



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL APPEAL CASE NO. 8 OF 2015**

**GILBERT KIPTUM NGETICH.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**(Appeal arising from the judgment of [Mr. J. Macharia, Ag.P.M] in Keroka Traffic Case No. 560 of 2011}**

**JUDGMENT**

The Appellant **Gilbert Kiptum Ngetich** was convicted of causing death by dangerous driving contrary to **Section 46** of the **Traffic Act, Cap 403** of the **Laws of Kenya**.

The particulars of the offence were that on the **21<sup>st</sup> day of October, 2011** at about 1300 hrs along Keroka Sotik road at Nyaronde area in Masaba District within Nyanza Province being the driver of motor vehicle registration **No. KBM 568Z** Toyota Hilux Double Cabin drove the said vehicle on the said road at a speed having regard to all circumstances of the case including the nature condition and use of the road and amount of the traffic which is Actually at the same time or which might be reasonably expected to be on the road and knocked down one **Amos Nyauuma** aged 5 years who died on the spot.

The appellant pleaded not guilty and his trial commenced before **Keroka Magistrate Court at Keroka** before **Hon. J. Macharia**. He was found guilty and convicted and sentenced to 2 years imprisonment, on **17.04.2013**.

The appellant being aggrieved and dissatisfied has now appealed against both conviction and sentence.

He relies on ten (10) grounds. They are:-

1. *That the learned trial Magistrate erred in law and in fact in convicting the appellant when in fact there was no evidence supporting the charge.*
2. *That the trial Magistrate erred in law and in fact by not receiving defence including an examination-in-chief, cross examination and re-examination of the appellant and any of his witnesses.*
3. *The trial Magistrate erred in law and in fact when the evidence on record was tainted with a lot of contradictions.*
4. *The learned magistrate erred in totality in law and in fact on the whole procedure as to the mode of taking evidence especially defence evidence as he did not evaluate the defence evidence in totality and failed to accord the appellant evidence the due weight it deserved.*
5. *The trial Magistrate erred in law and in fact by not appreciating that the driver made a concerted effort to avoid the accident by swerving away from the accident victim but despite a judicious*

*effort the victim came into kinetic contact with the right front headlights of the appellant's motor vehicle.*

6. *The trial Magistrate did not appreciate that the contradictions adduced in the trial court by prosecution witnesses raised doubt that was to be for the benefit of the accused person but instead, the benefit of doubt went to the prosecution.*
7. *The trial Magistrate erred in law and fact by not applying the proper degree in criminal matters i.e beyond any reasonable doubt.*
8. *The trial Magistrate erred in law and in fact in convicting the appellant herein without proper evaluation of the evidence which was full of contradictions.*
9. *The sentence as harsh in the circumstances for a first offender who has had a clean accident free driving licence for approximately two decades.*
10. *That the evidence given did not prove negligence on the part of the appellant neither did it support the charge preferred against the appellant.*

### **The appellant's submissions.**

The prosecution witnesses were five (5) in number. However, only two, **PWI** and **PWIII**, appear relevant to this appeal.

**PW1** – Ronald Bosire was an eye-witness and

**PWIII** – Isaac Kambuthi – an investigating officer from Keroka Traffic Department.

### **PW1 and PWIII contradict on the following points:**

- a. On point of impact seems to vary,

**PWI**, said the deceased was hit on the side of the road. However, on this point,

**PWIII**, said the pedestrian was knocked on right side of the road before crossing the baseline. But the body was 25 metres from the edge of the road.

- b. On the distance of motor vehicle from the point of impact,

**PWI**, said it was 100 metres from the point of impact

**PWIII**, said the vehicle stopped 64 metres from the body. In cross examination, he reduced the distance to 54 metres. He construed this distance of 54 metres to indicate the motor vehicle was moving at a high speed. A reasonable speed the distance would have been 20 metres.

The appellant is said not to have been explained his rights under **Section 211** of the **Criminal Procedure Code** as by law established.

### **The role of the first appellate court**

As to whether there was sufficient evidence to support the conviction, this, court, as this is the first appellate court is enjoined to consider the entire evidence, evaluate it and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify (*see Okeno vs Republic [1972] E.A 32*).

At page 19 of the proceedings, the submission by the appellant that **Section 211** of the **Criminal Procedure Code** was not explained is clearly rebutted. What is more the appellant having been explained the importance of **Section 211**, made an informed choice, to not only give unsworn statement but also proceeded to state that he had no intention to call witnesses in defence of his case.

The points for determination

1. *The apparent contradictory testimonies of PW1 and PWIII as to the point of impact and the point of stoppage indicate that the appellant was not to blame.*
2. *Does the sentence meted out on the appellant harsh in the circumstances for a first offender who had a clean accident free driving licence for approximately two decades.*

On point 1, above, the guiding legal principle is the one enshrined in the case of: **Atito vs Republic 1975 E.A 278** where the Appeal 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”***

***And here the word fault is construed to mean a failure, a failure, a falling below the care and skill of a competent and experienced driver in relation to the manner of the driving and to the relevant circumstances of the case...”.***

### **FINDINGS**

Although it is indicated there was a school in the vicinity, there was no sign to that effect as a warning to the motorists. The driver – the appellant – was driving at, in my view, at high speed possibly 80, 120 KMH, possibly less or possibly more, but on his side of the road i.e on the left side.

The sudden emerging of a young man onto the road, brought up a situation which was dangerous but which, in my view, the driver had a fault input into this dangerous situation unfolding in front of his eyes.

The stoppage distance variously put at between 54 metres, or 64 to 100 metres, can be construed to be the evidence of high speed as this involved attempt to avoid a fatal impact with a pedestrian that appeared inevitable and also at the same time attempting to steady and control the motor vehicle. And all these happened in a split second.

Therefore the court’s finding on the offence of causing death by dangerous driving, the appellant had, in my view a fault on his part.

### **The second point for determination**

Secondly, the court’s finding on sentence is confirmed as harsh. The principles of sentencing in relation to this offence were considered by the **Court of Appeal, Criminal division in Republic vs Guilfayie [1973] 2 All E R 844, Lawton L. J.**, delivering the judgment of the court, said: ***“... there are many variations in penalties. Cases of this kind fall into two broad categories, those through inattention or misjudgment and secondly, those which has shown as selfish disregard for safety of other users of the road, with degree of recklessness. A sub-division of this category includes those caused by accused’s consumption of alcohol or drugs”.***

In the case of **Govid Shamji vs The Republic (unreported)** in which **Madan and Chesoni JJ** said: ***“... a custodial sentence does not necessarily serve the interests 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”***

In the instance case, the appellant was sentenced to 2 years imprisonment. In my view this was harsh.

- a. *Accordingly, this court rules that the appeal dated 18<sup>th</sup> July, 2013 be and is hereby allowed in respect of the sentence only.*
- b. *That the sentence imposed be and is hereby set aside, the period he has been in custody is deemed as adequate.*

c. *The appellant is set at liberty forthwith as a consequence thereof.*

It is so ordered.

**Dated and delivered** at **Nyamira** on this 19<sup>th</sup> day of October 2015

**C. B. NAGILLAH**

**JUDGE**

**In the presence of:**

***Oyagi* for the appellant**

***Malesi* for the respondent**

***Mercy* Court Clerk**