



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL E051 OF 2023**

**HENRY CHOMBA NJERU.....**  
**.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[An appeal firm the original conviction and sentence in Criminal Case No. 276 of 2023 of the Chief magistrate’s Court at Kerugoya delivered by Hon. A. Ithuku, CM]*

**JUDGMENT**

[1] Being aggrieved and dissatisfied with the judgement of A.K Ithuku, CM Kerugoya Chief Magistrate Traffic Case No. 276 delivered on 15<sup>th</sup> November, 2023 where he was convicted and sentenced to a fine of Ksh.100,000/- in and default imprisonment for one year, for the offence of causing death by dangerous driving c/s 46 of the Traffic Act, the appellant appeals against the same and puts forth the following grounds of appeal:

1. That the learned Magistrate made judgment against the weight of evidence.
2. That the learned Magistrate erred in law and in fact in failing to find that the particulars of the charges were not proved beyond reasonable doubt.
3. That the learned Magistrate erred in law and in fact in disregarding the contradictions and inconsistencies in the evidence adduced by the prosecution witnesses.
4. That the learned Magistrate erred in law and m fact in unfairly disregarding and/or dismissing the appellant’s defence.

**Brief Background**

[2] The accused is charged with causing death by dangerous driving contrary to section 46 (1) of the Traffic Act Cap 403 Laws of Kenya. The particulars are that on 24.4.2019 at

about 6.30 pm along Kagio-Kutus road within Kirinyaga County, the accused person, being the driver of motor vehicle registration no. KAP 791 Q make Toyota Hiace Van drove the said motor vehicle on a public road in a manner which was dangerous to the public, having regard to all the circumstances of the case including the nature; condition and use of road and the amount of traffic which was actually at the time or which might reasonably be expected to be on the road caused the death of one ROSE WARUGURU KINYUA, a pedestrian and seriously injuring JAMLICK WACHIRA MAGOCI a rider.

- [3] The Prosecution called seven witnesses and when the accused person was put on his defence he gave sworn evidence.
- [4] Upon Judgment on 15<sup>th</sup> November, 2023 the accused was convicted of the offence and subsequently upon mitigation, he was sentenced to a fine of Kshs.100,000 or serve in prison for one year.

### **Prosecution Case**

- [5] **PW1 - Jamleck Wachira.** He testified that on 24.4.19 at around 6.30 pm he was riding motor cycle registration no KMCV 848Z along Kutus- Kagio road. On reaching Kutus Municipality junction he saw a lady called Rose Waruguru at the road side. He offered her a lift. That as she boarded, she let out a scream that they were dead. He looked up and saw a vehicle coming towards them. It hit them and he lost consciousness.
- [6] Mr. Wachira said that he came to the hospital. His leg was broken. That at the time of the accident he was on the left lane facing Kagio. The vehicle left its lane and hit them. He was treated at Kerugoya and Afya Bora Mwea. He got to learn that Rose died as a result of the accident.
- [7] On cross-examination, the witness said that he was not licensed or insured. The decease, Rose, had not boarded the motorcycle. That he was charged accordingly. That the impact was off the tarmac. That he did not know whether the driver of the vehicle was avoiding to hit another vehicle.
- [8] **PW2- Simon Kinyua.** The deceased was his cousin. He came to court to testify how he identified the body of Rose - deceased for purposes of post mortem examination. On 29<sup>th</sup> April, 2019 he witnessed the post- mortem examination.
- [9] **PW3- Michael Kamau.** He lives in Ngaru. On the date of the accident he, was at Gatuto junction. He is a motor cycle rider who had a customer. That he had stopped. He said that he saw motor vehicle, Nissan registration no. KAP 791 Q was moving from Kagio towards Kutus direction. It tried to overtake a matatu. It could not complete the move as there was oncoming traffic. It veered off the road and hit two people.

