REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO 96 OF 1982

GEORGE MWANGI NGUNYI …….. APPELLANT

Versus

REPUBLIC …… RESPONDENT

JUDGMENT

The appellant was convicted by the First Class District Magistrate (Nyeri) on three counts:

1. Causing death by dangerous driving contrary to Section 46 of the Traffic Act (Cap 403).

2. Driving a motor vehicle on the road under the influence of drinks or drugs contrary to Section 44(1) of the Traffic Act (Cap 403).

3. Failing to stop after an accident contrary to Section 73(1) of the Traffic Act (Cap 403). On count one the appellant was sentenced to two years' imprisonment; on count two he was fined Kshs 1,000 in default six months' imprisonment and on count three he was fined Kshs 300 in default three months' imprisonment. The appellant was also disqualified from obtaining or possessing a driving licence for five years. There are seven grounds of appeal:

1. The learned District Magistrate erred in law in holding that the appellant drove motor lorry registration No 12 KA 27 in a dangerous manner.

2. The learned District Magistrate erred in law in convicting the appellant on driving a motor vehicle on the road while under the influence of alcohol or drugs without requiring the production in court of the result of the urine and blood samples taken from the accused for purposes of expert examination and such failure of justice.

3. The learned District Magistrate erred in law and fact in holding that the appellant failed to stop after the accident when there was overwhelming evidence to the effect that the appellant did in fact stop after the accident.

4. The learned District Magistrate erred in law in not recording what was observed at the scene of accident and any questions asked and answered and such failure has occasioned a failure of justice.

5. The learned District Magistrate erred in law in not giving reasons on which the convictions were based.

6. The decision of the learned District Magistrate was not supported by evidence to the extent required support a conviction.

7. The sentence imposed upon the appellant by the learned District Magistrate was harsh and excessive having regard to all the circumstances of the case. Mr Ole Kaparo for the appellant in addressing the court pointed out that there was no eye witness to this accident. He submitted that the appellant drove into the shamba in an attempt to avoid an accident. He also pointed out that the appellant stopped after the accident. The evidence before the learned trial magistrate was to the effect that on the material day the appellant was driving a lorry registration number 12 KA 27 along Ruringu/Ministry of Works camp road at about 5.00 pm on September 14, 1980. The appellant negotiated a corner and after driving a short distance left the road, smashed a bamboo fence into a home and in the process hit the deceased.

It is not disputed that this is how the accident occurred. It was the prosecution's contention that the appellant was driving dangerously and hence that is why he smashed into a bamboo fence and killed the deceased. The appellant's version was that he saw a woman and a child crossing the road and in trying to avoid an accident drove into the fence. I must point out there that an accident by itself is not conclusive evidence of careless driving or dangerous driving. There must be evidence to the effect that the driver charged was at fault. In R v Wallace [1958] EA 582 at p 585 Law J (as he was then) held:

"A conviction for driving without due care and attention cannot be founded on the mere fact of a collision, but be based on a finding of fact that the driver charged with the offence was guilty of some act or omission which was negligent and which was a departure from the standard of driving expected of a reasonably prudent driver."

The above was cited with approval in the latter case of Jesani v R [1969] EA 600. Hence a mere collision is not in itself proof of dangerous driving. In the case of R v Evans [1962] 3 All ER 1086 dangerous driving was defined as follows: "If a man adopted a manner of driving which at his trial on a charge of causing death by dangerous driving the jury think was dangerous to other road users in all circumstances, then on the issue of guilty it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best."

