



**Director of Public Prosecution v Tsuma (Traffic Case E133 of 2021)
[2022] KEMC 30 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEMC 30 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
TRAFFIC CASE E133 OF 2021
ZK KAGENYO, RM
NOVEMBER 24, 2022**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

TSUMA CHAKA TSUMA ACCUSED

JUDGMENT

1. The accused person who was arraigned on the 28th day of December 2021 was facing charges in 7 counts of:
 - i. Count 1- Careless driving contrary to section 49 (1) (a) of the *Traffic Act*.

The particulars are that on the 16th day of July 2021 at about 2015 hours at Mariakani-Kinango road, Kinango subcounty within Kwale county being a driver of motorcycle numberless make haojin blue did drive the said motorcycle on the said public road in a manner which was dangerous to the public having regard to amount of traffic at that time or expected to be on the road by overspeeding as a result hit one female adult, Nadzuwa Mwavuo and sustained grievous harm;
 - ii. Count 2- Failing to report an accident contrary to section 73 (3) of the *Traffic Act*. The particulars are that on the 16th day of July 2021 at around 2015 hours at Mariakani-Kinango road, at Kinango subcounty within Kwale county being a driver of motorcycle numberless haojin failed to report an accident after hitting one female adult pedestrian Nadzuwa Mwavuo Mumbo;
 - iii. Count 3- Failing to stop after an accident contrary to section 73(1) of the *Traffic Act*. The particulars are that on the 16th day of July 2021 at around 2015 hours at Mariakani-Kinango road, at Kinango subcounty within Kwale county being a driver of motorcycle numberless



make haojin failed to stop after hitting a female adult pedestrian namely Nadzuwa Mwavuo Mumbo;

- iv. Count 4-riding motorcycle on a public road without insurance contrary to section 103B (3) (7) of the *Traffic Act* No. 37 of 2012. The particulars are that on the 16th day of July 2021 at around 2015 hours at Mariakani-Kinango road at Kinango subcounty within Kwale county being the rider of motorcycle numberless make Haojin did ride the said motorcycle on a public road without insurance;
 - v. Count 5-Riding motorcycle on a public road without license contrary to section 103B(5)(7) of the *Traffic Act* No. 37 of 2012. The particulars are that on the 16th day of July 2021 at around 2015 hours at Mariakani-Kinango road at Kinango subcounty within Kwale county being a rider of motorcycle numberless Haojin did ride the said motorcycle on a public road without driving license:
 - vi. Count 6- Riding motorcycle on public road without helmet contrary to section 103B(1)(7) of the *Traffic Act* No. 37 of 2012. The particulars are that on the 16th day of July 2021 at around 2015 hours at Mariakani-Kinango road at Kinango subcounty within Kwale county being a rider of motorcycle numberless Haojin did ride the said motorcycle on a public road without helmet; and
 - vii. Count 7- Riding motorcycle on a public road without reflective jacket contrary to section 103B (1) (7) of the *Traffic Act*. The particulars are that on the 16th day of July 2021 at around 2015 hours at Mariakani-Kinango road at Kinango subcounty within Kwale county being a rider of motorcycle numberless, Haojin did ride the said motorcycle on a public road without reflective jacket.
2. The accused denied the charges and a full trial ensued.
 3. The accused person was unrepresented. He was present in court all through the trial. The matter was conducted in Kiswahili Language, the language of choice by the accused. He conducted his case while in custody even though he had been granted bail and a personal bond of Ksh. 50, 000/= and 70, 000/ with one surety of similar amount, respectively.
 4. The DPP to prove their case lined up a total of 5 witnesses.
 5. On the 28th August 2022, the accused was acquitted under section 210 of the Criminal Procedure Code for counts six and seven and placed on his defence for counts one, two, three, four and five, while upon being placed on his defence, his evidence, unsworn without calling any witness for the defence.

The Prosecution's Case

6. PW 1, Nadzua Mwavuo Mumbo told the court that on the 16th day of July 2021 at around 1900 hours, while leaving her workplace which is at Kinango headed to her home which is at Mazora, while walking, she was knocked down by an oncoming motor cycle. She told the court that, she was walking on her left-hand side while the motor cycle was being ridden on her extreme right-hand side of the road but when it got near her, it the rider swerved towards her and knocked her down causing her left leg to fracture.
7. After she was knocked down as such, the rider started insulting her and he left her lying on the ground, writhing in pain and helpless. By good luck, one Safari Mwasau, PW 3, passed by and PW 1 requested him to help her and that is how the PW 1's husband was notified of the accident. When the husband, PW 2, and PW 3 came, she was taken to the police and the hospital for treatment.



8. PW 2, Marao Mwero narrated how PW 3 reported to him that evening that his wife had been knocked down and immediately he went to the scene of the accident in the company of PW 3 and they took his wife, PW 1, to the hospital.
9. PW 3, Safari Mwasau told this court that on the 16th day of July 2021, at around 1945 hour, as he was riding his motor bike, he found a lady lying on the ground writhing in pain and she requested him to help her which she did by reporting to PW 1's husband and thereafter taking PW 1 to the hospital.
10. PW 4, NPS Service No. 91935 PC Maalim Mbarowa testified in his capacity as the investigating officer in the matter. His evidence was a regurgitation of the narration by the PW 1, PW 2 and PW 3 as he interrogated them and recorded their statements. In addition to the report by the complainant and the PW 2 and PW 3, PW 4 produced as P. Exh 4 the Motor Cycle Registration No. KMFP 538C that he believed was the motor cycle that knocked down PW 1. He also produced as P. Exh 5 the Motor Vehicle in section report for the Motor cycle registration No. KMFP 538C and a sketch plan of the scene as P. Exh 6.
11. PW 5, Clinical Officer Moses Kasyoki Mutuku adduced medical evidence that proofed the injuries sustained by the complainant herein and the treatment plan his facility provided for the complainant.

The Defence Case

12. DW 1, the accused person denied the charges in toto. He denied not only being a boda boda rider but also posing skills of operating a motorcycle and instead told this court that his work is a mason assistant. He said that the charges he was facing were as a result of a grudge between the complainant and his wife which arose from a disagreement on a chama (merry-go-round fund) due to delayed remittance by DW 1's wife.

Analysis and Determination

13. The Court is called upon to determine;
 - a. Was the accused riding the motor cycle at the material time and place as charged;
 - b. If yes;
 - i. did he have a driving license to ride as such?
 - ii. What is the legal position in regard to the 1st count as drafted?
 - iii. Did he cause an accident?
 - iv. Did he report the happening of the said accident?
 - v. Did he stop after causing the said accident? and
 - vi. Was the said motor cycle insured against third parties?

Was the accused riding the motor cycle at the material time and place?

14. On the first issue on whether the accused was riding a motor cycle on the 16th day of July 2021 at around 1900 hours, I find it in the affirmative. PW 1 said that he recognized the accused person. The question that I pose to myself, was the recognition free from error?
15. PW 1 stated that she knew the accused person for a long period of time before the accident. From the evidence by PW 2 and PW 3, they told this court that PW 1 told them from the onset that the person



who was riding the motor cycle that hit her was the accused person herein. When she was testifying, the Accused said that he knew the complainant as a neighbor. He said that he had earlier interacted with her.

16. PW 1 told the court that the accused person when he knocked her down using the motor cycle, he insulted her. In her evidence, it was easy to discern that there was an exchange of words that spanned for sufficient period of time to recognize a person you have known as a neighbor. Further, PW 1 stated that during this exchange of words, the two were at close proximity of about 1 metre.
17. It is my finding that PW 1 recognized the accused person without error.
18. The accused person in his defence stated that he does not know how to operate a motor cycle. I observed PW 3 as he testified. He described himself as a bodaboda operator. He described the accused as one of them, meaning, one of the boda boda operators in his area. When he was cross examining him, the two were making friendly gestures, smiles and in fact the cross examination turned out as a casual buddy talk, the intervention of the court notwithstanding. Finally, I take note of how the accused person was arrested. PC Mbarowa stated that he arrested the accused person while seated on a black motor cycle. This is circumstantial evidence that I can only make one inference, that indeed the accused was a motor cycle operator and that at the material time and place to these charges, he was riding a motor cycle.

What is the legal position in regard to the 1st count as drafted?

19. The accused person was charged in count 1, under section 49 (1) of the [Traffic Act](#) which provides thus,
 49. Driving without due care and attention
 1. Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable.....
 2. Where any person is charged with an offence under section 47 and the court considers that the evidence is such as to justify a conviction under this section but not under section 47, the court may convict such person of an offence under this section.
20. In my view, the offence under section 49 (1) of the [Traffic Act](#) is that for riding without due care and attention as opposed to reckless driving which is the closest to careless driving which is the offence established under section 47 of the [Traffic Act](#).
21. Indeed, the particulars in count 1, in part were,

.....being a driver of motorcycle numberless make haojin blue did drive the said motorcycle on the said public road in a manner which was dangerous to the public having regard to amount of traffic at that time or expected to be on the road by overspeeding as a result hit one female adult, Nadzuwa Mwavuo and sustained grievous harm. (underline mine).
22. These facts were for the offence established under section 47 of the [Traffic Act](#) which provides thus;
 47. Reckless driving
 1. Any person who drives a motor vehicle on a road recklessly, or at speed, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is



at the time or which might reasonably expected to be on the road, is guilty of an offence and liable..... (underline mine).

23. Section 49 (2) of the Traffic Act gives a fall back clause to section 49 if one is charged under section 47 of the Act but section 47 of the Act does not have an equivalent reciprocating clause and hence if a charge falls under section 49, it falls fair and square without any reference to any other clause to hang on.
24. Section 134 of the Criminal Procedure Code is couched in mandatory terms thus;
Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.
25. The statement of the offence in this case was for careless driving but the facts were for an offence under section 49 of the Traffic Act. In my view, there is no way that it can be said that driving without due care and attention is synonymous to careless driving.
26. As such, I find that the charging of the accused under count 1 as drafted constituted a defect in the charge as the statement of the offence was talking of a non-existent offence.

