



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 210 OF 2011

(Being an appeal from the Original Conviction and Sentence in Traffic Case No. 5 of 2010 in the Principal magistrates Court at Kitui – Mr A.G Kibiru (P.M) on 10/11/2011)

JOHN MWEMA MBWAAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT.

The appellant herein **John Mwema Mbwaa** was convicted at Kitui Law Court with four counts of causing **Death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya** and **one count of carrying excess passengers contrary to Section 100 of the Traffic Act Cap, 403 Laws of Kenya**. The appellant was sentenced to serve **3 years imprisonment on Count 1, II, III and IV and 6 months imprisonment on Count V**.

Being dissatisfied and aggrieved by the conviction and sentence, he lodged this appeal. The particulars were that on the 20th day of February, 2010 at about 9.40 am at Kauwi area along Kabati – Kitui Road in Kitui District within Eastern being the driver of motor vehicle Registration No. **KBH 968 P Toyota Carina Station Wagon**, drove the said motor vehicle along the said road on a manner which was dangerous to the public having regard to all the use of the road and the amount of traffic which was actually at the time or which might reasonably be expected to be on the road, drove the motor vehicle loaded with nine (9) passengers and Miraa (gut) instead of four and at a high speed and lost control of the said motor vehicle which overturned on the road and caused the Deaths of Agnes Kavata who was a passenger on board.

On Count II: On the same facts caused the Death of **Jane Mutuo Mwinzi** who was a passenger on board.

On Count II. On the same facts, caused the Death of **Carol Mwinzi** who was a passenger on board.

On Count IV: On the same facts, caused the deaths of **Caroline Syungui** who was a passenger on board.

On Count V. It was alleged that on the same date and time, he carried nine (9) passengers instead of four.

The appellant denied the charge and prosecution called six witnesses to support its case.

Appellant gave a sworn defence and called no witness. However, the trial magistrate found the appellant guilty, convicted him and sentenced him to 3 years imprisonment on Counts 1-4 and 6 months imprisonment on Count 5 and the sentence to run concurrently. The trial magistrate also suspended the appellant driving licence for 3 years after the sentence.

The appellant through the firm of **J K Mwalimu Advocates** filed a Petition of Appeal and relied on various grounds:-

1. ***That the learned Senior Resident Magistrate erred and misdirected himself on the law and the facts when he disregarded the immediate cause of the accident of a tyre burst and imposed a reasoning that was not fully backed by the evidence on record and thereby erroneously convicted the appellant.***
2. ***That the learned Senior Resident Magistrate erred and misdirected himself on the law and the facts when he applied selective bits of the evidence in convicting the appellant while disregarding the exonerating evidence.***
3. ***That the Learned principal magistrate erred and misdirected himself on the law and the facts when he convicted the appellant on doubtful and contradictory evidence.***

When the appeal come up for hearing on 16/10/2013, the learned counsel, **Mr Mwalimu** submitted on behalf of the appellant and reiterated the contents of the Petition of Appeal. He submitted that the trial magistrate disregarded the immediate cause of accident and imposed reasoning not a backed by the evidence. That PW2 who was a passenger in the motor vehicle stated that motor vehicle was at a high speed of about 180 KMPH when motor vehicle had a tyre burst . That PW2 did not complain about the speed nor the other passangers. He further submitted that there was no witness to corroborate the evidence of speeding. Further, PW4 only attributed the accident to speeding and overloading and that was not direct evidence. That though the trial magistrate ruled that the motor vehicle was extremely damaged, PW6 who produced the inspection report did not mention extensive damage.

The learned Counsel further submitted that the appellant's defence was disregarded. He had stated that the accident was caused by a tyre burst and he had tried to control the motor vehicle but it landed in ditch as he was avoiding an oncoming motor vehicle . Appellant had 16 years of experience and his evidence was more credible than that of PW2 . That the appellant was convicted on doubtful and contradictory evidence. He urged the court to allow the appeal and set aside the sentence. It was further submitted that no evidence that appellant was carrying nine passengers and the sentence was excessive.

M/s Gakobo, the learned State Counsel, opposed the appeal. She supported the conviction and the sentence, She further submitted that the evidence on record was clear and the motor vehicle was overspending at 180 Km/h and that evidence was not controverted . That the cause of accident was over speeding and motor vehicle was overloaded. She further submitted that the defence of the appellant was considered by the trial court but the defence did not dislodge the prosecution case. She also submitted that the sentence was not excessive as the maximum sentence was 10 years but the court considered the mitigations and sentenced the appellant to 3 years imprisonment on each of the count of causing death by dangerous driving.

I have now analyzed and re-evaluated the evidence on record so as to reach my own findings and draw my own conclusions as is required of me as the first appellate court. In doing so, I am mindful of the fact that I did not have the advantage of seeing nor hearing the witnesses as they testified. This is in line with the case findings on the case of **Kiilu and Another Vs Republic (2005) KLR page 174** where the court held that:-

An appellant on first appeal, is entitled to expect evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on evidence. The first appellate court must first itself weight conflicting evidence and draw its own conclusions".

In his Judgement, the trial magistrate framed the issues for determination to be whether the appellant drove dangerously and caused the said accident.

In summary, **PW2 Alex Kyalo Mungau**, had told the court that on 20/2/2010 at 9.30 am he had gone to Mbeere market to collect Miraa. They boarded motor vehicle at Kitui to take them to Mbeere and were nine passengers. The motor vehicle was KBH 968P, driven by the appellant. As they travelled, motor vehicle got a tyre burst. The motor vehicle was driven at a speed of 180 Km/h. After the tyre burst, motor vehicle lost control and it rolled. PW2 was thrown in the motor vehicle's boot and other passengers died on impact. PW2 was injured and taken to hospital. He lost consciousness and came to in hospital. Later his P3 form was filled.

