



**REPUBLIC OF KENYA**

**IN THE HIGH COURT, AT MACHAKOS**

**CRIMINAL APPEAL NO. 121 OF 1986**

**JOHN WANJALA OKWISIA .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(Appeal From The Resident Magistrate's Court At Kitui)

**JUDGMENT**

The appellant was convicted and sentenced on three counts as follows: Count 1 (causing death by dangerous driving) three years imprisonment with driving licence suspended for three years after serving the term of imprisonment.

Count 2 (failing to stop after an accident, a fine of Kshs 300 in default one month imprisonment.

Count 3 (driving a defective motor vehicle) a fine of Kshs 700 in default two months imprisonment.

On appeal he complains that the Attorney General's consent should have been obtained before his trial as he was a government employee and that his evidence was not considered by the trial court and he also challenged the evidence upon which he was convicted. It is necessary therefore to review the entire evidence and the case against the appellant.

PW 1 Peter Masila Muthui started his account of events on December 9 1986, from the entire record I am satisfied that the date given by him was erroneous and that the events he described which was corroborated by other evidence (PW 2, PW 3 and PW 4) accused on December 8, 1986 being the date of the charge and not on December 9, 1986. On the said material date he was riding his motor bicycle with the deceased Johnstone Kitau Mutisya as pillion passenger on the Kitui – Machakos road when they came upon PW 2, PW 3 attending to their motor bicycle which had broken down. PW 1 and the deceased stopped. It was dark. A motor vehicle without lights drove by PW 1 jumped from off his bike on which he was sitting and fell into a trench on the off side of the road. When he stood up again he saw his pillion passenger had been hit by the passing vehicle. He did not see the driver. PW 2 was a pillion passenger on the bike ridden by PW 3. They had stopped to repair a puncture on the Kitui – Machakos road when PW 4 Patrick Mbusi also riding a motor bicycle stopped to help them. The repair was almost done when PW 1 and the deceased arrived on the scene. After the repair PW 2 and PW 3 had ridden away some 100 metres or so when PW 2 heard and saw an unlit vehicle approach at high speed past them. He then heard a bang. He and his colleague returned to the scene where they heard the bang. They found PW 1 crying and the deceased lying on the road with a head injury. PW 2 and PW 3 followed the lorry to the Kitui police station. They all entered the station together and saw the driver of the lorry. The lorry belonged to the

Ministry of Water Development. The driver reported the accident. PW 2 heard the driver say that he had informed his boss the vehicle had no lights. The vehicle did not stop after the accident. PW 3 gave evidence to the same effect and materially corroborates the evidence of PW 2 and PW 1 except that PW 3 was not sure whether or not the lorry stopped after the accident. PW 4 likewise gave an account of what he saw at the scene. His own motor bike had lights by which he saw the registration number of the lorry as GK 2 X. According to this witness the lorry stopped for about a minute and then drove away. PW 4 and his pillion passenger followed it to Kitui station where they reported the accident. PW 5 said that the lorry had no lights and did not stop and that the deceased died on the spot. PW 6's evidence was in similar terms. PW 7 was an inspector of Water Development. He identified the appellant as the driver of the lorry GK 2 X which was involved in the accident in question. After being declared hostile witness he read his statement to the police containing the statement that the lights of the lorry were not functioning properly. The evidence of PW 8 the doctor showed the cause of the deceased's death as cardiorespiratory failure due to severe head injury sustained in a road accident.

Inspector Victor Mathenge PW 11 testified that the appellant reported the accident involving GK 2 X to him and upon going to the scene he found the body of the deceased Kitau Mutisya Nyaga on the left side of the road. He suspected the appellant to be drunk and took him to the hospital where samples of his urine and blood were taken. No analysis report was produced but the officer produced Exh P 2 which was a notice of intended prosecution for dangerous driving issued by him to the appellant. He also produced a sketch plan. The lorry was inspected and found to be defective (per report numbered VT No 189114).

The appellant's evidence was that on December 8, 1986 while driving the lorry GK 2 X and accompanied by James Njoroge they met a motor cycle registration No KSW 714 Isuzu with two persons on it. This was on the Machakos – Kitui road. The motor cycle made a U turn and came towards the left side of the lorry. The lorry hit the cycle. He stopped, went on to the road and saw he had killed one person. He got back to the lorry and went to report at Kitui police station. He drove on knowing his lights were defective in that they came on and off, he said.

Firstly the appellant's complaint that the Attorney-General's consent should have been obtained prior to his prosecution is misconceived. The charge is not brought against the Government but against the appellant personally and it was sufficient for purposes of his prosecution that he was given notice of intended prosecution by PW 11. The said complaint therefore has no merit in law and fails as a ground of appeal.

Secondly upon consideration and assessment of the evidence summarized above I am satisfied that the appellant's conviction was supported by ample evidence in respect of counts 1 and 3. I am satisfied on the evidence of PW 1 and PW 7 inclusive that the accident that resulted in the deceased's death occurred by reason of the fact that the appellant drove his lorry GK 2 X recklessly and at a speed in a manner which was dangerous to the

public or other by driving at night either without headlights or with defective lights and that therefore counts 1 and 3 have been proved on the evidence. At least one prosecution witness (PW 3) was not sure whether or not the lorry stopped after the accident. The appellant said he stopped briefly after the accident and found he had killed the deceased. I will give him the benefit of the doubt as regards count 2 in particular as he wasted no time but went directly from the scene of the accident to report to the police at Kitui. Perhaps he feared his own life in the circumstances. I therefore acquit him on count 2.

In *Govind Shamji v The Republic* (unreported) it was said by Madan and Chesoni JJ that the offence of causing death by dangerous driving is not an ordinary type of crime and that there are cases where a custodial sentence is merited for example, when there is a compelling feature such as an element of intoxication or recklessness. In this case although PW 11 suspected the appellant of having taken alcohol it was not established that he was drunk. But driving a lorry at night without lights or adequate lights involves a deliberate danger. This is therefore misconduct not a case of momentary lapse but deliberate misconduct or recklessness, that led to the death of the deceased. I am of the view therefore that a custodial sentence is merited and would uphold the disqualification from driving for 3 years from the date of sentence by the trial court in respect of count 1. The sentence of the trial court is to that extent rectified,

as suspension from a future date after imprisonment would appear unlawful.

The sentence with regard to count 3 is set aside and substituted by a term of imprisonment for 3 months to run concurrently with sentence under count 1 aforesaid.

Dated and delivered at Nairobi this 12th day of October, 1987.

**E.N.A. TORGBOR**

**JUDGE**