



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 63 OF 2015

JAMES THIANE.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment in Nanyuki Chief

Magistrate's Court Traffic Case No. 238 of 2013 by

Hon. E. Bett Senior Resident Magistrate on 23rd July 2015)

JUDGMENT

1. **JAMES THIANE IMWOYO** the appellant in this matter was charged before the Chief Magistrate's Court in Nanyuki with the **offence of careless driving contrary to section 49(1) of the Traffic Act**. He was convicted as charged and was sentenced to pay a fine of Kshs.50,000. Being aggrieved of that conviction has filed this appeal against both conviction and sentence.

2. This court is required as the first appellant court to re-evaluate the trial court's evidence and come up with its own conclusion bearing in mind that it has neither seen or heard the witnesses that testified before the trial court. See **OKENO vs REPUBLIC (1972) EA 32:-**

"This being the first appellant court, the court is enjoined to re-evaluate, re-assess and re-examine the evidence that was tendered before the trial court and arrive at its own conclusion. The court must however, remind itself that unlike the trial court, it did not have the benefit of hearing and observing the demeanor of the prosecution witnesses as well as the deportment of the appellants as they testified and must therefore make due allowance for that."

3. Joseph Wangura an 80 year old man was on 6th August 2013 sometimes after 6.00 p.m. driving his motor vehicle registration number KAH 928. He was accompanied in his vehicle by his wife Doris Wangari PW 2 and his grandson Eric Maina Wairimu PW3. He stated that he was driving along Nanyuki Narumoro Road going to Naromoru. When he was at a place called Toll another vehicle suddenly emerged from a feeder road on the right hand side as one approaches Naromoru. He confirmed that his vehicle had its headlights on. He said because his vehicle was in motion it hit the other motorvehicle which ended up in the ditch. Wangura's vehicle stalled on the road. It is important to note that when he was cross examined he confirmed that prior to the accident he was talking to his wife who was seated on the back seat of his car.

4. The evidence of PW 2 and PW 3 correspond to the evidence given by Wangura in as far as the

emergence of the other motorvehicle was concerned. However when both of them were cross examined they denied that Wangura was at the time of the accident talking to his wife.

5. Evidence was given by the motor vehicle inspector Bernard Wachira Mwai (PW 4). On examining both motor vehicles he concluded that there was no pre-accident defects in both vehicles.

6. A Medical Officer Dr. Zainabu gave evidence on behalf of the doctor who treated Wangura PW 2 and PW 3. The doctor was able to confirm that PW 3 who was then 16 years old had a laceration on his forehead following the accident. In respect of Wangura there was tenderness below his jaw and fractured second and third rib. In respect to PW 2 she suffered laceration on her left leg.

7. PW 6 the investigating officer Joseph Mbithi was informed about the accident on the material date at about 7.30 p.m. He went on scene of the accident and only found the appellant who was driving motorvehicle registration number KBQ 390 E. The vehicle of Wanguru was in the midst of the road facing the direction towards Naromoru. It is not clear what the investigating officer meant by saying that it was in the midst of the road. I however get assistance from the sketch that he drew which indicates that that vehicle to have been nearer the middle of the road. The vehicle of the appellant was off the road. In his opinion he blamed the appellant for the accident for having emerged into the road and into the path of Wanguru's vehicle.

8. The appellant gave sworn evidence in his defence and stated that he had been on that day at a Seminar. He was an employee of Kenya Power and Lighting Company. He was travelling to Meru on the Nanyuki road. As he drove he said that he heard a loud noise which sent his vehicle into the ditch. He realised that he had been hit by a vehicle being driven by Wangura. The evidence that he adduced suggested that Wangura contrary to prosecution's evidence entered the highway from a feeder road going toward Nanyuki and in the process hit the appellant's vehicle. His evidence was supported by Danson Nyaga (DW 2). Danson was employed as a supervisor by G4S security company. On that day at 7.00 p.m. he was on his way to carry out supervisory duties at Naromoru. On his way he witnessed the accident between Wangura and the appellant. He stated that the appellant's vehicle was not ahead of him rather that both vehicles were going in the opposite direction. Wangura's car according to his evidence came from the feeder road which was on the right hand side as one was heading to Naromoru. It then hit the rear passenger's side of the appellant's vehicle. He saw the appellant's vehicle swerve after being hit and land in a ditch. This witness was very emphatic on his testimony and stated that he did not know the appellant prior to this accident. He assisted the appellant to guard his car because a crowd had gathered at the scene of the accident.

9. I have considered the learned trial magistrate's judgement in this matter. The learned trial magistrate believed the evidence of the prosecution which in his view was supported by the fact that the damage to Wangura's car was on the front side of his vehicle whereas the damage of the appellant car was at the rear. The damage to the vehicles was supported by the vehicle inspector. However in my view it was important to lay emphasis on the evidence of DW 2 who was an independent witness. He stated that he did not know the appellant prior to the accident. His evidence in my view had greater weight than the evidence of the prosecution which was supported by the evidence of family members. It was also interesting to note that Wangura said that before the accident he was holding a conversation with his wife who was seated in the seat behind him. His wife PW 2 and his grandson PW 3 denied that there was any such conversation. Why did they deny that which Wangura had stated. Was it that they were intent on laying the blame on the appellant and believed that if they accepted that there was a conversation blame would be put on Wangura. There was also failure of the prosecution in failing to adduce evidence on the distance that Wangura saw the vehicle of the appellant before the collision. There was also no evidence what evasive action Wangura took to avoid the accident. Although the investigating officer drew a sketch map which was submitted in evidence it is important to note that when the sketch mark was drawn Wangura's vehicle was no longer at the scene. It is not also clear whether the appellant's vehicle was there. But more importantly PW 6 stated in evidence that on 6th August 2013 when accident occurred it rained that night. He did a sketch map drawing the following day 7th August 2013.. Could those failures of marking the vehicle of Wangura before it was removed and the fact that it rained that night give credence to the evidence in defence that the collision occurred because Wangura's vehicle emerged from

the feeder road and hit appellant's vehicle. The fact that Wangura's vehicle was damaged to the front while the appellant's vehicle was damaged at the rear does not naturally lead to a conclusion that it was the appellant that was at fault. In my view the evidence of the prosecution and the defence considered together lead this court to find that there was doubt in the prosecution's case. That is a doubt in my view that has to be taken in favour of the appellant. But perhaps the one thing that raises doubt is the fact that Wangura when he first reported the incident to the police and a P3 form was filled this is what he informed the police:-

“Patient reports being involved in a road traffic accident on 6/8/13 at 7.30 p.m. He was driving a person vehicle when an oncoming vehicle rammed into them”

The underlined portion is mine wishing to lay emphasis on that statement. That statement by Wangura was contrary to his and his witnesses' evidence before court. To reiterate in court he said the vehicle of appellant appeared before his and as a result he collided with it whereby appellant's vehicle ended up in the ditch. In the P3 it is reflected to the contrary. That the appellants' vehicle rammed into Wangura's vehicle.

10. It is as a result of the above finding that the appellant's appeal against conviction and sentence succeeds. With that doubt in mind the **appellant's conviction is hereby quashed and his sentence is hereby set aside. If the appellant had paid the fine imposed on him an order is hereby made for refund to be made to him.**

DATED AND DELIVERED THIS 9TH DAY OF NOVEMBER 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: James Thiane Omwoyo

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE