



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO. 61 OF 2015

AMOS MWENGEA MUTUA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate's Hon. J. Ombora dated and delivered on 31st July, 2014 in Traffic Case No. 1271 of 2014, Republic Versus Amos Mwengea Mutua at Shanzu Law Courts)

JUDGEMENT

The Appellant, **AMOS MWENGEA MUTUA**, is charged with causing death by dangerous driving contrary to section 46 of the Traffic Act.

It is alleged that on the 11th day of May, 2014 at about 7.30p.m. at Shauri-Moyo area along Kilifi-Mombasa road in Kilifi County within Coast region, the accused person being driver of a motor vehicle registration No. KBX 847R make Isuzu Dilux Pick-up drove the said motor vehicle on a public road recklessly or at a speed in a manner which was dangerous to the public, having regards to all the amount of traffic which was actually at a time or which might be reasonably be expected to be on the road, in that you drove the said motor vehicle at a very high speed that you were unable to control and veered off the road and rolled severally thereby causing the death of one passenger namely EUNICE KANINI KISANGI aged 20 years and slight injuries to one passenger and extensive damage to the said motor vehicle.

The charge was read out and explained to the accused person in Kiswahili language and he replied;-

Accused – “It is true.”

The prosecution proceeded to give facts as follows:-

“On 11/5/14 at around 7.30p.m., the accused was driving motor vehicle KBX 847R Isuzu Dilux from Kilifi towards Mombasa with two passengers on board in the double cabin. On reaching Shauri-Moyo area the accused swerved to his side and lost control of the motor vehicle and rolled severally before it rested on its 4 wheels at a distance of 55 meters from the point it veered off the road. The accused sustained a cut on his forehead and bruises on right hand and one passenger Eunice Kanini Kisangi sustained fractures on both right hands and legs and the one passenger Pius Mohamed sustained light cuts on both hands. The motor vehicle was extensively damaged. The victims were rushed to Kilifi hospital and the motor vehicle was inspected and there were no pre-accident defects.”

After the accident the three passengers were all rushed to Kilifi District Hospital and the accused and Pius were discharged but one Eunice Kisangi was admitted and later transferred to Coast General Hospital where on 15/5/14 at about 1a.m. she was pronounced dead. The body was removed to Coast General Hospital for post mortem which was conducted on 21/5/14 at around 11.00a.m. and a form filled by Dr. Said and the cause of death was haemorrhagic shock due to fractured femur. The deceased was aged 20 years. I have the certificate of inspection of the motor vehicle signed by G.D. Zile and I wish to produce them as exhibits (P. Exhibit 1 and 2). Investigations were carried out by P.C. Francis Aburi who upon visiting the scene made an opinion that the motor vehicle was overspeeding as per the skid marks on the road as the road was straight and there were no obstacles that may have contributed to the accident. It was conducted on 21/5/14 at around 11a.m. and a form filled by Dr. Said and the cause of death was haemorrhagic shock due to fractured femur. The deceased was aged 20 years. I have the certificate of inspection of the motor vehicle signed by G.D. Zila and I wish to produce them as exhibits (P. Exhibit 1 and 2). Investigations were carried out by PC Francis Aburi who upon visiting the scene made an opinion that the motor vehicle was overspeeding as per the skid marks on the road as the road was straight and there were no obstacles that may have contributed to the accident. It was established that due to overspeeding the motor vehicle rolled at a distance of 55 metres away from the edge of the road found where it veered off the road. I have the sketch plans and I wish to produce them as exhibits 3. After the investigations the accused was arrested and charged with the offence of causing death by dangerous driving. The accused was issued with a notice to attend court on 15/5/14 and I would wish to produce the same as exhibit. The accused had an interim driving licence No. 132-1761. The motor vehicle had insurance certificate No. B6476025. I wish to produce copy of the interim licence and copy of Insurance (P. exhibit 5 and 6).

The Appellant replied;-

“The facts are true.”

The learned trial magistrate proceeded to enter a plea of not guilty against the accused and convicted him on his own plea of guilty.

The prosecution indicated that the appellant was a 1st offender and the accused had nothing to say in mitigation.

