



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL CASE NO. 58 OF 2014

((From the original conviction and sentence in Traffic Case no. 536 of 2010 of the

Principal Magistrate's Court at Kilifi before Hon. R. N. Wasige – SRM)

ABDALLA JUMA BAKARI.....ACCUSED

VERSUS

REPUBLIC.....APPELLANT

JUDGMENT

The Appellant was charged with the offence of Causing death by Dangerous Driving contrary to Section 46 of the Traffic Act Chapter 403 Laws of Kenya. The particulars of the offence were that the Appellant on the 21st January, 2009 at 8.00pm at Mweza Ngombe along Kilifi-Malindi road, the Appellant drove motor vehicle registration number KBH 940R Nissan Matatu in a reckless manner that was dangerous to the public and hit a pedal cyclist namely KAHINDI KAINGU KALAMA (deceased) who died at Kilifi District Hospital while undergoing medical treatment.

The Appellant was also charged with two other counts of Failing to stop after being involved in an accident and failing to report an accident. He was convicted of all three counts and sentenced to serve five (5) years imprisonment.

His licence was cancelled for a period of three years. The grounds of appeal are that he pleaded not guilty during the trial, the charges were defective, the conviction did not consider the circumstances of the offence, the sentence is harsh and a fine could have been a better option, his defence was not considered and that the prosecution did not prove its case to the required standard.

Counsels for both parties agreed to determine the appeal by way of written submissions. I have gone through both sets of submissions. Counsel for the Appellant contends that the prosecution evidence was contradictory and did not prove the case. PW1 who was the main witness was on phone and heard a bang. He did not witness the accident. PW4 was not at the scene. The investigating officer went to the scene alone and did not find the victim at the scene. It is further submitted that the identification of the Appellant was under strenuous conditions. The accident occurred at 8.00pm and there was no sufficient lighting. PW4 did not properly see the Appellant. Miss Ruto for the Appellant further contends that the Appellant was arrested after a period of six (6) months after the date of the accident. No identification parade was conducted. The Appellant raised an alibi defence but it was not fully considered. The burden

of proof was shifted to the appellant. Counsel cited the cases of **BUKENYA & ANOTHER -VS- REPUBLIC (1972) E.A 549, NDUNGU KIMANYI -VS- REPUBLIC (1979) KLR 282** and that of **VICTOR MWENDWA MULINGE -VS- REPUBLIC (2014)eKLR.**

Miss Kitilit, Counsel for the State opposed the appeal. Counsel submitted that the evidence adduced proved that an accident did occur. The Appellant was the one driving the accident vehicle registration number KBH 940B, a matatu. The sentence is proper and not harsh as it is within the maximum sentence period of ten (10) years imprisonment. There is no provision for the alternative of a fine.

Six (6) witnesses testified before the trial magistrate. PW1 JOSEPH KITONYO KALAMA boarded the accident vehicle registration number KBH 940B on 21st January 2009 at 7.30pm. He was from a religious rally with Sunday School Children. He boarded the vehicle at Mtondia and had agreed with the driver not to carry any other passengers but that agreement was ignored. When they reached a few metres to Mkoroshoni, while talking on phone, he heard a bang and was hit by the side mirror. The driver told him he had hit a cyclist. The driver slowed down and accelerated. PW1 started bleeding. He was taken to a private hospital where he was treated and discharged. He was later issued with a P3 form. He was seated at the driver's cabin with two children. The driver kept on picking passengers. After the accident PW1 called BSCO DECHE whom he found at Majaoni stage.

PW2 Sergeant ELIJAH KALAMI investigated the case. He was based at the Kilifi Police station dealing with traffic matters. The incident was reported the same evening of 4th November, 2009 at around 8.30pm. He was notified that it was a hit and run accident. He visited the scene but the victim was not there. He went to Kilifi District Hospital and found the deceased undergoing treatment. He learnt that the victim was a bicycle cyclist. The following morning he got information that the victim had passed on. He revisited the scene and drew sketches. The deceased's relatives took to the police station a damaged bicycle. On 26th November, 2009 PW1 went to the station and reported the accident. By.....had been injured by a piece of glass. PW1 gave him the registration number of the accident vehicle. PW2 managed to trace the owner of the vehicle as well as the Appellant. The Appellant was charged with the offence.