- [10] PW3 said that he was 20 meters from the point of impact. That he got to know the people later. That he knew the driver, accused. He used to see him t Kutus.
- [11] In cross-examination he said that the deceased was a neighbor. He is not licenced to ride a boda boda. The vehicle was white in colour. That the lady was trying to board a motor cycle. The vehicle was avoiding a head on collision with the lorry. That there was no vehicle joining the road from Gatuto.
- [12] **PW4 -Eliud Kinyua.** He is the husband to the lady who passed away. He attended the post mortem examination. He got to know that the accident happened at Gatuto junction.
- [13] **PW5- Hezron Macharia.** He is a clinical officer, testified. He examined PW1. He assessed the injuries as grievous harm. According to him they were consistent with vehicle accident. He produced a P3 form as exhibit. The probable cause of the injuries was road accident.
- [14] **PW6- Dr. Ndirangu Karomo.** He is the one who produced a post-mortem report in respect of the deceased. The examination was conducted by his colleague, Dr. Njogu. The cause of death was cardio-respiratory arrest. The report is not signed but stamped by medical superintendent. It is exhibit 2.
- [15] **PW7- Cpl Vincent Ndunga.** He was the investigating officer. He and PC Sambu visited the scene. That motor vehicle no. KAP 791 Q and motor cycle were involved in the accident. The accused person was driving the motor vehicle that his PW1 and the deceased. That he pulled off the road to avoid head on collision. That the victims were hit while few metres off the road.
- [16] The investigating officer produced sketch plans of the accident and inspection reports. The point of impact of the accident was 4 metres off the road. He said that he charged the accused for hitting the cyclist and a pedestrian while they were off the road. That the motor cycle was not in motion when hit. That he overtook without care. The motorcyclist did not see the vehicle that the accused overtook.
- [17] The investigating officer emphasized that the accused was avoiding head on collision on cross examination. He said that he overtook improperly. That it was a straight road. He was referred to the sketch plan. He could not tell where PW2 was standing. PW3 went to record a statement on his own volition at the station. PW3 did not assist the injured. He did not get the registration number of the vehicle the accused was overtaking. He knew the accused before the accident. He had 18 years of driving. There was a vehicle that joined the road from Gatutho. The oncoming lorry did not stop.

### **Defence case**

[18] **DW1 – Henry Chomba Njeru.** He is from Kagumo village. He said to have 15 years of driving experience. On 24.4.19 at 6pm he was driving motor vehicle no. KAP 071 Q Toyota Hiace from Kagio to Kutus. He was on the left lane facing Kutus. He was at a speed of 70 -90 KPH. On reaching Gatuto junction a vehicle emerged. He swerved to the right. He veered off the road to the right. He said that he stopped his vehicle. There was a motor cycle approaching from Kutus direction. It got off the road and hit his stationary vehicle and the rider and passenger fell down. He went to Kutus Police Station. The accused blamed the driver of the vehicle that joined the road carelessly.

[19] On cross-examination he said that accident occurred at 6pm. There were Boda Boda riders at the junction. That was a vehicle that joined the road from Gatuto. The vehicle did not hit his vehicle. That impact with the motor cycle was off the road. He got to learn that the passenger died. The accident occurred in 2019.

### **Appellant submissions dated 28/10/2025**

*Whether the prosecution proved beyond reasonable the offence of causing death by dangerous driving*

[20] The appellant submit that the prosecution failed to prove the element of dangerous driving. The Court of Appeal, in the case of **ATITO VS. REPUBLIC 1975 EA 281**, held as follows:

***“To justify a conviction for 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 the situation.”***

[21] The prosecution despite calling several witnesses failed to show any fault on the Appellant’s part.

[22] The core of the prosecution's case was that the Appellant drove in a manner which was dangerous to the public hence causing the death of Rose Waruguru. However, this theory was fundamentally undermined by its own witnesses as discussed earlier. Further, Investigating Officer (PW7) conceded under cross-examination that the Appellant was "avoiding head on collision" and that "there was a vehicle that joined the road from Gatuto"

[23] This testimony from PW7 directly corroborates the Appellant's sworn defence that an external agent, a vehicle emerging from the junction, caused the emergency. The act of swerving to avoid a collision, especially one caused by the actions of another road user, cannot be automatically classified as "dangerous driving".

*Whether the Appellant's defence was properly considered and evaluated*

[24] The appellant submit that The Learned Trial Magistrate Erred in Dismissing the Appellant's Defence. The Appellant gave a sworn statement in his defence. His account was consistent, plausible, and, as shown, was partially corroborated by the testimony of the Investigating Officer (PW7). The magistrate's failure to engage with this part of PW7's testimony and to explain why the Appellant's consistent defence was rejected constitutes a fatal error in the evaluation of evidence.

[25] It is trite law that the burden of proof rests with the prosecution therefore, the inconsistency of the evidence given by the prosecution's witnesses alongside the omission of Gatuto junction in the sketch plan proves that the prosecution failed to discharge their burden of proof. The Appellant's defence, when considered alongside the prosecution's own evidence, raised a reasonable doubt as to his culpability.

