



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT KAKAMEGA
Criminal Appeal 46 of 2008**

STATEAPPELLANT

VERSUS

DAVID OKUMU OMOGO.....RESPONDENT

JUDGEMENT

The Respondent was charged with 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 respondent on the 13th day of January, 2006 at around 2.00 p.m. at Makhokho area along Kakamega-Kisumu road in Kakamega District, within Western Province, being the driver of motor vehicle Reg. No. GK A167L Nissan Pickup, drove the said motor vehicle dangerously in a speed or in a manner which was dangerous to the public, having regard to all circumstances of the case including the nature, condition and use of which might have reasonably been expected to be on the road, caused the death of **MELVIS MIDEVA**.

The Respondent was acquitted on 6th November, 2007 under Section 210 of the Criminal Procedure Code.

The State was dissatisfied by the Acquittal and preferred this appeal. The grounds of Appeal are that the trial magistrate erred in law in failing to find that the particulars of the charge were proved, erred in finding that the prosecution evidence had contradictions, failed to analyze all the exhibits produced and erred in finding that no prima facie case had been established.

Mr. Karuri, learned State Counsel submitted that the trial court focused its attention only on the issues of alleged high speed but left out the issue of dangerous driving or driving in a manner dangerous to the public. The deceased, a school girl was knocked while walking off the road from behind as per the evidence of PW3 who was with the deceased. Counsel further submitted that the six witnesses did establish a Prima facie case to warrant putting the accused on his defence. The learned magistrate did not analyze all the evidence and that there was no contradiction at all on the evidence adduced.

Mrs. Osodo, Counsel for the Respondent opposed the appeal and supported the findings by the trial court. The charge was causing death by dangerous driving. PW1's evidence on cross-examination was that he saw the vehicle after the accident. Similarly, PW3 saw the vehicle after it had hit the child. The point of impact was not clearly established. PW6 tried to introduce the element of the presence of mud at the point of impact but this was an afterthought as that information was not contained in his statement.

The deceased was hit by the accident vehicle on 13th January, 2006 at about 1.30 p.m. PW1, Josphat Amalambe testified that he was on the right hand side of the road while the accident occurred on the left side of the road as one heads to Kisumu from Kakamega. He

was 50 metres from the scene and only saw the vehicle after hearing the noise of collision. Upon hearing the noise he checked and saw the child had fallen.

PW2, **George Bunyima** identified the body at Mukumu hospital on 16th January, 2006 for the Doctor to perform Postmortem. PW7, **Dr. Jason Amukonyi** performed the postmortem. According to the Doctor, the deceased was six (6) years old and had bruised right side of the face, fracture of left femur and right clavicle, bruises on both elbows, fracture of the frontal skull and fracture of left parietal bone. The Doctor opined that the cause of death was severe head injury. PW4, **Chrispo Kidiga Ombeva**, was a relative also identified the deceased's body at the mortuary to the Doctor who performed the Post mortem.

PW3, **S M**, was with the deceased going back to school after lunch. He was 9 years old when he testified. He could recall that the accident vehicle hit the deceased on the stomach and she fell down. The vehicle came from behind and he saw it after it had hit the deceased on the abdomen.

PW5, **Police Constable, Robert Barasa**, accompanied the deceased's relatives to the mortuary for purposes of identifying the body to the Doctor who performed the Post mortem.

PW6, **Sergeant Joel Boiyo** was informed about the accident at about 2.00 p.m. and he went to the scene. He drew the Sketch Plan and found blood stains about 2 ft from the edge of the road. He also later checked the accident vehicle and found it had a dent on the front left bumper. PW8, George Odhiambo, produced the Inspection report that had been prepared by his colleague, M. J. Midude who had retired. The report indicated that the accident vehicle was G. K. A167L, Nissan Pick Up. It had a dent at the front left hand side, left hand side lights housing was broken, the left hand side reflector was ripped off. The vehicle had no pre-accident defects.

After the prosecution closed its case the trial magistrate found that the respondent had no case to answer and acquitted him under **Section 210** of the Criminal Procedure Code.

The only issue for determination is whether the prosecution evidence did establish a Prima facie case to warrant putting the respondent on his defence. The only relevant evidence as to how the vehicle was driven is that of PW1, PW3 and PW6. PW3 was with the deceased. He did not see the vehicle coming as it came from behind. They were walking on the left side of the road heading to school. The deceased was walking ahead of PW3. From PW3's evidence, it is not possible to determine whether the respondent was driving dangerously or at an excessive speed. From his evidence, it is not clear whether they were walking on the road or off the road.

PW1, Josephat Amalemba, was an eye witness. In his evidence in chief, he testified that the children were 3 metres from the road. There were five children. The vehicle was swerving to avoid a pothole and the vehicle was at a high speed. While being cross-examined, the witness testified that he saw the child after the vehicle hit her. He was on the right side of the road about 50 metres from where the accident occurred. He did not see the vehicle approaching and only saw it after hearing the noise of the collision with the child. He checked after hearing the collision. He conceded that he had not looked at the vehicle before the bang.

From PW1's evidence, it is clear that he did not see the vehicle as it was approaching. His evidence that the vehicle was avoiding a pothole is not true as he saw the vehicle after the accident. If he was 50 metres from where the accident occurred, it is possible that he could not see clearly. He checked after the collision. It is not possible to determine how the vehicle was being driven from his evidence.

PW6 went to the scene after the accident. He found blood stains 2 ft from the edge of the road on the soil. He identified the possible point of impact where there was mud. The mud could have fallen from the accident vehicle. This was before the point where there was blood. The sketch and fair plans produced cannot be held to be a correct presentation of the incident. The trial court evaluated the evidence of PW6 and found it to be wanting. The trial court found that the mud that was alleged to have been the point of impact could have fallen from any other vehicle and more so the issue of mud was not on his statement.

Although the injuries sustained are extremely serious as per the Postmortem report that alone cannot make the court conclude that the vehicle was being driven in a dangerous manner. Whoever picked the deceased to hospital could have assisted the court in finding out where the deceased had fallen after the accident. It is possible that she fell at the point where PW6 found blood but that point is not necessarily the point of impact.

The trial magistrate analyzed the relevant evidence that would have enabled her put the respondent on his defence. She found the evidence of PW1 wanting as he testified in his evidence in chief that the vehicle was being driven at a high speed but when being cross-examined stated that he saw the vehicle after the collision. The trial court also noted from the evidence of PW3 that the vehicle came from behind and therefore the witness could not have known how it was being driven.

I do find that the trial court did reach the correct decision. There was no eye witness who saw how the vehicle was being driven to enable the court make a reasoned conclusion. The evidence was analyzed and there was no need to put the respondent on his defence merely to hear from him on how the accident occurred.

In the end, I do find that this appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 5th day of November, 2009.

SAID J. CHITEMBWE

J U D G E