



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL NO 198 OF 1990

OKECH..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence of the Senior Resident Magistrate's Court at Homa-Bay in Traffic Case No 635 of 1990, Nderu Njuguna Esq Ag RM)

JUDGMENT

The appellant was convicted of dangerous driving, contrary to section 46 of the Traffic Act.

The evidence of Teresia, PW2 was that she was waiting for a matatu while sitting at the junction on 21st January, 1989 at about 9.30 am when the appellant drove his motor vehicle reg no KDV – 558 from Kisii direction towards Oyugis and knocked down the deceased cyclist on the left side of the road. He died instantly. Andrea, PW3 said that he was ploughing in his *shamba* there and saw the motor vehicle after it had knocked down the deceased. This then would mean that Teresia was the only eyewitness.

PW1 is Dr Nathan who carried out the postmortem examination on the body of the deceased after PW4 identified the body.

PW5, PC Patrick visited the scene and drew the sketch plan (Ex 2). In his evidence on oath the appellant denied the charge saying that the deceased suddenly emerged from a side road on the left trying to cross the road on his bicycle, he applied his brake but there being very little distance between them his motor vehicle hit the deceased.

Mr G Maseso, the learned advocate for the appellant submitted that the charge was not proved and the conviction was wrong.

He pointed out, *inter alia*, that the learned magistrate drew wrong conclusions and failed to direct his mind properly to the evidence before him.

Mr Bwonwonga, the learned Principal state counsel supported the conviction saying that the evidence established that the manner of the appellant's driving was dangerous in the circumstances prevailing at the time. He pointed out that the visibility was clear at about 9.30 am and the appellant hit the deceased cyclist in front of him.

I have considered the evidence, the judgment and the submissions with utmost care.

It was said in *Evans* [1963] 1 QB 412 that the test of whether a piece of driving is dangerous is objective.

It is quite clear from the reported cases that if a driver in fact adopts a manner of driving which was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his competent best.

In the instant case the evidence of Teresia was that the road there was straight. However, I note that PC Patrick said that near the scene there was a bend. Further during cross-exam, this witness of the soft sex, Teresia was saying that the cyclist and the motor vehicle of the appellant were moving in the same direction. However, during re-exam, this lady said, the cyclist emerged from the side track. He was moving in the main road. Nowhere in the judgment the learned magistrate gave any space to what Teresia said as above in her re-examination. The above quoted evidence of hers materially supported the defence of the appellant.

It must be remembered that Teresia was the only eyewitness to the accident. There were passengers in the appellant's motor vehicle. The Republic called none of them to testify. When a court is confronted with the testimony of a single witness in support of the charge it has to be extremely careful, as has been said time and again, in relying on it without warning itself on the dangers in recording a conviction on such evidence by itself. The court may convict on a sole testimony if the quality thereof were to be sound. Teresia's evidence differs from that of PC Patrick on whether or not there was a bend and further it is self contradictory as pointed out herein above.

It was wrong for Andrea, PW 3 to say that the bicycle was coming from Kisii direction going upwards towards Oyugis since earlier on in his evidence he said that he saw the motor vehicle after it knocked down the deceased. This witness was in a *shamba* ploughing with his oxen and it appears that he went to the scene soon after the collision. Further if he were to be believed it would be difficult to explain the evidence of Teresia when she said that the deceased emerged from the sidetrack.

PC Patrick's evidence shows that the point of impact was 1.5 metres inside the tarmac road from its edge. This evidence that the cyclist was 41/2 feet in the road tends to support the defence, which was to the effect that the deceased cyclist emerged suddenly and tried to cross the road. The evidence of Patrick, PC shows that there is a junction at the point of impact and that the deceased's cycle was hit at the said point. There was no evidence from the Republic that the appellant was at a high speed. The appellant said that he was doing about 60 Kph then. In his judgement the learned magistrate said that, there is no way the cyclist could have emerged from the side road, without PW11 Teresia seeing him.

It is clear by now that this was misdirection in view of Teresia's earlier stated evidence in re-exam.

The magistrate further erred when he said, there is over-whelming evidence that the accused's motor vehicle was following the cyclist from a distance since there was no such acceptable evidence let alone overwhelming evidence.

In my view had the Court below directed its mind properly to the evidence before it, it would have found the appellant not guilty. The appeal is allowed. The conviction is quashed, the sentence is set aside and it is ordered that the appellant be released forthwith unless otherwise lawfully held.

Dated and Delivered at Kisii this 19th Day of December, 1990

V.V. PATEL

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JUDGE