



No. 103/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 173 OF 2012

DAVID MUASA WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Traffic Case No. 98/2011 by Hon. P. N. Gesora on 15/11/2012)

JUDGMENT

1. The Appellant was charged with seven (7) counts of causing death by dangerous driving contrary to section 46 of the Traffic Act, Cap 403 Laws of Kenya.
2. Particulars of each count stated that on the 17th day of July, 2010 at about 5.30am along Mombasa-Nairobi Road, in Machakos District within Eastern Province, being the driver of motor-vehicle registration No. KAZ 802B Scania Bus, drove the said motor-vehicle on the said road without due care and attention to other road users by overtaking where the road was not clear thus causing an accident by hitting motor-vehicle registration No KBG 475E Isuzu lorry which was moving from the opposite direction and as a result caused the death of **Melkar Wanje Baraka** in count 1. In counts 2-7 persons who died were indicated as **Lennox Mumba Nzai, Caleb Wekesa, Festus Kabaruru Muruga, Nancy W. Wangire, Anita Chizi Chokwe and John Kinyua Kamau**
3. The Appellant was tried, convicted and sentenced. He was fined Kshs. 30,000/= or six (6) months imprisonment in default on each count.
4. Being aggrieved by the conviction and sentence, the Appellant now appeals on the following grounds:-
 - He was convicted on a defective and non-existent charge. The statement of the offence was inconsistent with the particulars thereof.
 - Evidence adduced by prosecution witnesses was contradictory. The point of impact was not established.
 - The direction the motor-vehicles were moving to was not established.
 - The evidence of the appellant and his witnesses was not considered.
 - No post-mortem report was produced in evidence. He attributed all these to the error and misdirection on the part of the trial magistrate
5. In her submissions **Ms Kamende**, Counsel for the appellant submitted that the judgment of the court was based on non-existent charges. The charges were defective and contrary to section 134 of the Criminal Procedure Code. The trial magistrate failed to make a finding on how the lorry

reached the middle part of the road and changed the statement in respect of the direction the motor-vehicle eventually faced.

6. Further, she submitted that the court failed to make a finding per the requirement of Section 169(1) of the Criminal Procedure Code. The court failed to evaluate the defence's evidence and filled gaps into the prosecution's evidence.
7. In a response thereto, the learned State Counsel **Mr. Mwangi** opposed the appeal. He argued that the fact that there was death as a result of the accident was not in dispute. The accident was caused by the appellant who was driving at a high speed. His manner of driving was reckless. The evidence of the Motor-vehicle Inspector clearly showed that the appellant failed to keep to his side as the bus was extensively damaged on the right hand side following a head-on collision.
8. Further, he submitted that the appellant's defence was factually inaccurate. The photographic evidence taken of the scene had been tampered with therefore compromised. The evidence lacked probative value. Finally, that the court's observation and findings were accurate. In the circumstances the conviction was safe. He urged the court to uphold the conviction and sentence.
9. This being the first appeal, it is incumbent upon me to evaluate the evidence independently and draw my own conclusions. (see ***Okeno versus Republic [1972] E.A. 32, also Njoroge versus Republic [1987]KLR 19.***)
10. The evidence adduced before the learned trial magistrate was that on the 17th July, 2010 at 5.30am, the appellant was driving motor-vehicle registration number KAZ Isuzu Bus (*hereinafter "the bus"*) from Malindi heading to Nairobi. He had passengers on board. On reaching Kyamutheke-Konza area within Machakos County, he collided with motor-vehicle registration number, KBG 475E Isuzu Lorry. Some of the passengers sustained fatal injuries. Investigations carried out culminated into the appellant being charged.
11. PW1, **Patrick Munyao Kaminda** a tout who was aboard motor-vehicle registration number KBG 475E Isuzu lorry (*hereinafter "the lorry"*) that was being driven by **Bonvita Wambua**, said they were from Mlolongo heading to Salama when he saw a bus coming from Mombasa direction. It attempted to overtake another motor-vehicle; it moved onto their lane and collided with the lorry. After the collision, the bus overturned on the road on the left lane and faced Nairobi direction. The lorry was pushed facing right and stopped on the same lane as one faces Nairobi.
12. PW2, **Bonvita Wambua Daudi**, the driver of the lorry registration number KBG 475E, stated that on reaching Kyumvi as he descended, he encountered a bus that was overtaking a big lorry. He tried to swerve to the edge of the road to avoid a head-on collision. They however collided. The impact was on his lane. The bus overturned. The lorry's tyre burst. It lost control and tilted facing the right side of the road.
13. PW5, **Mary Medza**, a passenger on the bus stated that the bus overtook a lorry as another one was coming from Nairobi direction. The lorry that was being overtaken did not give them an opportunity of returning to their lane. In the process another lorry came from the Nairobi direction. The motor vehicles collided.

