Rono v Republic (Criminal Appeal E013 of 2023)
[2025] KEHC 3892 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3892 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E013 OF 2023

JRA WANANDA, J

MARCH 28, 2025

BETWEEN

SYLVESTER TANUI RONO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the conviction of the Appellant in Iten Senior Principal Magistrates Court Traffic Case No. E165 of 2022 in which he was charged with two counts.

2. In Count I, the Appellant was charged with the offence of causing death by obstruction contrary to Section 46 of the *Traffic Act*. The particulars of the offence were that on 8/07/2021 at about 1730 hours along Iten-Eldoret road within Elgeyo Marakwet County, being the driver of the motor vehicle Registration number KAV 462 Isuzu bus (school bus), the Appellant stopped the vehicle on the road thus causing obstruction to other road users and without considering the nature of the road, and the flow of traffic at the time of accident, thereby the rider of the motor cycle registration No. KMFC 793X, Baja Boxer, one Daniel Kiptanui Kiprono rammed the rear side of the said bus causing the death of the said rider.

3. In Count II, the Appellant was charged with the offence of causing an accident by obstruction contrary to Section 53(1)3 of the *Traffic Act*. The particulars of the offence were that on the same date, time and place aforesaid, he stopped the said motor vehicle on the road thus causing obstruction to the said motor cycle thus causing injuries to (i) Eugene Kiplimo 8 yrs.(ii) Fabian Kiplimo 6 years and (iii) Kelvin Kiplagat Kiplimo 4 yrs.

4. The Appellant pleaded not guilty and the matter then proceeded to trial. The Prosecution called 2 witnesses whereas the Appellant testified on his own behalf, and also called 1 other witness. By the

Judgment delivered on 29/08/2023, the trial Magistrate convicted the Appellant of the main charge, and sentenced him to pay a fine of Kshs 100,000/- and in default, to serve 6 months in prison.

5. Aggrieved with the decision, the Appellant filed this Appeal vide the Petition filed on 6/09/2023 through Messrs Magare Musundi & Co. Advocates. Quoted verbatim, the grounds are as follows:

   i. The Learned trial Magistrate erred in law and in fact by finding that the prosecution had proved its case beyond reasonable doubt without giving the Appellant a benefit of doubt.

   ii. The Learned trial Magistrate failed to consider all the relevant circumstances of the case before reaching the conclusion that the prosecution had proved its case beyond reasonable doubt.

   iii. The Learned trial Magistrate failed to consider the weighty evidence of the defence and instead placed reliance on the prosecution's evidence hence arriving at an erroneous conclusion.

   iv. The Learned trial Magistrate erred in law and in fact by finding that the prosecution's allegations that the Appellant stopped abruptly and blocked the road were never disputed by the defence hence proved.

   v. The Learned trial Magistrate erred in law and in fact by solely relying on the hearsay evidence produced by the prosecution.

   vi. The Learned trial Magistrate ventured into a gap filling exercise in favour of the prosecution's case by concluding that the deceased could have been blocked by the Appellant owing to rainy weather while in actual fact it was the prosecution's duty to prove those allegations.

   vii. The Learned trial Magistrate did not evaluate all the circumstances surrounding the case before him and thus reached an unfair conclusion hence the need to have the sentence set aside and the sentence quashed.

Prosecution evidence at the trial Court

6. PW1 was PC Charles Shikami from the Iten Traffic Base. He testified that on 08/07/2021, while at the station, he was informed that an accident had occurred at Rural area, he proceeded to the scene and on arrival, he found people surrounding a school bus, Registration No. KAV 462 and there was a motorcycle Registration No. KNFC 793X at the side nearby, the bus was facing Eldoret and the motor-cycle was 15 metres from the point of impact behind the bus. He stated further that there was blood at the point of impact, and that the injured pillion passenger was taken to the hospital where he died.

