REPUBLIC OF KENYA

IN THE HIGH COURT APPELLATE SIDE NAIROBI

CRIMINAL APPEAL NO 504 OF 1979

TIMOTHY ORWENYO MISSIANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction in the first class District Magistrate's Court, Nairobi (Traffic Case No 7012 of 1978)

JUDGMENT

The appellant was charged with causing death by dangerous driving and with using an uninsured vehicle upon a road. He pleaded "guilty" to the latter charge and "not guilty" to the former; but was convicted on both charges. He was fined Shs 4000, with a default sentence of six months' imprisonment if the fine were not paid, for driving without insurance and Shs 2500 for the more serious offence of causing death. He now appeals against what he calls the "conviction" which must relate to the charge in respect of which he pleaded "not guilty", but not against sentence. However, as he has appealed, this Court is empowered, under section 354 (3) of the Criminal Procedure Code (and has the duty in a proper case) to increase the award. In this case the Republic seeks such increase.

The short facts, as found by the trial court were that the appellant, driving with speed on a clear, sunny day, with nothing to obstruct his vision, went off the road and knocked down and killed an eight-year old child who was going home from school. She was picked up by the car and dropped after some distance. There was nothing wrong with his vehicle and he took no avoiding action. His defence was that he did what he could in the circumstances obtaining and cannot be blamed for what occurred. Nine grounds of appeal were set before us, one of which, the eighth, was abandoned and the other grounds were taken together. It is not unfair to say that counsel appreciated (and told us that he appreciated) the extent of the task required of him, beginning with telling us that he was at a loss for words, was hesitant and, had a difficult hurdle to get over, but he felt that he had in his client's interest to argue his case; which he did. He indicated, with admirable forthrightness where his difficulty lay, ie that there were two eye-witnesses whose evidence contained, as he put it, "only minor contradictions. Their two versions substantially consistent".

But he thought the police evidence and their sketch plans to be deplorable, as he described it. It is not so, but even were it otherwise the magistrate, with a far less stringent attack upon it than was made before us, said no more than that the evidence of one eye-witness that the appellant came at speed and hit the child when she was off the road and dragged her for a distance was supported by another eye-witness and a policeman who found the child off the road "and even the sketch plans". So he did not place any great reliance on those plans and we are at a loss to understand why the policemen's evidence to which we have referred should have been described as "deplorable". There is no doubt that it was so described for counsel (as our note has it) told us the "Police evidence and sketchesdeplorable". Counsel also urged

upon us that whilst one of the eyewitnesses said that the child was hit by the left front of the vehicle the vehicle examiner said that the dent was on the right front of the vehicle supporting the defence case. We do not think that this is at all material, if that is, there is a discrepancy. There was evidence that the car swerved left on to the pavement and went perhaps 15 yards after it did so. And of course, as we said, there were two eye-witnesses as to what occurred. Turning to the magistrate's judgment, counsel urged on us that it was "not entirely satisfactory" and the analysis "perfunctory", but we do not subscribe to that.

In supporting the conviction counsel for the Republic pointed out that the appellant, being uninsured, had no right whatever to have been on the road; and, of course, that is right, but that is not for taking into account in respect of the charge of causing death. He was also right to draw attention to the condition of the road, the time of day and so on.

Although, as we said, the appeal was generally argued we will give our answers to the grounds of appeal, and we do so as follows: (1) The magistrate did not err. The appellant was driving at speed. There was credible evidence establishing it to be so. (2) Undoubtedly, the charge was proved as the law requires. (3) Corroboration as such was not necessary for one witness alone could have proved the appellant's guilt. All that the magistrate meant was that there was more than one witness who could speak of what happened, and that he believed them. (4) The magistrate did not err. He was entitled, and we believe right, to have accepted the evidence which he did. In any case his findings were as to fact upon credibility and he considered it; see *R v Gokaldas Kanji Karia* (1949) 16 EACA 116 and *Uganda v Khimchand Kalidas Shah* [1966] EA 30. (5) We do not find that the evidence was inconsistent or contradictory.

Such discrepancies as the evidence may have thrown up are of no consequence. (6) and (7) The magistrate did not err. (9) The evidence which was accepted, and on our individual assessment, rightly accepted, proved the guilt of the appellant beyond all reasonable doubt. He was correctly convicted.

In relation to sentence, counsel said that it was a sad case and started off very badly, going on to say that there were civil proceedings elsewhere with attendant penalties and hardships. But, the fact that damages may have to be paid does not mean that we should not resolve what is a proper sentence on the facts. We adopt what this Court (Trevelyan and Todd JJ) said in *Ndirangu Mathenge v The Republic* (unreported) and *The Republic v Ndirangu Mathenge* (1979) (unreported) as to sentence in these cases:

> it is perfectly true that the appellant's personal circumstances … were rightly for taking into account, but there is also the safety of the public to bear in mind …

In *Njuguna Kabanya v The Republic* (unreported) Todd J said:

> it cannot be too clearly known that if drivers cause death by dangerous driving they may well be in real and imminent danger of being sent to prison for a substantial period of time ...

We endorse that. We do not propose to interfere with the sentence for driving uninsured but, agreeing with senior State counsel that a fine, in the circumstances of the case, was manifestly lenient and inadequate, we set it aside and in its place order that the appellant will undergo a sentence of three and a half years' imprisonment. Counsel for the appellant, again with admirable fairness, told us that he was very surprised that the magistrate did not consider disqualification or endorsement; our experience in these cases leads us to think that such orders are sometimes not made because provisions for them is in a different part of the Traffic Act. At all events we cancel the appellant's driving licence and declare him to be disqualified for holding another licence for a period of eight years. We order that the appropriate entries be made in his licence. The periods of imprisonment and disqualification will begin from the date of the original sentence.

Appeal dismissed.

Dated and delivered at Nairobi this 18th day of July 1979.

E. TREVELYAN

JUDGE

S.K SACHDEVA

JUDGE