



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 38 OF 2015

JOSEPH KIHAGI MUGO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

*(An appeal from the conviction and sentence of the Chief Magistrate's Court (J. Kasam) at Kerugoya,
Traffic Case No. 214 of 2014 dated 19th August, 2015)*

JUDGMENT

1. **JOSEPH KIHAGI MUGO**, the appellant herein was charged with 2 counts of traffic offences before Kerugoya Chief Magistrate's Court Traffic Case No. 214 of 2014. The counts were as follows:
 - i. Causing Death by Dangerous driving contrary to Section 46(1) of Traffic Amendment Act, 2012. The particulars in this count were that on 24th December, 2013 at about 8 p.m. at Karia area along Kerugoya-Kutus road within Kirinyaga County, the appellant being the driver of motor vehicle Registration No. KBS 240V Isuzu Bus 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, condition and use of the road and the amount of traffic which was expected at the time to be on the road thereby causing the death of NICHOLAS MUNENE WANJIRU a rider of motor cycle Registration No. KMCK 160 make Puma.
 - ii. Reckless driving contrary to Section 47(1) of the Traffic Amendment (No. 2) Act, 2012.

The particulars given on this count were that on the 24th December, 2013 at about the same time and place, the appellant being the driver of motor vehicle Registration Number KBS 240V Isuzu Bus drove the said motor vehicle in a manner which was dangerous to the public, having regard to all circumstances of the case including the nature, condition and use of the road and the amount of traffic expected at the time on the said road, and injured on REUBEN WACHIRA GICHOB I who was a pillion passenger on motor cycle Registration Number KMCK 160H make Puma. It is apparent from the pleadings that only the first count was read over to the appellant for which he pleaded not guilty but the plea on the 2nd count appears to have been erroneously left out altogether and the trial court proceeded on the trial in respect to the first count and at the conclusion of trial found the appellant guilty of the offence and convicted him and sentenced him to 2 years imprisonment. Nonetheless he felt aggrieved by both the conviction and the sentence

and preferred this appeal.

2. That brief summary of the evidence adduced at the trial court shows that the appellant on the material date and time indicated above was driving motor vehicle registration Number KBS 270V Isuzu Bus (which was misdescribed in the charge sheet as KBS 240V) from Kerugoya Town when he encountered a motorcycle heading the same direction and knocked it down and in the process caused the death of NICHOLAS MUNENE WANJIRU who was riding the motor cycle Registration Number KMCK 160H and injured REUBEN WACHIRA GICHOGU, a pillion passenger in the said motorcycle. Reuben Wachira Gichogu (P.W.1) told the learned trial magistrate that on the fateful time they had reached an area called Karia when the said bus hit them from behind as a result of which he fell down and became unconscious. He regained consciousness after two weeks only to learn what had happened including the fact that his friend, Nicholas Munene had died in the accident. P.W.4, **James Ndanu** a clinical officer from Kerugoya Hospital gave evidence on the multiple injuries suffered by the said P.W.1 and produced a P3 (Exhibit 1) confirming the serious injuries. P.C. **Piston Herbert** (P.W.6) the investigating officer who visited the scene after the accident gave evidence and told the trial court how he found the scene. He stated that he found a motor cycle Registration Number KMCK 160H lying on the left side of the road towards Kutus. The body of the late Nicholas Munene the motor cycle rider, was found lying near the motor cycle. The witness told the trial court that the pillion passenger had been taken to hospital. The bus was lying on its side on the right side off the road as one faces Kutus from Kerugoya. He further told the trial court that he went to the Kerugoya Hospital and found the pillion passenger badly injured and the conductor of the bus also admitted at the same hospital. The driver was not found either at the scene or at the hospital. A sketch plan of the scene was drawn and produced at the trial as Exhibit 9 and a fair plan Exhibit 10.
3. The evidence adduced by the motor vehicle inspector perhaps was odd in the sense that he produced an inspection report of the accident bus but gave registration of the bus as KBS 240V which obviously was not the case. When called upon to defend himself the appellant clearly told the trial court that the bus he was driving and which was involved in the accident was KBS 270V. It would appear that from the start of the initial report and recordings, the Police got mixed up and ended up indicating a motor vehicle Registration Number KBS 240V which was not a bus as established by the evidence adduced by the appellant.
4. The appellant in his sworn defence told the trial court that the motor cycle rider was at fault as it tried to turn right suddenly when the bus was in the process of overtaking. He however, could not give account of why he fled the scene after the accident and only surfaced 9 days later.
5. The learned trial magistrate upon evaluation of evidence found the appellant guilty and convicted him. He was sentenced to serve 2 years imprisonment without an option of fine. He felt aggrieved by both the conviction and the sentence and filed this appeal citing the following grounds namely:-
 - i. ***That the Charge Sheet was defective as it read that he was driving motor vehicle Registration KBS 240V when he was driving motor vehicle Registration KBS 270V.***
 - ii. ***That the learned trial magistrate erred by not considering the fact that the motorcycle rider was the one to blame for the accident.***
 - iii. ***That the learned trial magistrate erred by failing to note that the motorcycle rider was not licensed to ride or be on the road as he lacked insurance cover.***
 - iv. ***That the learned magistrate erred by failing to note that the motor cyclist did not use a reflective jacket and a helmet to protect himself.***
 - v. ***That the learned trial magistrate erred by failing to note the contradiction in the motor vehicle inspection report indicating motor vehicle Registration Number KBS 240V when he was driving motor vehicle Registration Number KBS 270V and that he could not have been driving two motor vehicles at the same time.***
 - vi. ***That the sentence was too harsh and that no option to fine was given.***

