



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 71 OF 2015

*(Appeal originating from the conviction and sentence by Hon. C. WEKESA AG, SRM in Nyeri C.D.
CASE NO.8 of 2012)*

GEORGE MUTAHI KIRANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was charged with two counts.

COUNT 1 is the offence causing death by dangerous driving contrary to section 46 of the traffic Act CAP 403 Laws of Kenya. Particulars are that on the 22nd day of July 2012 at about 7.30 pm along Nyeri – karatina road in Nyeri county within the republic of Kenya, being the driver of motor vehicle registration number KAW 158 H Toyota corolla station wagon the appellant drove the said motor vehicle on the said road in a manner which was dangerous to the public having regard to all circumstances of the case including the nature, conduct, condition and use of the road and amount of traffic which was actually at the time for which reasonably be expected to be on the road and caused death of willie wanyanga mugi.

COUNT 11 is the offence of failing to report an accident contrary to section 73(3) of the traffic Act cap 403 laws of Kenya. Particulars are that on the 22nd day of July 2017 at about 7.30pm along Nyeri – karatina road in Nyeri county within the republic of Kenya the appellant being a driver of motor vehicle registration number KAW 158H Toyota corolla station wagon drove the said motor vehicle on the said road and caused an accident to a pedestrian by name willie wanyanga who was seriously injured and died while undergoing treatment and failed to report the accident to any police station.

The appellant was convicted for both counts and fined kshs 60,000 in default one year imprisonment for count 1 and kshs 1000 in default one month imprisonment in default for count 2.

Mr. Gikonyo for the appellant filed 6 grounds of appeal but argued all the grounds together. He submitted that the main ground is whether the prosecution proved particulars of the charge. Whether the appellant dangerously drove the vehicle and whether he failed to report the accident. He submitted that it is a cardinal principle of law that the onus is always on the prosecution to prove its case beyond reasonable doubt. He referred to **East African court of Appeal case no.76 of 1957 Ramanlal Trambaklal Bhatt vs Rep(1957)E.A 334 and 335** and **Njeru vs Republic(2006)2KLR 44** where the court of appeal held that it was a cardinal principle of our law that the onus was on the prosecution to prove its case beyond reasonable doubt. He submitted that court record show that the witness said he recorded statement the following day but statement show 4 days after the accident. He also pointed out that he was with other

people but the statement say he was alone. He submitted that there is contradiction on the registration number of the vehicle and the distance the vehicle stopped after the accident and the witness deny seeing the accident nor knowledge of what transpired. He further submitted that pw6 said he cannot tell which vehicle he saw. He added that the investigating officer admitted that there was no eye witness to the accident and that he did not have evidence as to how the vehicle was being driven neither could he tell the condition of the road at the time of the accident; that the investigating officer said he does not know how the deceased landed on the road and whether he wanted to commit suicide or not. He further submitted that the vehicle was not found at the scene of the accident and no forensic examination was conducted to ascertain whether it came in contact with the deceased. He submitted that the appellant reported the accident within 24 hours as per investigating officer's evidence. Counsel submitted that despite the investigating officer saying that no one witnessed the accident and he does not know the manner in which the appellant was driving, the magistrate went ahead to convict the appellant on both counts. He referred to ***Msa court of appeal no.129 of 1975 Atito vs. Republic where*** the court held as follows:-

“To justify a conviction of causing death by dangerous driving there must be a situation which was dangerous when viewed objectively and also some fault on the part of the driver causing that situation”

Counsel for the appellant also referred to ***kakamega Hccr.appeal no 57 of 2007*** where the judge restated the test for dangerous driving laid down in ***kitsao vs. Republic Msa Hccr.A no.75 of 1975***(unreported) and ***Msa Criminal Appeal No.129 of 1975 Atito vs.Republic***.He submitted that no evidence has been adduced on speed.

