeal, the appellant made only short submissions that this court sitting on appeal to order that the sentences of on the 3 counts do run concurrently or that same be reduced. On matters of evidence, he noted the contradiction in the testimony of PW7 and PW8. He otherwise pleaded for leniency.

The state (learned counsel Ms. Oduor) strongly opposed the appeal arguing that the prosecution had presented a consistent and well corroboration case, and that accused was positively placed at the scene as the driver of the motor vehicle KAD 601H, trailer ZB 6016 that the appellant had been driving recklessly and was warned by the witnesses barely 15 minutes before the accident occurred, to no avail. Counsel maintained that the state had proved the case beyond any reasonable doubt as required by the Law, and that the sentences meted out on accused were very lenient and within the law. She pleaded that this court should invoke the provisions of S. 354 of the CPC to enhance the sentence.

I have considered the pleadings filed herein by the appellant ending with the written submissions handed over to the court on 9th February, 2017. I have also considered the oral submissions made in court by both the appellant and counsel for the state. This is a first appeal to the High Court. This being so, this court is required to reconsider the evidence, re-evaluate it and make its own conclusions. A court of appeal would not normally interfere with a finding of fact by the trial court unless: -

(a) It was based on no evidence.

(b) It was based on a misapprehension of the evidence.

(c) The judge was shown demonstrably to have acted on wrong principle in reaching the finding he did.

This court is bound by these principles (*see Sumaria & Another -vs- Allied Industries Limited (2007) 2 KLR1*). I have accordingly re-evaluated the evidence before the trial court.

On the first consideration on whether the conviction was not based on any evidence or was based on a misapprehension of evidence, it is noted that PW1, PW2 and PW3 were among those who had been carried in the lorry. They know accused and confirmed that he was the driver of the said lorry when it had an accident. They even gave uncontroverted evidence that the occupants of the lorry had complained to the accused on the manner he had been driving only moments before the accident occurred to no avail.

And in his unsworn evidence on 12th November, 2014, the appellant clearly admitted that he had been the driver of the lorry Registration Number KAD 601H, and that he would carry loaders while going to the shamba. He even confirmed that the victims had in fact been on board his motor vehicle, having found them already on board. Further that on hearing the members of the public ask for the driver, he did not want to identify himself and instead proceeded to report to Kapsabet Police Station.

With these admissions made by the appellant himself, this court is convinced, as rightly determined by the learned trial magistrate that the appellant was in fact the driver of the said motor vehicle at the time of the accident. There is therefore absolutely no doubt as to the vehicle that appellant had been driving, nor the date of the accident.

On the 2nd issue of whether the sentences ought to have been concurrent, rather than consecutive, this court is guided by Section 37 of the Penal Code.

S. 37, "Where a person after conviction of an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be

executed concurrently with the former sentence or any part thereof;

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of a fine shall be executed concurrently with a former sentence....”.

The above provision clearly stipulates that a sentence of imprisonment after another conviction shall be ordered to be consequent upon the first term of imprisonment. And that it is the discretion of the court to order that such sentences do run concurrently. And lastly, that where there is an option of a fine (Count III), the sentences can only run consecutively. This is exactly the situation that appertains to this appeal the appellant was convicted and sentenced to imprisonment terms on both counts I and II. On Count III, he was sentenced to pay a fine and in default to serve an imprisonment term. I am convinced that the learned trial magistrate applied the law correctly in ordering that the sentences run consecutively. This ground of appeal must therefore also fail.

As to the plea by the appellant that the sentences to counts I and II be reviewed to give an option of fines, I have noted that on both these counts, the appellant was charged with causing death by dangerous driving Contrary to Section 46(1) of the Traffic Act, Cap 403 Law of Kenya. That section stipulates punishment for this offence to a term not exceeding 10years imprisonment. No option of a fine has been given by the law. In this matter, the learned trial magistrate sentenced appellant on both counts to 2years imprisonment. This to me, is reasonable in the circumstances and I have no reason at all to interfere with the same as urged by both the appellant and prosecution sides.

In all, I am not convinced that this appeal raises any grounds meritorious of this court granting the prayers sought therein. Finding no merit in this appeal, I dismiss the same wholly. Orders accordingly.

DATED, SIGNED and DELIVERED at ELDORET, this 8th day of February 2017.

D.O. OGEMBO

JUDGE

Judgment read in open court in the presence of: -

- 1. The Accused and*
- 2. Ms. Kageni for the State.*