Did the accused report the accident?

27. Section 73 (3) of the Traffic Act provides that,
If in the case of any such accident as aforesaid the driver of the motor vehicle for any reason does not give his name and address to any such person as aforesaid, or if any injury has been caused to any person, dog or cattle, the driver shall report the accident at a police station or to a police officer as soon as reasonably possible, and in any case within twenty-four hours of the occurrence thereof. (underline mine)
28. In this case, the accused person knew that an injury had been caused to the complainant herein. Despite such knowledge, 496 days later, he has never reported the occurrence of such accident. I find him in breach of the statutory requirement.

Did the accused stop after the accident?

29. Section 73 (1) of the Traffic Act provides thus,
If, in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby injury or damage is caused to any person, vehicle, dog or cattle, the driver of the motor vehicle shall stop, and if required to do so by any person having reasonable grounds for so requiring give his name and address, and also the name and address of the owner and the identification marks of the vehicle. (underline mine).
30. The duty that was placed upon the accused person was to stop after the accident and the other requirements are auxiliaries upon stopping. I contextualize this requirement by comparing a hit and run accident and this being a hit and stop accident. It was the evidence of PW 1 that once the accused person knocked her down, he stopped and insulted her. By virtue of him stopping, the charge is defeated.

Did the accused person have a driving license and was the motor cycle insured?

31. Turning on to the other question, on whether the accused person had the driving license and whether the motor cycle was insured. These were facts well within the knowledge of the accused person. He



- declined to disclose to the investigating officer the motor cycle that he was riding. Section 36 of the [Traffic Act](#) Mandates a rider to produce a Driving License upon demand by a police office. The accused has never produced such a driving license.
32. Section 111 (1) of the [Evidence Act](#) places a burden to the accused person to proof that he had the driving license and that his motor cycle was insured a fact that he was unable to proof. This is one of the rare instances when the burden of proof shifts to the accused person. As such, I make a finding that the accused person was riding a motor cycle that was uninsured against third party risks and that he did not have a driving license so to operate.
33. I have considered the defence by the accused person which he denied the prosecution the opportunity to test its veracity by way of cross examination, and I find the same to be mere denials and an afterthought, a defence whose destiny is to fail.
34. Lastly, I will say something about the motor cycle produced in court as P. Exh 4 being motor cycle registration number KMFP 538C. from the entirety of the prosecution case, I did not find the nexus between the motor cycle and the accident. In this regard, PW 4 who seized this motor cycle from its holder did not provide a basis of how he took possession of the motor cycle. I say this because the complainant did not provide the number plate of the motor cycle that knocked her down a fact that is amplified by virtue of recording the number plate of the motor cycle as numberless in all the 7 counts in the charge sheet.
35. As such, I direct the Kwale Law Courts, Court Executive Officer to release the motor cycle registration number KMFP 538C, produced as P. Exh 4 on the 13th day of June 2022, to its owner, having regard to the provisions of Section 8 of the [Traffic Act](#). To this end, the Investigating Officer, NPS Service No. 91935 PC Maalim Mbarowa is hereby directed to bring this information to the person he seized the motor cycle from within 14 days of today.

Disposition

36. Having found so, this court hereby dismisses the case against the accused person and forthwith acquits him under Section 215 of the Criminal Procedure Code for the charges in:
- a. Count 1 as charged for the offence of careless driving contrary to section 49 (1) of the [Traffic Act](#); and
 - b. Count 3 as charged for the offence of failing to stop after an accident contrary to section 73 (1) of the [Traffic Act](#).
37. On the other the court finds the accused guilty for, and convicts him under section 215 of the Criminal Procedure Code for the charges in;
- a. Count 2 for the offence of failing to report an accident contrary to section 73 (3) as read with section 75 of the [Traffic Act](#);
 - b. Count 4 for the offence of riding motorcycle on a public road without insurance contrary to section 103B (5) as read with section 103 B (7) of the [Traffic Act](#); and
 - c. Count 5-Riding motorcycle on a public road without license contrary to section 103B (5) as read with section 103 B (7) of the [Traffic Act](#).
38. The accused person shall be set at liberty for the acquittals in regard to Counts 1 and 3 immediately upon satisfaction of the sentences to be mete in regard to the convictions in counts 2, 4 and 5.



39. The accused person is hereby informed of his right to lodge an appeal against this judgment and the convictions in counts 2, 4 and 5, in the High Court at Mombasa within 14 days from today's date if dissatisfied with this court's finding.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 24TH DAY OF NOVEMBER 2022.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of:

Mr. Felix- Court Assistant

Ms. Nandi, Principal Prosecution Counsel, for the DPP

Tsuma Chaka Tsuma – Accused

Court

Due to the exigencies of work on the part of the prosecution and given that the Court 4 Prosecutor is on transfer, as the prosecutor in Court is just holding brief for the Court 4 prosecutor, this matter shall come up for sentence hearing on the 5th day of December 2022.

KIONGO KAGENYO

RESIDENT MAGISTRATE

