



REPUBLIC OF KENYA

Tui v Republic

High Court, at Nairobi

May 29, 1991

Porter & Mbaluto JJ

Criminal Appeal No 1259 of 1989

Criminal law – causing death by dangerous driving – whether merely alleging high speed is sufficient - failure to call expert evidence to show that speed may have been implied by the length of the skid marks - whether charge proved beyond reasonable doubt.

The appellant was convicted in a Magistrate's Court for the offence of causing death by dangerous driving and sentenced to two years imprisonment.

The case for the prosecution was that the accident was caused by the appellant in that he had driven at a high speed as well as on the wrong side of the road and also failed to brake in time to avoid hitting the deceased.

In convicting the appellant the trial magistrate relied on the evidence of alleged high speed and a further claim that the point of impact was on the appellant's wrong side of the road.

Held:

1. To merely state that a motor vehicle was traveling at a high speed without elaborating was not sufficient.
2. There was no expert evidence to show what speed was implied by the 44.50 meter skid marks.
3. However, there was sufficient evidence to show that the appellant had driven without due care and attention and he was guilty of the offence of careless driving contrary to section 49 of the Traffic Act.

Appeal allowed.

Cases

No cases referred to.

Statutes

Traffic Act (cap 403) sections 46, 47, 49

Advocates

Mrs Ondieki for the Respondent.

May 29, 1991, the following Judgment of the Court was delivered.

The appellant was convicted in the court below of causing death by dangerous driving contrary to section 46 of the Traffic Act and was sentenced to 2 years imprisonment. His appeal to this court is against both the conviction and sentence.

The prosecution of the appellant arose from an accident which occurred within Thika Municipality on 11.8.88. On that day the appellant was driving his matatu from Donyo Sabuk when he hit a young girl as she attempted to cross the road near the Polysack Company.

At the point of the accident the road is straight and the evidence is that the weather was good. Further evidence by the motor vehicle examiner suggested that the appellants's *matatu* did not have any pre-accident defect.

The case for the prosecution was that the accident was caused by the appellant in that he drove at a high speed as well as on the wrong side of the road and also failed to brake in time to avoid hitting the deceased. These acts and omissions were alleged by the prosecution to have constituted dangerous driving.

The two key witnesses for the prosecution were IP Mwongera (PW 2) and Vincent Otai Handa (PW 4).

PW 2 was the police officer who visited the scene of accident and drew the sketch plan. The sketch plan which was produced as evidence suggested that the appellant's matatu had crossed the middle of the road and was on the right side when the accident occurred. It also showed that the matatu came to rest 44.5 meters from the point of impact thereby according to PW 2 implying high speed. All that evidence was accepted by the learned trial magistrate without any thought whether it had any flaws.

A close look at the sketch plan also shows that the matatu came to a stop on its correct side of the road after supposedly hitting the deceased on the other side of the road but on being cross-examined by the appellant, who was unrepresented, PW 2 conceded that the matatu was partly off the road meaning that the sketch did not correctly represent exactly what PW 2 actually saw when he visited the scene. His evidence should therefore have been treated with utmost caution.

PW 2's evidence is that of an eye witness. He was sitting on culvert by the roadside when the accident occurred. He said that the accident occurred in the middle of the road and that the appellant was driving at a high speed. He further said that the deceased's view of the oncoming matatu might have been blocked by another matatu from which she had alighted apparently a few moments before she was struck by the appellants matatu. That piece of evidence tends to support the appellant's defence which was that the other matatu (from which the deceased had alighted) blocked his view and that of the deceased and may have contributed to the accident. The defence was rejected simply because PW 4 in another part of his evidence had said, and that was supported by the evidence of the conductor of the other matatu, that that matatu had already left when the accident occurred. Quite obviously the evidence of PW 4 is self contradictory because if it is true that the other matatu interfered with the deceased's view of the road it must have been there when the accident occurred or just immediately before it occurred. That contradiction was not resolved by the learned trial magistrate.

In convicting the appellant of causing death by dangerous driving the learned trial magistrate relied on the evidence of the alleged high speed tendered by PW 2 and PW 4 and the further claim by PW 2 that the point of impact was on the appellant's wrong side of the road.

As we have already observed it was unsafe for the learned trial magistrate to rely on these pieces of evidence. As regards the alleged high speed both PW 2 and PW 4 can hardly be said to have given any convincing evidence about the matter. To merely state that a motor vehicle was traveling at a high speed, without elaborating, does not mean anything – high speed, in comparison to what – after all what one person regards as high speed may be no more than a crawl to another. And as to the braking distance there was no expert evidence to show what speed was implied by the 44.40 meter skid marks.

From the above reasons we are not sure that a case of causing death by dangerous driving was proved beyond any reasonable doubt. There is however sufficient evidence to show that the appellant drove the matatu without due care and attention. We so determine because there is ample evidence to establish that the road was straight and there was nothing to indicate that the appellant attempted to stop before he hit the deceased. Even if his view of the road was blocked by the matatu which he said in his defence had dropped the deceased he could have seen the deceased in sufficient time to avoid hitting her if he had been driving carefully. In our view he was guilty of the offense of careless driving contrary to section 49 of the Traffic Act. We therefore quash the conviction under section 47 of the Act, set aside the sentence and substitute therefor a conviction under section 49 of the Act and order the appellant's immediate release, if not already released, for he has already served more than the maximum sentence allowed under section 49 of the Traffic Act.