REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 140 of 2015

CHARLES MURIUKI WAHOME..……...……..APPELLANT

VERSUS

REPUBLIC …….…….……RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's court at Kibera Cr. Case No. 3977 of 2010 delivered by Hon. B. Ochoi, Ag SPM on 27th August 2015).

JUDGMENT.

Background

Charles Muriuki Wahome, herein the Appellant, was charged with two counts of causing death by dangerous driving contrary to Section 46 of the Traffic Act. The particulars of the charge were that on 30th August, 2009 at about 2030hrs along Dagoretti Road near Bible School, Karen within Nairobi Area, being the driver of motor vehicle registration number KAM 361 N, a Toyota Matatu, drove the said motor vehicle at a high speed and lost control of the said vehicle and swerved off the road to the left and rolled thereby causing the death of Sophia Naisae and Mary Naisae respectively.

In count III he was charged with reckless driving contrary **to Section 47(1) of the Traffic Act**. The particulars of the charge were that on 30th August, 2009 at about 2030 hrs along Dagoretti road within Nairobi Area being the driver of motor vehicle registration number KAM 361 N, a Toyota Matatu drove the said motor vehicle recklessly and swerved off the road to the left and rolled whereby several passengers were injured, namely; Veronica Nadupol, Jane Soila, Mary Warusho and Margaret Naisenya.

The Appellant was found guilty in all the counts. He was sentenced to 12 months imprisonment in respect of counts I and II and a fine of Kshs. 5,000/=, in default serve two months imprisonment in count III. His licence was also revoked for a year. He was dissatisfied with both the conviction and sentence and he preferred the instant appeal. In his Petition of Appeal dated 9th September, 2015 he was dissatisfied that his defence was not considered, that the sentence imposed without the option of a fine was excessive, that the learned magistrate failed to *apportion blame to the passengers who also contributed to the accident and failed to apply the correct principles in his judgment and finally that the case was not proved beyond a reasonable doubt.*

Submissions

The appeal was canvassed by way of oral submissions. Learned counsel for the Appellant, Mr. Nyangito

submitted that the conviction of the Appellant was based on insufficient evidence. He submitted that the Appellant could not be blamed for the accident as the same occurred when he swerved to avoid hitting a pothole. He submitted that the victims in counts 1 and 2 were a mother and her child. When the vehicle swerved, the mother panicked and threw the minor out through the window in an attempt to save her life. She pulled her head out of the window to see what was happening. Thus when the vehicle hit the electric pole, her head was badly injured which in turn caused her death. Counsel submitted that it was never demonstrated that the Appellant was reckless in the manner he drove the vehicle. He relied on **Thoya v. Republic[2000] eKLR** to buttress this submission.

It was the counsel's submission that the prosecution advanced a case of over speeding on the part of the Appellant. To the contrary, they failed to demonstrate the same, in particular what constituted over speeding. He submitted that the Appellant was privately hired by the passengers and he was driving under their instructions. As such, he could not drive at a sped higher than they authorized him. In any case, the vehicle was confirmed by PW3 that it did not have pre-accident defects which demonstrated he did not contribute to the accident. Counsel further faulted the failure to call an independent witness who would have given an objective account of how the accident occurred. He submitted that the key prosecution witnesses, PW1 and 2 were relatives of the deceased who gave biased evidence. On the sentence, he submitted that it was harsh and excessive as it failed to take into account the fact that the Appellant had no intention of causing the accident.

Learned State Counsel, Ms. Atina for the Appellant opposed the appeal. She submitted that the Appellant's defence was properly considered. He submitted that Section 46 of the Traffic Act does not give the option of a fine and therefore the sentence imposed was not only proper but lenient in the circumstances. Further, that the elements of the offences charged were proved beyond all doubt. She submitted that it was also shown that the death was caused by the actions of the Appellant. She submitted that the dangerous driving must not be the cause of the death but the substantial part of it and that the accident must be attributed to the fault of the driver. In this regard, she submitted that the Appellant was driving at night in a pothole riddled road. Given his 12 years' experience in driving he should have been more careful. To the contrary, he was reckless, the result of which was the accident.

In reply, Mr. Nyangito submitted that there was nothing wrong with driving at night and that the Appellant actually exercised due diligence to avoid the accident.