In sentencing the Appellant, the trial magistrate had this to say;-

“I have considered the circumstance of the offence and the fact that the accused person is a first offender. I have also noted that the deceased lost her life as a result of careless driving by the accused who was overspeeding as the report shows that there was no pre-accident defects noted in the motor vehicle upon inspection. The fact that the accused was driving using an interim licence shows that he had not gained sufficient experience on the road yet he was overspeeding a fact which suggests that he was a real danger even to other road users. I have also considered that the accident was self involving with no obstacles on the road and there is no doubt that it was due to careless overspeeding. The court also notes that the accused is not remorseful at all. Even though the accused is a first offender this kind of offence is a serious one and is treated as such and that is why the legislature gave a severe term of imprisonment upon conviction. I will sentence the accused to serve 5 years imprisonment. Right of appeal 14 days.”

Aggrieved by this decision, the Appellant on 7th April, 2015 drew and filed a memorandum of appeal seeking out five (5) grounds of appeal which he seeks to have the judgement set aside and sentence terms reviewed or varied.

In the memorandum of appeal five (5) grounds were raised as follows;-

1. That the learned trial magistrate erred in having failed to appreciate that the appellant fully cooperated with the court by having pleaded guilty and even admitted the facts as presented by the Respondent. Accordingly, it was unreasonable for the court to conclude that the Appellant was

- not remorseful as the Appellant's not guilty should have been treated as such.
2. That the learned trial magistrate erred in having failed to take into account the fact that the Appellant was a first offender, had pleaded guilty and there was no evidence that the Appellant had either consumed alcohol or any other intoxicating substance and neither was it suggested by the Respondent that the Appellant had deliberately taken risk and/or controlled the motor vehicle with care abandon so as to warrant a custodial sentence.
 3. That the learned trial magistrate erred in having failed to appreciate that the proceeding herein, having been the first time that the Appellant was appearing in court, as indeed he was treated as a first time offender, that the appellant was quite understandably not aware of how proceeding are conducted in the court. Had the Appellant not been subject to the said handicap, the Appellant would have mitigated as follows:-
 - a. That he was a first offender.
 - b. The reason he swerved was because he said a big pothole which he had to avoid but in the process the vehicle overturned a few metres from the pot-hole.
 - c. Infact, the deceased was his fiancée and more than anything, the Appellant will throughout his life live to remember that because of his action he lost his fiancée.
 - d. That he fully cooperated with the police and the court.
 4. That accordingly the Appellant prays that it be deemed that having served prison term for barely a month, the same be deemed as adequate punishment in all the circumstances.
 5. That in all the circumstances, the sentence imposed is excessive, harsh and unreasonable and it would be fair and just to set aside or vary the same.

M/S Murage counsel for the Appellant has submitted that the Appellant was charged with causing death by dangerous driving contrary to section 46 of the Traffic Act for which he was convicted on his own plea of guilty and sentenced to serve ten (10) years imprisonment by the trial court on 31/7/2014. She stated that it is this sentence that the Appellant is appealing against for he feels it was extremely harsh given the set of circumstance laid out in his grounds of appeal.

According to M/S Murage, learned counsel for the appellant, the trial magistrate ought to have considered that by pleading and drifting the facts as prescribed by the Respondent the appellant had demonstrated honesty and that he was not preferred to waste court's time and that he was remorseful.

She also submitted that there was no evidence that the appellant had consumed alcohol or anything intoxicating to suggest that he had deliberately failed to take control the motor vehicle he was driving. It was confirmed that the appellant was a first offender and was unrepresented hence he did not understand the nature of proceedings which were to be conducted and he ought to have conducted himself.

M/S Murage, counsel for the appellant went on to explain that had the appellant been represented he would have brought out the issue of being a first offender, explained the reason he swerved to his right because of a pothole and that the deceased, Eunice Kisangi was his fiancée, therefore he was highly traumatized.

She further submitted that the appellant had already been in custody for over 1 year and has therefore served adequate sentence.

She prayed that the appeal be allowed and judgement of the lower court set aside. She also prays that the sentence of 5 years imprisonment be deemed extremely harsh and that 1 year he has already served be deemed as adequate punishment. She cited section 35 of the Penal Code to support this.

The state through the learned state counsel, M/S Ogweno opposed the appeal. She submitted that the plea was properly taken, hence unequivocal.

She relied on the case of *Wainaina Vrs. R. KLR 615 [1986]* where the accused was also charged with the offence of causing death by dangerous driving and was convicted. She urged the court to consider the

conviction in this case.

M/S Ogweno submitted that section 35(2) (ii) and (iii) of the Criminal Procedure Code which provides;-

“The appellate court with the duty to alter the finding, maintain the sentence, reduce or increase the sentence. Can only be exercised where the court is satisfied that there exists sufficient evidence that entitles it to alter the order.”