[26] They rely on the case of **Peter Nguu v Republic 021] KEHC 8860 (KLR)** where the court stated at para 50 as follows:

***“The contradictory evidence presented before the trial court leaves no independent evidence which can sustain and as was held by the Court of Appeal in Ngure vs. Republic [2003] E.A.: -***

***“The mere occurrence of an accident alone is not enough to prove a charge of causing death by dangerous driving under section 46 of the Traffic Act. Evidence must disclose a dangerous situation and the driver must be shown to be guilty of a departure from the normal standard of driving which would be expected of a reasonably prudent driver.”***

**Respondent submissions dated 30/7/2024**

[27] *Whether the respondent proved the essential ingredients of the offence of causing death by dangerous driving*

[28] **Section 46 of the Traffic Act provides that:**

***Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a 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 actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence ...***

[29] In the case of **Kimathi v Republic (Criminal Appeal E069 of 2022) [2023] KEHC 25179 (KLR) (2 November 2023) (Judgment)**, the High Court deduced the essential elements of this offence to be:

**a. *Causing the death of another person.***

**b. *By driving a motor vehicle recklessly or at a speed or in a manner which is dangerous to the public.***

[30] It is not in contention that there was the death of Rose Waruguru Kinyua as evidenced by the testimonies of PW2, PW4 and the post mortem report (Exhibit No. 2) adduced by PW6. What is in contention is whether the appellant caused the death of Rose Waruguru by driving motor vehicle KAP 791 Q in a manner which is dangerous to the public.

[31] The respondent submits that the appellant/accused caused the death of Rose Waruguru by driving KAP 79 Q motor vehicle in a manner which is dangerous to the public. This is evidenced by the testimony of PW3 and corroborated by PW1 and PW7. PW3 testified that he had stopped his motorcycle at Gatuto Junction. This was about 20 metres from the point of impact between the vehicle that the appellant drove and the motorcycle. From there, he saw two events. One, he saw a Nissan, KAP 791 Q moving from Kagio to Kutus, trying to overtake a matatu. Further, across the road, he saw a woman trying to get onto a motor cycle. The Nissan could not complete overtaking due to oncoming traffic. The vehicle veered off the road, hitting the man and the woman. The man was identified as Jamleck Wachira PW1 and the woman was Rose Waruguru Kinyua the deceased.

[32] The respondent submits that the appellant/accused' sworn statement does not paint the true picture of the events for three reasons. First, PW3 had stopped his motorcycle at Gatuto Junction.

[33] If indeed a vehicle emerged from Gatuto Junction approaching appellant's lane, it would have hit PW3 before getting to his lane as claimed. PW3 was not hit by the vehicle. Second, if the motorcycle in question was moving at a high speed, it would be impossible for the woman to try to get onto it. Third, PW1, the rider of the hit motorcycle, testified that he had stopped to carry Rose Waruguru, the deceased.

[34] This was corroborated by the testimony of PW3 who was just about 20 meters away watching the woman attempt to get onto the motorcycle and the testimony of PW7 who adduced the motor vehicle inspection reports and testified that the motorcycle was not in motion at the time of impact.

### Issues

- [35] Whether the prosecution proved beyond reasonable the offence of causing death by dangerous driving.
- [36] Whether the Appellant's defence was properly considered and evaluated.

### Analysis

- [37] This being a first appeal, this Court is under a duty to re-evaluate, re-analyse and reconsider the evidence tendered before the trial court and arrive at its own independent conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify. This principle was clearly stated in **Okeno v Republic [1972] EA 32, where the Court of Appeal held that a first appellate court must itself weigh conflicting evidence and draw its own conclusions.**

#### **Whether the offence of causing death by dangerous driving was proved**

- [38] Section 46(1) of the Traffic Act criminalizes driving in a manner dangerous to the public, having regard to all the circumstances of the case, including the nature and condition of the road and the amount of traffic, where such driving causes death.
- [39] The law on causing death by dangerous driving was considered in **Atito v Republic [1975] EA 281, where the Court of Appeal held that:**

*“To justify a conviction for 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 the situation.”*

- [40] In **Ngure v Republic [2003] EA**, cited in **Peter Nguu v. R [2021] KEHC 8860 KLR**, the Court of Appeal emphasized that the mere occurrence of an accident is not sufficient; the prosecution must demonstrate a departure from the standard of care expected of a reasonably prudent driver.
- [41] In the present case, it is not disputed that Rose Waruguru died as a result of the accident. The crucial question is whether her death was caused by the appellant's dangerous driving.
- [42] Careful re-evaluation of the evidence reveals material inconsistencies and gaps. PW1 and PW3 testified that the impact occurred off the road. PW7 confirmed that the point of impact was four metres from the road.
- [43] PW7 conceded that the appellant was avoiding a head-on collision and that there was a vehicle that joined the road from Gatuto junction. This evidence substantially

corroborates the appellant's defence that an emergency situation was created by another road user.

