REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 221 OF 1995

HANNINGTON OKELLO OGOLA……..APPELLANT

AND

REPUBLIC……..…….RESPONDENT

JUDGMENT

The appellant was convicted of causing death by dangerous driving c/Sec. 46 of the Traffic Act.

It was not in dispute that the appellant was at material time driving a motor vehicle Registration KAC 953 C (G.K 567).

It hit the deceased child about 6 ½ years old who died as a result of the injuries caused. The accident was along Heshima Road near Marison Primary School within Nairobi area.

In convicting, the appellant the learned Magistrate mainly relied on the evidence of Phillip Thongo (P.W. 2) a 13 year old boy and that of another minor called Anna Wanjiru (P.W 8) Std IV pupil at the time of the accident in 1992.

Both the above children said that the appellant was driving at a high speed at the time the child was hit. Phillip further said that the appellant had overtaken a bus and gone back to its side before the accident.

Against the evidence of the above, two minor witnesses the evidence of P.W. I and P.W. 3 was as follows: - P.W. I Julius William Kinyua Chabari a clerk with a Directorate of Security Intelligence said that the deceased boy suddenly jumped onto the road and the appellant was driving about 30 K.P.H at the time. He reasserted in Cross-examination that the child suddenly ran onto the road.

P.W. 3 Francis Juma attached to the Directorate Security Intelligence testified that the appellant's vehicle was passing; the deceased jumped onto the road and was thus hit by it. He added that the appellant was driving at a low speed.

P.W. 3 as well as P.W. 4 Sgt Wanjohi said that the appellant had not overtaken any motor vehicle.

The appellant in his defence stated that he was driving motor vehicle at the time at a speed of around 30 to 40 k.p.h when the child knocked himself against his vehicle.

Bearing in mind the evidence adduced in the Court below, which shows the contradictions, it is not possible to agree with the learned Magistrate when she says in her judgment.

> "I find that the prosecution evidence in support of the charge against the accused person is overwhelming"

Indeed it must be further noted that the learned magistrate failed to comply with the procedure required before recording the evidence of the two minor witnesses i.e. (P.W. 8).

It is well established that before the evidence of a person of tender years is admitted, a *viove dive* examination should be carried out by Court to satisfy itself that (a) the witness is possessed of sufficient intelligence and understands the duty of speaking the truth, (b) understands the nature and significance of an oath. If satisfied as to (a) but not as to (b) the evidence may be examined but not on oath.; if satisfied as to (a) and (b) evidence should be taken on oath. The Court should make a note on the record to show that the procedure is complied with in order to avoid doubts as to its observance - see SAKILA V. R (1967 E.A. 403.

IN the instant case the record shows that the Magistrate affirmed Phillip (PW 2) after he said that he knew it was against God to say lies. There is nothing on the record to show that the boy knew the nature and significance of oath.

So far as Anna (P.W. 8) goes the record states that she understood the importance of speaking the truth and no more. It is clear that she gave evidence not on oath.

Evidence not on oath requires corroboration as a matter of law. Phillip's evidence taken after he was affirmed was without the required voire dire examination on the issue.

The Magistrate further failed to give proper place to the evidence of P.W. 1 and P.W. 3 in his judgment. He did not direct his mind to it as is clear.

For the above reasons I find that the conviction cannot stand.

ORDER:- the appeal is allowed. The conviction is quashed and the sentence is set aside. The appellant be released forthwith.

Dated and delivered at Nairobi this 2nd day of March, 1995

V.V. Patel

JUDGE