She added that section 46 of the Traffic Act under which the appellant was charged provides for the sentence of a term not exceeding 10 years and so the 5 year imprisonment term give was not excessive. She referred the court to the case of *R. Vrs. Jayani & Another KLR (2001) 593* where it was held that paragraph 3 and 4:-

“The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing for reparation for term done to victims in particular and to society in general. This is also seen as promoting a source of responsibility in offenders.”

A court on appeal will only interfere with the discretion of a trial court in sentencing where the sentence was imposed against legal principles or where relevant factors were not considered or irrelevant and or extraneous matters considered or normally where the sentence is manifesting excessive in need of the circumstance of coming case.

I have considered the grounds of appeal, submissions by both counsel and cited laws.

In this case, I find that it is not in contention that the appellant was properly convicted and sentenced on his own plea of guilty. In fact, I have gone through the proceedings of the lower court with regard to the matter and established that the plea was unequivocal as the trial magistrate observed the manner of recording and steps to be taken in pleas of guilty as laid down in the case of *ADAN VRS. REPUBLIC [1973] E.A. 445*.

What is in contention is that in meting out the sentence against the appellant, the trial magistrate erred by failing to consider that;

- i. The appellant had pleaded guilty to the offence and concluded that he was not remorseful.
- ii. The appellant was a first offender.
- iii. The appellant was appearing in court for the first time and was unrepresented therefore was not aware of how proceedings are conducted in court.
- iv. That had he been represented he would have properly mitigated by pointing out to court that;-
 - a. He was a first offender,
 - b. The reason he swerved.
 - c. The deceased was his fiancée and he had been traumatized by her death.
 - d. He had fully cooperated with the police.

And as a result, he meted out a sentence, which the appellant feels is extremely harsh in the circumstances.

The trial magistrate sentenced the appellant to serve five (5) years imprisonment out of the prescribed 10 years under section 46 of the Traffic Act.

In the case of *Ugalo s/o Owoura V. Reginan (1954) EACA 270*, the appellate court sets out the pertinent

principles which must guide this court in disposing of the instant matter:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by trial judge unless, as was said in *JAMES V R (1950) 18 EACA 147*;

“It is evident that the judge has acted upon some wrong principles or overlooked some material factor. To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.”

In this particular case, what needs to be determined is whether this is a proper case to interfere with sentence.

The offence of dangerous driving under section 46 of the Traffic Act carries a maximum, but not a mandatory sentence of ten years imprisonment.

Madan and Cheson JJ, in the case of *GOVID SHANJI V. REPUBLIC (Unrepresented) CRIMINAL APPEAL NO. 30 OF 1975 (Nairobi)* stated:-

“The offence of causing death by dangerous driving is not an ordinary type of crime. While it cannot be given an aura of protection by putting it in a class of its own, the people who commit this offence do not have a propensity for it, neither is it a type of crime committed for gain, revenge, lust or to emulate other criminals. In a case of causing death by dangerous driving, a custodial sentence does not necessarily serve the interest of justice as well as the interests of the public. There are of course cases where a custodial sentence is merited, for example, when there is a compelling feature such as an element of intoxication or recklessness.”

The appeal in this case, though it was indicated by the prosecution that he was overspeeding hence the motor vehicle rolling, it has not been shown that he was driving under the influence of alcohol or any other intoxicating substance, deliberately taken risk and or controlled the motor vehicle with care abandon, had a bad driving record, or with selfish regard for other road users or passengers.

By pleading guilty, I find the appellant relieved the prosecution of the burden of having to go for a full length of trial to prove their case beyond reasonable doubt. It also showed that he was remorseful.

It is also worth noting that the appellant was unrepresented and his appearance in court, being the first one, must have overwhelming hence his failing to say anything in mitigation.

I am guided by the principles of sentencing set down in relation to the offence under section 46 of the Traffic Act by LANTON L.J. in *R Vs. GUILFAYCE (1973) 2 AU E.R. 844* and find that the prosecution has not raised the any compelling grounds to warrant the appellant continue serving a custodial sentence.

I therefore allow the appeal against sentence and proceed to review the sentence by the trial magistrate.

The appellant is fined Kshs.50,000/- or he serves 1 year imprisonment in default. I also order his driving licence cancelled for 1 year.

Ruling delivered, dated and signed this 13th day of October 2015.

D. CHEPKWONY

JUDGE

In the presence of:

M/S Ocholla for the state

Appellant

Court Assistant Kiarie