On cross-examination, she stated that she was seated next to the passenger passageway and could therefore see how the accident happened. She heard a bang as the lorry scratched the bus on the side.

14. PW8, **Samuel Maina Macharia**, an Inspector of Motor-vehicles examined the lorry and bus that were involved in the accident. From the damages noted on both motor vehicles, he concluded that the collision was head-on as the motor-vehicles had come from different directions.
15. PW9, **Boniface Shabir Baraka**, a passenger in the motor- vehicle who sat right behind the driver on the middle seat said the bus was speeding. He saw two motor-vehicles running parallel. The bus then collided with the oncoming motor-vehicle. On cross-examination he estimated the bus to have been moving at 80-100km per hour. One of the motor-vehicles was small while the other was big.
16. PW11, **No.43731 Corporal Paul Wanjohi** visited the scene of the accident. He found the bus on the left hand side of the road as one faces Nairobi. The lorry was some 32 metres away from the bus when facing the Nairobi direction. It was some 7.7 metres off the road. He drew the sketch plan. On cross examination; he stated that the point of impact was partly on the middle part of the

- road and partly on the opposite lane.
17. The appellant's evidence was that while driving he saw two (2) motor-vehicles from the opposite direction that blocked his way. On seeing the lights he slowed down. He swerved to avoid colliding with the motor-vehicle; the bus was then hit on the right at the driver's door extending to the right side. He was driving at 60 kph.
18. DW2, **Rodgers Wekesa Baraza**, DW3, **Benedict Baraza** testified that they were in the bus when they saw a truck overtaking a saloon car. The lorry then hit the bus on the right side and the impact according to them was on the right side. The driver of the bus had attempted to avoid the accident by braking but it was too late.
19. DW4, **Reuben Mauti Asuko**, an ex-police officer, a private investigator and employee of Directline Insurance Company moved to the scene of the accident after the lorry had been towed away. He however, drew the road view, photographed the scene and made a sketch plan.
20. DW5, **Joseph Kazungu Kadenge** a conductor of the bus stated that the appellant attempted to avoid a lorry that was overtaking another motor-vehicle when the lorry hit the bus. According to him the bus was being driven between 50 – 60 kph.
21. It has been argued by the appellant's counsel that the appellant was charged with an offence that does not exist in law. The particulars of the offence support an offence created by Section 49 of the Traffic Act. This in her opinion makes the charge defective. The appellant was charged with offences under Section 46 of the Traffic Act. The marginal note of Section 46 of the traffic Act states thus:-

“Causing death by driving or obstruction”

The statement of the offence in the case reads as follows:-

“Causing death by dangerous driving contrary to section 46 of the Traffic Act”

22. The statement of the offence is not faulted by the appellant. Section 46 of the Traffic Act provides that:-

“Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence...”

23. Lifting what is relevant would read thus :-

“Any person who causes the death of another by driving...a motor-vehicle on a road...or in a manner which is dangerous to the public...”emphasis is mine.

24. A perusal of the charge sheet as drawn shows that the manner (mode) that was dangerous is described as:-

“...drove the said motor vehicle on the said road without due care and attention to other road users by overtaking where the road was not clear, thus causing an accident by hitting motor vehicle registration No. KBG 475E Isuzu Lorry which was moving from the opposite direction and as a result caused the death of...”

25. As correctly pointed out by counsel for the appellant, driving a motor-vehicle on a road without due care and attention amounts to careless driving contrary to section 49 of the Traffic Act. The question to be posed is whether the anomaly was fatal hence making the charge defective?
26. What ought to be contained in a charge is stated in Section 134 of the Criminal Procedure Code which provides thus:-

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as the nature of the offence charged”.

27. The question to be answered, therefore is whether in the instant case the charge clearly informed the appellant what he was being accused of to enable him prepare for his defence. It is a requirement that the accused should be made to understand the nature of the charge he faces to enable him prepare for his defence. I have perused the Lower Court record; the accused was represented by counsel. The alleged omission was not pointed out. Even in the submissions the issue was not raised. This means that the Appellant understood the charge and was able to prepare for his defence.

28. Since no injustice occurred, the use of the words

“...without due care and attention to other road users...”

In framing of the charges does not make the charge defective.

29. It is not in dispute that the seven deceased persons stated in each and every count died as a result of the accident that occurred on the 17th July, 2010 at 5.30am. PW10, **Dr. Emmanuel Loiocha** performed post-mortem on their bodies and opined that their death was due to haemorrhage due to a road traffic accident.