[44] The prosecution did not produce evidence of excessive speed, recklessness, or any deliberate dangerous manoeuvre by the appellant. While PW3 alleged an attempted overtaking, he equally acknowledged the presence of oncoming traffic and the appellant's attempt to avoid a collision. The investigating officer was unable to clearly account for all vehicles involved or explain why the alleged joining vehicle was omitted from the sketch plan.

[45] In **Peter Nguu v Republic [2021] KEHC 8860 (KLR)**, the High Court held that where prosecution evidence is contradictory and does not conclusively demonstrate dangerous driving, a conviction cannot stand. The contradictions in the present case, particularly regarding how the emergency arose and who caused it, create reasonable doubt.

### ***Finding***

[46] The Court has evaluated the evidence presented by the Prosecution and the Defence before the trial Court afresh as required of a first appellate court (***Okeno v R*** (1972) EA 32) and as a whole as required by ***Okethi Olale v. R*** (1965) EA 555. See also ***Kiarie v Republic*** [1984] KLR 739, where the Court of Appeal held that a trial court must consider the accused's defence and weigh it against the prosecution case.

[47] The Prosecution witness PW1 testimony that he was picking up a passenger when they were suddenly hit by the on-coming motor vehicle is corroborated by the evidence of PW3 who was watching from across the road at Gatuto Junction who saw the accused attempt to overtake a vehicle ahead of him and on finding an oncoming lorry had to swerve off the road hitting the PW1 and his would be passenger who were about for metres of eh road.

[48] This Prosecution evidence at the place of the accident off the Kagio-Kutus road on the right side towards Kutus agrees with the defence evidence of having had to swerve off the road on account of a sudden vehicle joining the road on the left side at Gatuto junction. The difference in the Defence story was just that after he had stopped off the road on the right side to wards Kutus a speeding motor cycle driven by PW1 with the deceased as passenger came and hit the accused's motor vehicle.

[49] The Investigating Officers admission in cross-examination of a Junction near the scene and of "a vehicle that joined the road from Gatuto" does not mean that the

prosecution evidence of the accused trying to overtake and swerving off the road when he found an on-coming lorry is discharged.

[50] There was no evidence as to why the accused did not swerve off the road to the left instead of swerving all the way to the right side of the road to avoid the vehicle that joined at the Junction. There similarly no explanation as to why it was difficult to brake to avoid the vehicle unless the vehicle was speeding at more than the 70/90km/h speed that the accused admitted. The prosecution version of the accused overtaking on the right as he drove towards Kutus and on finding an on-coming vehicle before he could complete overtaking and therefore swerving off the road to the right to avoid a head on collision is the more reasonable explanation of the collision with the motor cycle admittedly on the right side of the road.

[51] There was no explanation for the accused's evidence that the rider of the motor cycle in his version of events had come off the road and hit his motor vehicle while riding very fast, as follows:

*“When I got off the road I stopped. A motor cycle approached from Kutus direction. **The motor cycle got off the road and hit my vehicle.**”*

This almost independent incident in the accused's version of event was wholly unexplained. The accused had evidential burden to prove this on a balance of probabilities. The Court respectfully agrees with Peter Wafula Juma & 2 Others v. R [2014] EKLK (F. Gikonyo, J.

[52] The Court does not find any material contradiction or discrepancies in Prosecution evidence. The fact that the PW3 did not assist the victim of the accident does not distract from his evidence when evidence is that there were other people at the accident and the PW1 was taken to hospital by the people. That he volunteered to give record a statement 30 days after the incident does not indicate untruthfulness in his evidence, as people who witness accidents are known to keep away for testifying to avoid the protracted court proceedings. The Court does not see what motivation the PW3 eye-witness had to lie in his account of the accident.

[53] This Court finds that the Prosecution proved its case beyond reasonable doubt and the discrepancies in the evidence of its witnesses are minor and immaterial to the proof of want of care to the degree of reckless driving without consideration of the other road users bearing in mind the area of the accident at a busy section of the Kagio-Kutus road at Kagio. In deference to the Defence evidence, had the accused been driving at reasonable speed he would have been able to control and stop his vehicle even if as he said in his defence another vehicle suddenly entered the main road at Gatuto junction.