The above was adopted in the East African case of Musulu v R [1969] EA 20. During the trial of the appellant evidence was led to show that the appellant had just negotiated a corner an then for no apparent reason (according to prosecution) he left the road, smashed into bamboo fence, hit electricity post, hit a tree and in the process hit the deceased. All this happened off the road. The appellant's explanation, which was rejected by the trial magistrate, was that he was trying to avoid an accident as a woman and a child appeared. The learned trial magistrate considered all the evidence before him and came to the conclusion that the appellant was lying about a woman and a child. In a case of this nature it must be remembered that it is upon the prosecution to prove the charge as laid beyond reasonable doubt. It is not upon the accused to prove his innocence. Hence we must consider the evidence of those present and other surrounding and/or supporting evidence. There is the important evidence in form of a sketch plan. The sketch plan shows clearly how the lorry left the road and smashed into the bamboo fence. Point of impact is shown in the sketch plan (Exhibit 3) in which the relevant measurements are also shown. It is not normal for a vehicle for no apparent reason to leave the road and smash into the fences (see Patel v R [1968] EA 97 p 101). In the present appeal the appellant's explanation was that he was trying to avoid an accident but a nasty accident occurred. The trial magistrate rejected the appellant's story. I have evaluated the evidence before the lower court and have come to the conclusion that the sworn statement by the appellant was full of contradictions. First, he said that he saw a woman and a child but only a few lines below that statement denied seeing the woman or the child. The learned trial magistrate was quite entitled to reject the appellant's story as false. On my own evaluation I find that the appellant was not telling the truth. Hence, we have to turn to the evidence by the prosecution. Does this evidence disclose dangerous driving? In Atito v R [1975] EA 278 at p 281 the Court of Appeal held:

"We think the proper test is that laid down in Kitsao v Republic Msa HC CR C 75 of 1975 (unreported)

that to justify a conviction of the offence of causing death by dangerous driving there must not only be a situation which, viewed objectively was dangerous, but there must also be some fault on the part of the driver causing that situation."

Hence, in the present appeal there must be evidence that there was element of fault on the part of the appellant which led to this accident which eventually caused the death of the deceased. In regard to this element of the fault, Megaw LJ reading the judgment of the Court of Appeal in R v Gosney [1971] 3 All ER 220 at p 224 said:

"Fault certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame … fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense even though normally no danger would have arisen from it is sufficient." In the present appeal I have considered the evidence laid before the trial court and having given it careful evaluation I am of the view that the appellant was at fault. He negotiated a corner at a speed and failed to control the lorry and hence smashed into the bamboo fence and ended up by killing the deceased woman. I have no doubt whatsoever that the appellant's manner of driving at the material time was dangerous. The appellant was properly convicted on the first count. As regards the second count there can be no doubt that the appellant was under influence of drink at the time of the accident Mr Ole Kaparo had withdrawn the ground of appeal on that plaint but made a last minute attempt to revive it but did a poor job of it. The doctor who examined the appellant testified that the appellant's muscle co-ordination was poor. The report from Government Chemist following analysis of appellant's blood and wine indicated that the appellant had a had not been indicated what amount would make one drunk. But question of alcoholic influence differs from person to person. There are those who will consume the entire crate of beer (twenty five bottles) but still be in full control of their faculties and yet there are some who will consume only two or three bottles and be completely riotous as to the extent of doing the impossible. In the present appeal we have evidence of the doctor who examined the appellant plus the report from the Government Chemist. Clearly the appellant was under influence of drink as to be incapable of controlling it properly. I find that his conviction on the second count was inevitable. As regards the third count of failing to stop it has been conceded by the learned State Counsel that there was no evidence. Indeed, the appellant stopped after the accident. Hence, conviction on third count is quashed and sentence set aside. The fine of Kshs 300 if paid by the appellant should be refunded to him.

On the first count of causing death by dangerous driving it was argued that a sentence of two years' imprisonment was excessive. The learned State Counsel while supporting a custodial sentence was of the view that the sentence of two years' imprisonment was rather severe. The appellant is a first offender and although this was a serious accident I am of the view that a sentence of twelve months would be appropriate. Hence, the sentence of two years is reduced to twelve months imprisonment. As regards the second count the sentence imposed of Kshs 1,000 in default six months in prison is not excessive in the circumstances of this case and hence that sentence will stand. I have no reason to interfere with the period of disqualification and hence that order stands.

The final position in this appeal is that on count one the accused is to serve twelve months imprisonment and on second count the fine of Kshs 1,000 in default six months imprisonment stands. The sentences are to run consecutively. The appeal is allowed as regards the third count. The appellant is disqualified from obtaining or holding a driving licence for a period of five (5) years. The time that appellant had served in prison after conviction by the lower court will be considered in computing his term in prison. Save for the third count and reduction in sentence in the first count this appeal is dismissed. Order accordingly.

Delivered at Nyeri this 20th day of September, 1982.

E O'Kubasu

Judge