30. It was the evidence of DW1, DW2, and DW5 that the lorry was overtaking another car when it hit the bus. This meant that they attributed negligence on the part of the driver of the lorry. PW1, PW2 and PW5, however stated that the accident was caused by the driver of the bus (appellant) who was overtaking in circumstances that he was not supposed to. This resulted into the accident. With this kind of evidence from eyewitnesses, it was important for the point of impact to be established.

31. PW11, the investigating officer visited the scene of the accident prior to the scene being disturbed. He stated that there was sand and particles of the vehicle at the point of impact in his evidence in chief. On cross-examination he stated that the point of impact was partly on the middle of the road and partly on the opposite lane.

32. Looking at the sketch plan drawn, the point of impact is indicated on the right hand side of the road as one faces Nairobi direction. The width of the road is 7.3 metres. The point of impact is some three (3) metres away from the edge of the road. This means that the point of impact was some 0.65 metres inside the right lane as one faces Nairobi direction. To collide with the other one, the motor-vehicle that was on the left lane could have moved to the right lane.

33. The damages occasioned on both motor vehicles were on the right side which was evidence of the vehicle having come from the opposite direction. This would mean that the bus which was on the left side having moved to the right side would shoulder more blame.

34. In the case of an accident, a collision is not conclusive evidence of dangerous driving. There must be evidence of some fault on the part of the driver. (see **Republic versus Wallace [1958] E.A. 582**).

35. In the case of **Republic versus Evans [1962] 3 All ER 1086**, dangerous driving was defined as follows:-

“If a man adopted a manner of driving which at his trial on a charge of causing death by dangerous driving the jury think was dangerous to other road users in all circumstances, then on the issue of guilty it matters not whether he was deliberately reckless, careless, momentarily in-attentive or even doing his incompetent best”.

36. This is a traffic case which is quasi criminal. The duty was upon the prosecution to prove their case beyond reasonable doubt. PW1, the tout of the lorry, PW2, the driver of the lorry and PW5, a passenger on the bus stated that the bus was overtaking when the collision occurred. We however, have PW9, also passenger in the bus who said he was seated right behind the driver. He

stated thus:-

“... I saw two vehicles coming parallel. The bus was speeding. The lights came near. I held firmly as the bus collided with oncoming motor-vehicle and was thrown to the side...”

37. On cross examination he stated:-

“... I was seated behind the driver on the middle seat. I could see the road ahead clearly where headlamps were illuminating. At Konza I saw four headlights meaning the vehicles were approaching occupying both lanes. One was a smaller vehicle and the other a big motor-vehicle. The lights on the right lane which was of our base were from the big motor-vehicle. The scene had only two (2) lanes. The bus was at a speed of between 80-100kph. I could see the speedometer...”

38. In his evidence, the appellant said he saw two (2) motor-vehicles blocking the road. They were from the opposite direction. He stated that he slowed down, the vehicles were on both lanes and one was trying to overtake the other. He sensed danger as they were to hit each other head-on, he swerved off the road as the bus hit on the right side of the driver's door.

39. DW2 and DW3 were in the bus. They also saw a truck overtaking the saloon vehicle then there was a collision after the lorry moved to their side.

40. PW9, was a witness called by the prosecution. His evidence materially confirms what the defence said. This witness was not treated as a hostile witness. His evidence casts doubt to the prosecution's case as to who actually caused the accident.

41. I have perused the judgment of the learned trial magistrate in the Lower Court. Indeed as correctly pointed out by counsel for the appellant, there was an omission by the magistrate as he did not make a finding that the case had been proved beyond reasonable doubt.

42. It is a requirement for a judgment to contain points for determination and reasons for the decision.

43. This is a case where the trial magistrate stated as follows:-

“I accordingly find and hold that the accused herein moved to the adjacent lane thereby causing the collision with the on-coming vehicle above cited. This was definitely a dangerous move to make and he solely caused the accident. I accordingly hold that the accused is guilty and is convicted in all the seven counts herein as charged.”

44. It is mandatory for the court to weigh and analyse the prosecution and defence evidence in sum total. Had the magistrate analysed the evidence as a whole, I am sure he would have come up with a different verdict.

45. Having evaluated and analyzed the evidence as a whole I find that the conviction and sentence imposed in respect of all the seven (7) counts must be respectively quashed and set aside, and I so order accordingly.

46. The fine imposed, if paid shall be refunded to the appellant.

DATED, SIGNED and DELIVERED at MACHAKOS this 10TH day of OCTOBER, 2013.

L.N. MUTENDE

JUDGE