Ms. Mwaniki for the state submitted that the state is conceding the appeal on the ground that no eye witness was called to testify in court. She submitted that the prosecution chose to rely on circumstantial evidence. She said pw1 a motor cycle operator said the accident occurred at 7 pm and that he did not see the driver of the vehicle.pw1 also said he did not see any damage on the vehicle whereas pw3 and pw6 said that the vehicle was dragging its bumper. She said Pw4 the motor vehicle inspector never listed bumper as one of the parts damaged. She submitted that these contradictions casts doubt as to whether the appellant was involved in an accident in the manner the witnesses testified. She further submitted that the investigating officer visited the scene 4 days after the accident and there is possibility that the scene was interfered with. She submitted that it is unfortunate that a person died but the evidence adduced does not link the appellant to the offence.

This being the first appellate court it is my duty to reevaluate evidence and arrive at my own conclusion despite the fact that the state is supporting the appeal. I am guided by principles set out in the case of ***OKENO VS REPUBLIC [1972] EA 32*** where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

From record pw1 a motor cyclist said he was at Kwa murungu stage when he saw a vehicle stop. He rushed there to see if he could get a customer. He said on nearing the stage the vehicle took off. He was unable to identify the driver of the vehicle. He said after 20 minutes a person by the name Ephantus went and told him somebody had knocked his father. He informed the said Ephantus that he had seen a vehicle pass and taken its registration number. He gave registration number as KAW158H.He said that it was about 7 pm and that the vehicle was 10 meters away at the time he saw it.In cross examination pw1 said that he was employed by Ephantus as motor cycle operator. He said that he never saw the driver of the vehicle properly because of lights from the vehicles on the road. He said that Ephantus went to the stage the next day to ask if anyone had seen a vehicle. They later went to police station to record statement. On being shown the statement he admitted that it is indicated that he recorded after 4 days and that it also

shows that he saw Ephantus the next day.pw1 also gave the registration number of motor cycle as KMCB322V while his statement show KBH831G.He also admitted that he said the vehicle stopped at a distance of 10 meters while his statement show 100 meter. He also admitted that the person who asked for the vehicle was Ephantus mureithi while his statement indicate Ephantus ngugi; he confirmed that the said Ephantus mureithi was his employer. It is evident that pw1 contradicted himself in his testimony. He also admitted that he never saw the driver well due to light from other vehicles. He never mentioned any damage on the vehicle.pw3 Ephantus mureithi in cross examination said he never witnessed the accident. He said he found the appellants vehicle in grogan garage and he was told the owner of the vehicle had caused the accident. He said the vehicle's bumper was damaged.pw4 a motor vehicle inspector talked of damage to rear side end, rear side door, and panel was dented. I note that there is no mention of damage to the bumper.pw6 testified he lives about 20 meters from the road and that he heard noise of a vehicle pulling something and went to check .He said the driver of the vehicle told him he had hit a bump. Pw1 testified that he never identified the occupant of the vehicle as it was dark and that he only saw incomplete registration number KAW.pw6 never talked of seeing what was being pulled. If the vehicle had knocked and pulled a person or pulled a damaged bumper in the vicinity, I believe pw6 would have seen the damaged bumper. Pw9 an investigating officer said he found motor vehicle registration number KAW128H with a broken grill at the garage.

I have considered evidence adduced before the trial court. There is no doubt that no one witnessed the avccident.pw1 and pw6 talked of seeing the vehicle at different locations not at the scene. Both admitted that it was dark; both never saw the occupants of the vehicle.pw1 gave its registration number but never talked of any damage on the vehicle.pw6 never got full registration and never mentioned seeing a grill yet he said the vehicle was pulling something.Pw1 admitted that there were other vehicle using the road that is why he was unable to identity the driver. A question also arise as to how he was able to identify the registration number of the vehicle if he had difficulties in identifying the driver who had come out of the vehicle.pw9 also admitted that the appellant recorded his statement within 24 hours. From the foregoing I find that there is no dispute that the deceased was knocked and that he sustained fatal injuries but there is no evidence linking the appellant to the accident. The prosecution failed to prove their case beyond reasonable doubt. The doubt that arise from evidence herein goes to benefit the appellant. I proceed to quash the conviction and set aside sentence imposed. Fine paid be refunded to the appellant.

Dated and signed at Nairobi this.....day of...2017.

.....

RACHEL NGETICH

HIGH COURT JUDGE

Delivered at Nyeri this 19TH day of JULY 2017.

.....

JUDGE