Evidence

The prosecution's case was that on the material date 30th August, 2009, a group of family members who included PW1 and 2 hired a Matatu Toyota Reg. No. KAM 361N from Ngong to Nyandarua for a family function. In total, the vehicle carried 13 passengers. On their way back from Nyandarua in the evening about 8.30 p.m. at Karen Bible School, the vehicle lost control as the driver, the Appellant herein, was negotiating a corner. He veered off the road, hit an electric pole and the vehicle rolled before coming to a stop. As a result, two passengers who are the deceased persons in count No. 1 and 2 lost their lives while several passengers were injured. According to PW1 and 2 Jane Soila and Margaret Naisenya respectively, the Appellant at the time of the accident was moving at a very high speed and was unable to control the vehicle while negotiating the corner. The deceased Sophie Naisae was seated on the back seat left side and was holding her three years old baby, Mary Naisae. Sophia Naisae died on the spot while Mary Naisae died while undergoing treatment at The Karen Hospital.

PW4, PC Joan Achieng and **PW8 PC Walter Kanguru** were police officers from Lang'ata Police Station who visited the scene immediately after the accident. They confirmed that the accident occurred after the Appellant lost control while negotiating a corner. He hit an electric pole then rolled before the vehicle landed on its left side which was extensively damaged. In addition, they drew the sketch plan of the scene which showed that the vehicle skidded on the road for about 20 meters before hitting the electric pole and thereafter rolled for another 30 meters before it came to a stop. They were both of the view that the Appellant was driving at a high speed which caused him to lose control of the vehicle. PW8 in addition preferred the charges against the Appellant.

PW5, Leteti Ole Kasake was the father to Sophie Naisae and he witnessed the post mortem exercise at KNH mortuary. He also identified her body. Both post mortems were carried out by a Dr. Ndegwa but the post mortem reports were produced by **PW7 Dr. Dorothy Njiru** on his behalf. The reports noted that Sophie Naisae died from a spinal Injury due to a blunt force trauma due to a motor vehicle accident. Mary Naisae's death was caused by severe head injury due to blunt force trauma also consistent with a road accident.

PW6 Dr. Zephania Kamau of police surgery did medical examinations on PW1, 2, Veronicah Nadupoi Letet and Mary Narosh who were passengers in motor vehicle KAM 361N. They all had varied injuries sustained in the road accident. He produced their respective medical examination (P3) Forms as exhibits.

PW3 Stephen Kamaru was a gazetted motor vehicle inspector, who inspected the subject motor vehicle on 1st September, 2009. He noted that the vehicle had no pre-accident defects. He also testified that the vehicle may have had a rear side tyre burst but the same would not have caused the accident if the Appellant was not driving at a high speed. He produced the motor vehicle inspection report as an exhibit.

After the close of the prosecution case, the court ruled that the prosecution had established a prima facie case and accordingly put the Appellant on his defence. He gave a sworn statement of defence and did not call any witness. He testified that at around 8.30 p.m. while driving around Karen Bible School, the vehicle lost control as he tried to avoid hitting a pothole. He stated that he would have successfully avoided the pothole had it not been for an on-coming vehicle which blurred his vision with full headlights. He stated that when the vehicle started moving in a zigzag manner, the passengers started screaming. That is when the deceased, Mary Naisae who was on the back left side threw her baby out of the window and then pulled her head out of the window to see what was happening. It was at that point that the vehicle hit an electric pole and caused an injury to her head which caused her death. He stated that the child would also not have died if she had not been thrown through the window. He denied that he was driving at a high speed and maintained that he was driving between 40 and 50 km per hour. Further, that when he attempted to avoid the pothole, he applied brakes as a result of which one of the rear tyres blew causing him to lose control of the vehicle. Accordingly he had done his best in trying to avoid the accident.

Determination

It is now the duty of this court to reevaluate the evidence afresh and arrive at its own conclusions. In so doing, the court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See **Okeno v. Republic[1972] EA 32.**

After considering the evidence on record and the respective submissions, this court must determine whether the case was proved beyond a reasonable doubt, whether the Appellant's defence was considered and whether the sentence passed was excessive.

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. It follows that the accused is punished twice for the same offence; of dangerous driving. See **Atito v. Republic[1975] EA 278**, in which 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."**

This scenario obtains in the instant case. The Appellant was charged with two counts of causing death by

dangerous driving yet the deaths were occasioned in the same act of dangerous driving thereby rendering the second count duplicitous. For this reason, should the court uphold the conviction, the same shall apply only with respect to one count.