vii. ***That the evidence was not corroborated.***

6. The appellant relied on written submissions in this appeal which was not opposed by the state. I have however, looked at this appeal and considered the proceedings at the trial court. I have considered an issue that though not raised by either of the parties is significant to the fair administration of justice. The Respondent's main reason for not opposing the appeal was that the appellant was charged and convicted on non-existent Section 46 (1) of **The Traffic Amendment Act 2012**. I do find that the trial court made a decision about the issue and I do not think that it would be fair to render a decision on it at this stage because of the reasons which I will give shortly.
7. The appellant in this appeal as I have observed above was charged with two counts but apparently there was an inadvertent error on the part of the trial court when taking plea as it is apparent that the only plea taken was in respect of the first count – which was causing death by dangerous driving was taken. The plea in this respect to Reckless driving contrary to **Section 47 (1) (A)** of the **Traffic Act** was not taken. I note that the appellant's counsel during his submissions at the trial court mentioned the two counts but the issue escaped both the attention of the court and the prosecution. The resultant effect was that there was a mistrial that clearly occasioned a miscarriage of justice to the complainant in the 2nd count. I have reflected on the grounds raised and all the issues and have come to the inevitable conclusion that rendering a decision on any of them would not be in the interest of justice.
8. In the premises I invoke the powers of this Court under **Section 354 (3) (a) (1)** and reverse the finding on conviction and sentence and discharge the appellant and order that he be retried in another court of competent jurisdiction for the two counts. This explains why I found that rendering a decision on the grounds raised by the appellant at this stage would render the retrial academic, futile and prejudicial because the two counts are interrelated and occurred from the same transaction. The appellant does not suffer any prejudice because the accident occurred less than 3 years ago and he is out on bond. At the same time the complainant in count II will feel that justice is rendered when a determination is made one way or the other after a retrial. The appellant shall therefore be taken to the Chief Magistrate's Court,

Kerugoya for a fresh plea to be taken on both counts and a retrial. It is so ordered.

Dated and delivered at Kerugoya this 4th day of May, 2016.

R. K. LIMO

JUDGE

4.5.2016

Before Hon. Justice R. Limo J.,

State Counsel Omayo

Court Assistant Willy Mwangi

Appellant present

Interpretation English-Kiswahili

Omayo for State present

Joseph Kihagi appellant in person.

COURT: Judgment signed, dated and delivered in the open court in the presence of the appellant who appears in person and Omayo for State/Respondent.

R. K. LIMO

JUDGE