[54] The Court accepts the Prosecution evidence that the accused drove dangerously by seeking to overtaking the vehicle ahead, without establishing that there was no oncoming vehicle, and when he found an oncoming vehicle was forced to swerve off the road hitting the PW1 and the deceased as she prepared to climb on to the motor cycle. This Court finds that the Prosecution proved against the accused the charge of causing death by dangerous driving contrary to section 46 (1) of the Traffic Act Cap 403.

### **Whether the appellant's defence was properly considered**

#### *Judgment of the trial Court*

[55] The trial court did consider the evidence of the Defence against the Prosecution's evidence and for the reason given in the Judgment accepted the Prosecution case against the Defence. Contrary to the submission that the trial court did not consider the accused's defence, the judgment indicates that the court considered the evidence presented by the Prosecution and the defence as shown at paragraphs 20 -31 of the Judgment as follows:

*"22. The particulars in this case are that the accused person drove motor vehicle registration no. KAP 791 Q in a manner dangerous to the public having regard to all circumstances of the case, the nature, condition and use of the road and the amount of traffic that was reasonably expected to be on the road.*

*23. The prosecution relied on PW1, PW3 and the investigating officer. This is the evidence the defence said was contradictory. What came out throughout the evidence was that there was a collision involving motor vehicle KAP 791 Q and a motor cycle ridden by PW1. The impact was off the road on the right side of the road facing Kutus general direction. As a result of the impact, Rose Wauruguru Kinyua died. The facts are established by the prosecution and either admitted by the defence or not controverted.*

*24. The question whether the collision occurred as a result of dangerous driving on the part of accused person. The motor cycle rider and PW3 Michael Kamau stated that the accused person tried to overtake another vehicle. That he did not keep a proper look out and did not consider oncoming traffic. That when he found that he was about to collide with a lorry he swerved to the right and hitting a stationary motor cycle.*

*25. the accused person said that he veered off the road to avoid a vehicle that entered the junction carelessly. That he was stationary when the rider*

hit his vehicle. The investigating officer visited the scene. He saw the point of impact. He was convinced that the accused was to blame.

26. There was an eye witness PW3. He repeated what PW1 said. He said that the accused tried to overtake unsuccessfully. That he hit a stationary motor cycle. That the deceased had not boarded the motor cycle. I have compared the two versions. Having established that the collision occurred I found the version by the prosecution more believable. There is no evidence of the vehicle that is said to have joined the junction from Gatuto. While there is no burden of the proof of the accused to prove his innocence at this point the prosecution had adduced evidence that proved beyond reasonable doubt, that the driving by the accused was dangerous.

27. The accused person overtook dangerously. It was a straight road. He ought to have seen the oncoming traffic before overtaking.

28. The accused knocked down people who were off the road. They were stationary. They were not at fault. The accused person was either not keeping proper look out or was at a speed that he could not control the vehicle. Either way he caused death by his driving.

29. In the case of **Atito v Rep (1975) EA 282** the Court of Appeal stated that:

*"To justify a conviction for 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":*

30. Applying the decision to the case before me, I find that the accused person created a dangerous situation by overtaking recklessly. The situation resulted to death. By not keeping a proper look out he was at fault.

31. In the end I am convinced that even with the statement of defence the prosecution having proven the case beyond reasonable doubt. The accused person is hereby convicted as charged under Section 215 of the Criminal Procedure Code. It is so ordered.

A.K. Ithuku •

Chief Magistrate

15.11.2023”

This Court agrees with the reasoning of the trial magistrate in the Judgment.

**Sentence**

[56] Upon considering the accused's mitigation the trial court sentenced the accused as follows:

**"Court:**

***I note the pleas in mitigation. Accused person is a first offender. He is hereby sentenced to pay a fine in the sum of Ksh.100,000/- or serve in prison for one year."***

[57] This Court does not find any reason, on the test in ***Wanjema v. R*** (1971) EA 493 to interfere with the conclusion of the trial court, with which it agrees, both on conviction and sentence.

**ORDERS**

[58] Accordingly, for the reasons set out above, the Court finds that the appeal has no merit and it is dismissed.

*Order accordingly.*

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF APRIL 2026.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

Ms. Kathigiu, for Mr. Magee for the Appellant

Mr. Mamba for the DPP/Respondent.