The next issue was whether the offence was proved beyond a reasonable doubt. The definition of what constitutes dangerous driving was set out in **R v. Gosney[1971] 3 All ER 220, thus:**

> **"In order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some fault on the part of the driver, causing that situation. 'Fault' certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame… Fault involves a failure; a falling below the standard of car or skill of a competent and experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case."**

That being said, the court must interrogate the circumstances of the instant accident and determine whether it was caused by the Appellant's fault. The Appellant lost control of the vehicle as he negotiated a corner. It hit an electric pole before coming to a stop on its side. The distance from the point where the vehicle lost control to the point where it hit the electricity pole was 20 meters. This is clearly established by the skid marks on the drawings produced in court. After hitting the pole, the car moved another 30 meters and as per PW1 it rolled before coming to a stop. These circumstances point to the vehicle's momentum being very high. It moved more than 50 meters; 20 in a straight line and 30 after changing the direction. For such a scenario to be achieved the vehicle would clearly be moving at a speed far exceeding the 50 kph the Appellant stated he was traveling at. I have no doubt then that both PW1 and PW2 gave a truthful account that the vehicle was moving at a high speed despite the fact that they could not see the speedometer.

The Appellant asserted that the reason he lost control was as he tried to hit a pot hole on the road that was further compounded by oncoming traffic that blurred his vision with beaming headlights. In contrast, the fair sketch plan of the scene produced in court did not show any potholes on the road. Further, the evidence of PW1 and PW2 was that there was no oncoming traffic at the time immediately preceding the accident. Furthermore, as I pointed out, even if there was a pothole, the long stretch of the skid marks was indicative of a person who was unable to control the vehicle when he was faced with the obstruction (pothole or headlights). They were a testimony of a vehicle that was at high velocity that it could not stop immediately the driver was faced with a challenge. He ought to have known that the road terrain demanded that he drives at a low speed so as to enable him negotiate the corner with ease. His failure to observe due care and attention ultimately caused the accident. In addition, PW3, the motor vehicle inspector testified that although the vehicle may have had a tyre burst, if it was being driven at a reasonable speed given the terrain of the road, the Appellant would have been able to avoid the accident. These factors demonstrate that the accident was occasioned by human factors; which were nothing less than the recklessness of the Appellant. He was therefore at fault.

The Appellant also submitted that the deceased, Sophie threw her child out of the vehicle in an attempt to save her from the accident and that she also tried to get out of the moving car which caused her injuries. I find this assertion highly unlikely. It was disproved by the autopsy report which confirmed that the cause of the death of Sophie was spinal injury due to blunt force trauma. This means that her head was not the point of impact as the Appellant asserted. This is further vindicated by the motor vehicle inspector's report that the window of the vehicle on the side she sat suffered the greatest damage. Furthermore, the Appellant's assertion that Sophie threw out her child through the window was disproved by PW1 and 2 who testified that all along, she was holding her baby. It is also doubtful how the Appellant who was busy controlling a vehicle in at such a time could have seen her throw the baby through the side mirror. I find that the Appellant did not exercise due care and sped into a corner with the regrettable consequences of the loss of lives. The conviction was thus proper.

The Appellant also submitted that his defence was not considered. I have however had the opportunity of reading through the judgment of the learned trial magistrate. He ably considered the Appellant's defence

and found it not plausible. On the part of this court I have already held that the Appellant's defence was not convincing and that the evidence on record clearly pointed that the Appellant was driving at a high speed as he tried to negotiate a corner as a result of which he lost control.

On whether the sentence was harsh and excessive, Section 46 of the Traffic Act provides for a punishment of imprisonment for a term not exceeding 10 years. The Appellant was only sentenced to 12 months imprisonment and his driving license revoked for a year. In my view the sentence was not only reasonable but lenient. I will however not enhance the same given that a sentence is intended to serve as a deterrent measure. The court hopes that for the period the Appellant serves in prison he shall learn the value of driving carefully.

In the result, I find that the prosecution proved their case to the required standard; beyond a reasonable doubt. I uphold the conviction on all the three counts but in respect of the offences of causing death by dangerous driving the convictions are combined into one. The sentence passed is also upheld. However, for the third count, I substitute the fine with a custodial sentence of two months. The Appellant shall be committed to prison to complete the balance of sentence of seven months. The sentences shall run concurrently. It is so ordered.

Dated and delivered At Nairobi This 8th Day of June, 2017.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. M/s Ngetich holding brief for Mr. Nyangito the Appellant.

2. M/s KImiri For the Respondent.