PW4, PC Protus Nganu attached to Kitui Police Station investigated the matter. An accident had occurred on 20/2/2010, involving motor vehicle KBH 968 P, Toyota Carina along Kitui – Kabati Road. He visited the scene and found motor vehicle lying upside down on the right side of the road. There were 3 female bodies on the road. He removed the bodies to the Kitui District Hospital mortuary and drew a sketch plan and prepared legend. He later learnt that another passenger died at Kitui District Hospital. He opened a file and visited the scene. After investigations, he charged the appellant with the present offence. The deceased were **Jane Mutuo Mwinzi, Carol Mutheu, Agnes Kaveti and Caroline Syungui Wambua**.

PW1, Dr Leonard Okoko attached to Kitui District Hospital produced post mortem reports for four deceased persons. The post mortem reports had been filled by Dr Maina whom he knew very well.

PW5 : Peter Wambua Muthengi produced a P3 form for Alex Kyalo which had been filled by one Joseph **Katothia** a colleague of his for 5 years and he knew him well.

The appellant on his part denied the charge and stated that on 20.2.2010, he had come from Embu. Then on his way back to Kitui, he found four people at Kiritiri. He gave them a lift and on the way near Kauwi, the motor vehicle had a tyre burst. He tried to control it but he was unable as he was avoiding a head on collision with an oncoming Nissan. He further stated that he had 16 year experience and did not cause the accident by dangerous driving.

The Court has analysed and re-considered the evidence on record. The issue now for determination is whether prosecution proved its case beyond a reasonable doubt.

In considering ground 1 of the appeal, in which the appellant submitted that the trial magistrate disregarded the immediate cause of the accident as the tyre burst and imposed a reasoning that was not fully backed by evidence on record, I find that there is no doubt that on 20/2/2010, there was a self involving accident along Kitui Road.

The accident involved motor **vehicle KBH 968P, Toyota Carina** driven by the appellant herein. There is no doubt that motor vehicle had carried more than a five passengers and also a load of Miraa as was adduced by PW2. There is also no doubt that motor vehicle had a rear tyre burst and thereafter motor vehicle rolled and four of the passengers died due to the injuries sustained in the accident. PW2 and the appellant were injured. PW2 told the court that he was sitted behind the driver and he saw the speedometer of the motor vehicle reading 180 Km/h.

That after the motor vehicle had a rear tyre burst, the appellant could not control the motor vehicle and it rolled and three of the passengers died on the spot. The appellant on his defence told the court that he was not at high speed and after the tyre burst, he tried to control the motor vehicle but it landed on the ditch. I have seen the motor vehicle inspection report exhibit 9. The motor vehicle had no pre accident defect but motor vehicle obtained extensive damage after the accident. The impact also caused the passengers to be thrown out of the motor vehicle and they received fatal injuries. I have also seen the sketch plan and after the tyre burst, the motor vehicle skidded for about 50 metres. That meant that the motor vehicle was at a high speed. Though the appellant submitted that the trial magistrate misdirected himself when he concluded that the cause of accident was over speeding and not tyre burst, I find that if

appellant was not at a high speed, he could have managed to control the motor vehicle. The impact would not have been so high as to cause the passengers to be thrown out of the motor vehicle. I humbly agree with the learned trial magistrate that the cause of accident was the over speeding and he had also carried five passengers instead of four and loaded motor vehicle with miraa.

On the second ground, the appellant submitted that the learned trial magistrate misdirected himself when he applied selective evidence in convicting the appellant. That he relied on the evidence of PW2 only and disregarded the exonerating evidence adduced by the appellant. I have analysed the findings of the learned trial magistrate and noted that he regarded all the evidence adduced in court. He stated that PW2 could see motor vehicle's speedometer reading 180 Km/h . That PW4 visited the scene and noted motor vehicle was over speeding. The trial magistrate considered the Defence and noted that the appellant was economical with the truth. The trial magistrate had the advantage of seeing the witnesses and observing their demeanor which I do not have. I have no reasons to doubt the trial magistrates findings on the defence of the appellant herein.

On the 3rd ground, the appellant submitted that the learned trial magistrate misdirected himself when he convicted the appellant on doubtful and contradictory evidence. I have considered the evidence of PW2, PW4 and the sketch plan. There is no doubt that motor vehicle was over speeding. The evidence of PW2 who was a passenger in the motor vehicle was not doubtful and there are no contradictions. In my humble opinion, I find that the trial magistrate convicted the appellant on sound evidence.

Finally on the fourth ground, the appellant submitted the learned trial magistrate imposed a manifestly harsh and excessive sentence considering the circumstances of the case.

However, the learned State Counsel submitted that a sentence of 3 years was lenient enough given that the offence fetches a maximum sentence of 10 years imprisonment. I have considered the provisions of **Section 46 of the Traffic Act**. Indeed the maximum sentence is 10 years imprisonment. The trial magistrate in his sentence stated that he had considered the mitigations. He however did not consider the circumstances of the case. The appellant was also injured in the accident and he had alleged that he had given the deceased persons a lift. The sentence imposed by the learned trial magistrate was not manifestly harsh as submitted by the appellant given that four people lost their lives. However, I have noted that the appellant was also injured due to the accident. I will reduce the sentence to 2 years imprisonment on counts **1,2,3,& 4**. However, the sentence of 6 months imprisonment on Count 5, will still stand. Sentence to run concurrently from the date of the conviction and sentence by the trial magistrate. The appellant will therefore be sentenced to the term already served since it is now more than 2 years since he was jailed.

The appeal succeeds on the sentence only.

L. N GACHERU

Dated, Signed and delivered at **MACHAKOS** this 7th day of May 2014

B T JADEN