REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.116 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. Kithinji A. R. - PM delivered on 12th August 2016 in Makadara CM.TR. Case No.7151 of 2009)

DAVID MUTUKU MUSILA………...…....…….…………….APPELLANT

VERSUS

REPUBLIC…………………………………………........RESPONDENT

JUDGMENT

The Appellant, David Mutuku Musila was charged with three (3) counts of **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act**. The particulars of the offence were that on 9th March 2009 at Kona Mbaya along Kangundo-Nairobi Road within Nairobi County, the Appellant, being the driver of motor vehicle registration No.KAK 894C Nissan matatu, drove the said motor vehicle at a speed that was 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 was reasonably expected on the road and hence caused the deaths of Jackson Mwathe Mulwa, Jacinta Nzambi and Stephen Wambua. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged. He was ordered to pay a fine of Kshs.100,000/- on each count or in default he was to serve five (5) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of contradictory and inconsistent evidence that did not establish that he had driven the motor vehicle in such a careless manner or that he had ignored warnings placed on the road. He faulted the trial magistrate for relying on the prosecution witnesses, particularly PW9 to the exclusion of other evidence which pointed to the fact that it was not the Appellant who was on the wrong. The Appellant took issue with the fact that the trial court erroneously reached the decision that he was driving at a high speed and that he had carelessly overtaken a stationary motor vehicle. The Appellant was aggrieved that he was not given an opportunity by the trial court to cross-examine all the witnesses and thereby denied him the right to fair trial. The Appellant faulted the trial magistrate for sentencing him to serve a sentence that was harsh and excessive in the circumstances and for failing to indicate whether the custodial sentences ran concurrently or consecutively. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral rival oral submission made by the Appellant's counsel Mr. Onindo and by Ms. Atina for the State. Mr. Onindo submitted that the trial was vitiated by the fact that the convicting magistrate did not comply with **Section 200(3)** of the **Criminal Procedure Code**. Learned counsel submitted that the trial court failed to critically analyze the evidence and thereby misapprehended the facts. He explained that it was apparent from the evidence that no warning signs were left on the road by the driver of the motor vehicle that had stalled on the road. It was also clear that the Appellant was driving the motor vehicle at a moderate speed. This was confirmed by the testimony of an administration police officer who was a passenger in the motor vehicle. He submitted that the trial court erred in believing the testimony of PW9 to the exclusion of other evidence which clearly pointed to the fact that no warning signs had been placed on the road and thus the Appellant was not able to see the vehicle before making an attempt to avoid colliding with it.

He faulted the trial magistrate for reaching the finding that it was due to the Appellant's over speeding that he made an attempt to overtake the motor vehicle which had broken down on his lane. Learned counsel submitted that the Appellant had swerved to his right in an attempt to avoid colliding with the stalled motor vehicle. This was the reason why his vehicle was involved in a collision with an oncoming motor vehicle. He explained that the evidence by prosecution witnesses clearly pointed to the fact that the Appellant was not careless and was driving at a reasonable speed at the time the accident occurred. In the premises therefore, he submitted that no evidence was placed before the court to support the thrust of the prosecution's case that it was the Appellant who was to blame for causing the accident. He urged the court to allow the appeal.

Ms. Atina for the State opposed the appeal. She submitted that the prosecution adduced evidence which established to the required standard of proof beyond any reasonable doubt that: the Appellant drove the suit motor vehicle at an excessive speed; that he did not pay due care and attention to the warning signs that had been placed on the road and therefore failed to stop behind the stalled motor vehicle so as to allow the oncoming motor vehicles to pass; that the accident was solely caused by the carelessness of the Appellant because the suit motor vehicle did not have any pre-accident defects; that a reasonable driver in the circumstances would not have overtaken the stalled motor vehicle in the manner that the Appellant did. She submitted that the Appellant overtook the stalled motor vehicle without due care and attention and thus caused the accident. She explained that the evidence adduced by the prosecution witnesses was consistent and corroborated each other in all material respects. In the premises therefore, she submitted that the appeal against conviction should be dismissed. On sentence, she urged the court to impose an appropriate sentence in view of the fact that the trial court failed to sentence the Appellant in accordance with **Section 28** of the **Penal Code**. Other than that, she urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. **(See Okeno -Vs- Republic [1972] EA 32).** In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to support the charge of causing **death by dangerous driving** contrary to **Section 46** of the **Traffic Act**.

