



Asutia Paul v Republic

High Court, at Nairobi November 20,

1984

Abdullah J

High Court Criminal Appeal 617 of 1983

Criminal law - motor accident - facts and evidence consistent with both versions - causing death by dangerous driving - effect of disqualification from driving while in prison - whether proper basis was laid for conviction of driver

An accident occurred at the junction of General Waruinge Street and 1st Avenue Eastleigh between an Isuzu lorry and a Volkswagen Combi. The driver of the Volkswagen died as a result of the accident. The driver of the lorry was charged with the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act. He was convicted after a trial and sentenced to 3 years' imprisonment and he was also disqualified from holding a driving licence for one year. The magistrate further ordered that the sentences were to run concurrently. The appellant wished to call the turnboys in his vehicle to testify but they were not called or summoned.

He therefore appealed against the sentence and the conviction.

Held:

1. In view of the sketchy evidence of the eyewitnesses and the sketch plan, which seemed consistent with either version, the evidence of the turnboys was of importance and the magistrate should have given opportunity for the two witnesses to testify. The absence of such evidence materially prejudiced the appellant.
2. If the disqualification was to run concurrently with the prison sentence such disqualification whose expiry would precede prison sentence would be of no effect.
3. There was no proper evidence that the driver of the lorry was speeding and that he was required to give way at the junction as opposed to the driver of the combi yielding.

Appeal allowed.

Cases

No cases referred to Statute

The Traffic Act section 46

Advocates

SKM Wandaka for Respondent

November 20, 1984, Abdullah J delivered the following Judgment.

The appellant was convicted by the district magistrate, of the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act, cap 403 Laws of Kenya. He was sentenced to 3 years' imprisonment and was disqualified to hold a driving license for one year. The trial magistrate further ordered that, the sentence to run concurrently. If he meant that the disqualification to run concurrently with the prison sentence, such disqualification, whose expiry would precede prison sentence, may prima facie, be of no effect.

The Isuzu Lorry Reg No KTV 185 driven by the appellant, was in collision with Volkswagen Combi Reg No KKG 027, driven by the deceased, at the junction of General Waruinge Street and 1st Avenue Eastleigh, as a result of which the deceased, John Kinyanjui, died.

Besides, the appellant and his two passenger, (the appellant intended to call them as witnesses but for reasons not recorded and unknown, neither of these was called to testify), there were two pedestrians (PW 2 and 5) who witnessed the collision.

According to John Njoroge Muhuhu (PW 2), who was somewhere on Bahati side of 1st Avenue and General Waruinge Road, when he saw a lorry with three persons inside, from Bahati side and a Volkswagen from Waruinge Road. The Volkswagen stopped and he saw glasses thrown up when the lorry collided with the Volkswagen. According to him, the lorry was being driven too fast. He did not notice any traffic signs. According to him, the lorry's windscreen was smashed and the Volkswagen was hit on the front side. It was drizzling.

Mr Stephen Wachira (PW 5), was outside some Kiosk when he heard sound of collision and saw the lorry come to rest where he had been standing on the pavement. It had collided with another small vehicle whose driver was injured. According to him, the lorry was traveling from Bahati side at a speed of 50 to 60 kph. He drew a sketch plan which he produced in court. According to Mr Wachira, the vehicles travelling from Bahati are required to stop at the junction. However, he cannot say where any vehicle stopped or not.

Cpl Leuiya (PW 8) went to the scene, took measurements and drew a sketch plan which shows that the General Waruinge is a major road and Eastleigh 1st Avenue is a minor road as there are stop signs on each side of Eastleigh 1st Avenue at the junction. The accident occurred at four road junction and according to what the appellant told him, the Combi was being driven from Eastleigh towards Waruinge street and he was driving from General waruinge street towards Eastleigh, when the collision occurred because the deceased, who was required to stop, did not stop.

The appellant made a witness statement the following day and an inquiry statement the day after the following day In both these statements, he insisted that he was driving on Waruinge Street, whilst the Volkswagen was travelling from Eastleigh Avenue to Waruinge Street.

In his defense, the appellant insisted that he heard a bang and stopped. He saw the Volkswagen on his offside. He went to call police.

As earlier said, the appellant expressed the desire to call two witnesses, who were presumably his turn boys but for reasons not known and not recorded, the trial magistrate proceeded to deliver judgment without these witnesses testifying . There is nothing on the record to show whether the fresh summons issued for May 5, 1983, were served on these witnesses or not. All that we have on the record, is that the judgment was delivered on that day viz May 5, 1983.

The appellant had said, in his statement to police, that he had his two turn boys with him. Mr Mukuha (PW 2), said that there were 3 persons in the lorry. In view of the sketchy evidence of the eye witnesses and the evidence of sketch plan which seem to be consistent with either version, the evidence of these

turn boys was of importance and the trial magistrate should have given opportunity for these witnesses to testify. The absence of such evidence may have materially prejudiced the appellant.

Again, according to sketch plan, the distance between the two vehicles after they came to rest was 3 feet and 8 inches. However, the sketch plan unfortunately, does not show the distance between the point of impact and the two vehicles. The visual examination of the sketch plan suggests that the point of impact was immediately in front of the Volkswagen. In these circumstances, it would appear that at the moment of impact the two motor vehicles were not traveling at a speed.

In his short and terse judgment, the trial magistrate found that the appellant "was at a very high speed and he did not stop at the T junction as it was his duty to do so and give way to the Volkswagen driver". With respect, there was no proper evidence that the appellant "was at a very high speed". The sketch plan shows four road junction. However, the magistrate describes the scene as T junction. Be that as it may, there was no evidence that the appellant did or did not stop or that he was required to stop. It was not resolved beyond reasonable doubt, that the appellant emerged from minor to major road.

In the event, the conviction cannot be sustained. The same is quashed and sentence of imprisonment and order of disqualification are set aside. The appellant be released forthwith unless, otherwise lawfully held.