PW3: GABRIEL JOSEPH JEFA is a brother to the deceased. He went to Kilifi Hospital mortuary on 26th November, 2009 and identified the body for postmortem purposes. PW4 BOSCO DECHE BUNGUYA is a teacher. He was called by PW1 and told him to rush to the Majaoni stage. He rushed there and found PW1 standing in front of a motor vehicle registration number KBH 940R while holding his ear. PW1 told him that he had been injured by the side mirror of the vehicle. PW4 met the Appellant who gave him his name as Omar. PW1 was bleeding. PW4 saw cracks on the vehicle's lights and the side mirror had been pushed towards the window.

PW5: JEFA TINGA is the owner of motor vehicle number KBH 940R. His evidence was that he had employed the Appellant as his driver. On 22nd November, 2009 the Appellant informed him at about 7.30am that he had hit a lorry from behind while on the road. The side mirror of the vehicle on the conductor's side was broken. The left side of the windscreen and headlamp were also broken. The Appellant offered to pay for the costs of repairs. The vehicle was repaired and the Appellant later left employment. Six months later while driving the vehicle, PW5 was stopped by the police at Kilifi and was informed about the accident. It is his evidence that the Appellant worked for him for six (6) months from the time of the accident until when he left employment.

PW6: DR CAROLINE OGWANG conducted the postmortem on 26th November, 2009 at Kilifi District Hospital. The deceased had multiple bruises all over the body and fractures on the neck.

The appellant gave sworn evidence. He stated that on 21st November, 2009 he did not drive the accident vehicle. He had been the driver but left employment about a week before the accident. On the 21st November, 2009 at 8.00 pm he was at his house at Tezo. He is a matatu driver and has driven several vehicles. When he was arrested he was driving a different vehicle.

From the evidence on record, it is established that the deceased died on 21st November, 2009 as a result

of a road traffic accident. The main issue for determination is whether it was the Appellant who caused the accident. In his defence, the Appellant denied that he was employed by PW5. He denied that on the material day he drove the accident vehicle. Given the evidence by the prosecution, it is clear that PW1 heard a bang and he was injured. It is his evidence that the driver told him that he had hit a cyclist. PW1 was able to identify the Appellant as he was with him from the time he boarded the vehicle until when he dropped all the Sunday school children. It is his evidence that he had hired the vehicle at the stage and this means he had talked with the driver. PW4 met the driver the same evening. The prosecution case is not based on identification. The sequence of events and the entire evidence show that indeed it was the Appellant who was driving the accident vehicle.

Counsel for the Appealing contends that no employment records were produced by PW5.

It is common knowledge that before the ongoing restructuring of the transport sector, Matatu drivers were employed as casual. No records were kept. The Appellant in his defence said he had been a driver of the accident vehicle but left about a week before the accident. No specific dates were given. At the same time he testified that he had not been employed to drive the accident vehicle. The defence did not raise any doubt on the prosecution case. PW5 knew the Appellant as his employee and there was no need for identification. The sketch plan drawn by PW2 shows that the accident occurred on the other side of the road meaning that the Appellant left his lane and hit the deceased.

From the evidence on record, I am satisfied that the prosecution proved its case. The sequence of events show that PW1 boarded the accident vehicle at 7.30am. The vehicle was heading towards the Kilifi side. The point of impact is the road side meant for vehicles heading to Malindi. PW5 was informed by the Appellant that he had hit a lorry from behind. Had the Appellant cared to stop and check what had happened, he would have taken the deceased to hospital. The accident occurred and was caused by the Appellant.

In the end, I do find that the appeal lacks merit on conviction and is hereby disallowed. On sentence, I do find that it is excessive given the fact that the accident occurred at night. I will set aside the five (5) year imprisonment sentence and replace it with eighteen (18) months imprisonment. The suspension of the Appellant's driving licence for three years shall remain part of the sentence.

Dated and delivered at Malindi this **2nd** day of **March, 2015**.

Said J. Chitembwe

JUDGE