This court has carefully re-evaluated the evidence adduced before the trial court in light of the submission made during the hearing of this appeal. There are two versions as regard to how the accident that is the subject of this appeal occurred. One version is by PW9 Joel Mbugua who was the turnboy of a lorry registration No.KYR 177 Mitsubishi. He told the court that on 8th March 2009 at about 6.30 p.m., their lorry, which was ferrying sand, developed mechanical problems and broke down. The lorry stalled along Nairobi-Kangundo Road near Ruai. He placed the life savers both infront and behind the lorry to warn other road users of the stalled lorry. The life savers were placed at an approximate distance of 150m from where the lorry had stalled on the road. He recalled that on the following day, at about 5.00 a.m., a Nissan matatu being driven from Kangundo direction overtook the stationary lorry and was involved in a head-on collision with another motor vehicle.

PW9's testimony in regard to how warning signs had been placed on the road was corroborated by PW5

Stephen Kioko, a passenger in the suit motor vehicle. He testified that the suit motor vehicle was being driven at a high speed. He saw twigs put laid on the road about 20 metres before where the lorry had stalled. Due to the high speed that the motor vehicle was being driven, the driver saw the lorry late. He attempted to swerve to avoid colliding with it. There was an oncoming motor vehicle. The suit motor vehicle collided with it resulting in the death of the deceased persons the subject of the case. PW3 Kennedy Mwanzia, an administration police officer who was a passenger in the suit motor vehicle, testified that he saw a stationary lorry on the road ahead and alerted the driver of its presence. The driver swerved to the right to avoid colliding with the lorry. There was an oncoming motor vehicle which the suit motor vehicle collided with.

This version of events was disputed by several witnesses who were in the Nissan matatu. PW12 Wilson Munyao and PW13 Daniel Musau Mutua testified that no warning signs were placed on the road and thus the driver of the suit motor vehicle could not be able to tell if there was a stalled motor vehicle on the road. They attributed the accident to the fact that the Appellant made effort to avoid colliding with the lorry by swerving to his right which resulted in the accident. The Appellant did not offer any evidence in his defence.

Which version of events should the court believe?

In cases such as the present one where the exercise of skill and due diligence in driving is required, the test as to whether the Appellant drove the suit motor vehicle in a dangerous manner is the test of a reasonable driver in the circumstances that the Appellant found himself on the material morning. **Section 46** of the **Traffic Act** defines causing death by dangerous driving as a situation in which a driver drives recklessly or at a speed or manner that is dangerous to the public taking into consideration all the circumstances of the case including the nature, condition and use of the road at the particular time. In the present appeal, the accident took place at 5.00 a.m. in the morning. It was still dark. The suit motor vehicle's headlights were switched on.

According to PW3, the Appellant was driving the suit motor vehicle at a speed of between 70 and 80kph. At such speed it was not expected that the Appellant would stop the vehicle and avoid the accident if he was careful. According to PW3, he alerted the Appellant that there was a lorry which was parked on the road. It was apparent that the Appellant was not paying attention to the condition of the road at the time. It was upon being alerted, that the Appellant swerved to the right to avoid colliding with the lorry. This court formed the view that PW9 was telling the truth when he testified that warning signs had been placed on the road at a reasonable distance to warn other road users of the presence of the stalled motor vehicle. It was clear that the Appellant either did not heed these warning signs or ignored them.

Further, he attempted to avoid the accident in the course of which he collided with an oncoming motor vehicle. A reasonable driver in his circumstances would have hided the warning signs placed on the road regarding the obstacle that was on the road. He should also have driven the motor vehicle at a speed that would have enabled him to safely stop the motor vehicle if there was an obstacle on the road. The finding by the trial magistrate's court to the effect that the Appellant failed to exercise caution when avoiding collision with the stalled lorry was therefore spot on. This court therefore finds no merit with the grounds put forward by the Appellant to the effect that the trial court properly failed to apply its mind on the facts of the case and therefore reached an erroneous determination.

As regard the Appellant's complaint to the effect that the trial court did not explain to him his rights under **Section 200(3)** of the **Criminal Procedure Code**, this court perused the trial court's proceedings of 21st October 2015. On that day, the trial court explained to the Appellant his rights as required by the law. The Appellant informed the court that he wished to have the case proceed from where it had reached. He cannot now complain that his rights were not read to him yet he was the one who informed the court that he had no problem with the convicting magistrate taking over the proceedings from where it had reached. That ground of appeal similarly fails.

The upshot of the above reasons is that the appeal against conviction lacks merit and is hereby dismissed. As regards sentence, this court agrees with the Learned State Counsel that under **Section 28(2)** of the

Penal Code, once the court imposed the fine of Kshs.100,000/- the default custodial sentence should not have exceeded one (1) year imprisonment. In the premises therefore, this court upholds the fine of Kshs.100,000/- for each count (a total of Kshs.300,000/-) but sets aside the default custodial sentence of five (5) years imprisonment. Instead the default custodial sentence shall be one (1) year imprisonment for each count. If the Appellant shall not pay the fine, the custodial sentences shall run concurrently.

DATED AT NAIROBI THIS 15TH DAY OF MARCH 2017

L. KIMARU

JUDGE