7. He testified further that he took the motor-cycle and the motor vehicle to the police station where they were both inspected and after completion of investigations, he charged the Appellant with the offence of causing death by obstruction. According to him, the accident occurred when the Appellant, as driver of the bus, stopped on the road to drop students, that it was raining, that that the rider could not overtake as there was an oncoming vehicle. He stated further that he attended the post-mortem exercise. He then produced a rough sketch plan of the scene, a fair sketch plan, legends, 2 inspection reports and a Notice of Intention to Prosecute (NIPT). In cross-examination, he stated that the accident occurred at 5.30 pm, that the motor-cycle was on the left side facing Eldoret, the bus was partly on the road, there is no stage at the scene, and that the rider hit the bus on the left side from behind.

8. PW2 was Dr. Sharon Anyango from the Iten County Hospital. She testified that on 14/07/2021, she conducted the post-mortem procedure on the body of the deceased, that the body had multiple injuries on the head, chest, hands and head and deep cut wounds on both legs, the main injury was a fracture of the scalp and that she concluded that the deceased died as a result of the head injury caused by road accident. She then produced the post-mortem Report signed on 24/07/2021.

Defence evidence

9. DW1 was the Appellant, Sylvester Tanui. He testified that on 08/07/2021 he was driving the motor vehicle Registration No. KAV 462 at 5.30 pm along Iten-Eldoret road dropping students to their homes, when at Rural area, he was knocked by the said motor cycle from behind when he was about to stop and that that he had not yet reached the stage. He stated that he stopped the bus and when he went behind to check, he found the rider and 3 children whom they removed from under the bus, and that a Report was made to the Iten Police station, and police officers came and recorded statements. He stated that thereafter, the motor-cycle and the bus were both inspected and he was later charged in Court. He testified further that the bus was hit on the right side, the motor-cycle was damaged in front, the police came after 20 minutes, and that the road is straight. He insisted that he had indicated to show that he was stopping, and stated that there was no traffic on the road and that there was little rain. In cross-examination, he stated that he was stopping when he was hit, he did not see the motor-cycle, that there is no stage at the scene, and that the bus was on the middle of the road. According to him, he was driving at a speed of 20km/hr. In re-examination, he conceded that he again conceded stopped on the road and that the place had no stage.

10. DW2 was Stanley Mitei, who stated that he was a conductor aboard the school bus. He testified that they were dripping students when at Rural area, the bus was hit from behind, he told the Appellant to stop and they went behind the bus to check and they found the rider and 3 children. He stated that the bus was hit on the right side, the motor-cycle was damaged in front, the road was clear and that it was raining. In cross-examination, he stated that the accident occurred on the road and that it was before the stage, which was about 20 metres away. He stated that the driver had indicated but was still on the road when they were hit. He testified that he, too, did not see the motor-cycle before the accident.

11. As already stated, after close of the trial, the Magistrate convicted the Appellant of the main charge and sentenced him to pay a fine of Kshs. 100,000/- and in in default, to serve 6 months imprisonment.

Hearing of the Appeal

12. The Appeal was canvassed by way of written Submissions. The Appellant filed the Submissions dated 16/07/2024, while the State-Respondent filed the Submissions dated 28/05/2024 through Prosecution Counsel, Calvin Kirui.

Appellant's Submissions

13. According to Counsel, the Appellant is a qualified driver of over 18 years' experience while the motor-cycle rider did not have a rider's licence neither did he have an insurance cover and that this was a complete violation. He submitted that there was no evidence of the Appellant having stopped at a non-designated area and that the bus was not stationery at the time of the accident. He submitted further that the Appellant (DW1) confirmed that he was about to stop the vehicle at the designated stage which was about 20 metres from the scene, that DW2 who was on the bus confirmed that the driver had put on indicator lights and was about to stop at the stage before they got hit by the motor-cycle from behind. According to him, the unqualified motor-cycle rider failed to observe basic road courtesy despite the driver of the bus having indicated that he was about to stop and therefore failing to reduce speed and that therefore, it was the recklessness of the rider that caused the accident.

14. He also submitted that the Investigating Officer (PW1) stated that he arrived at the scene but did not take eye-witness statements to ascertain the exact manner of the occurrence of the accident. According to Counsel, the officer could not therefore ascertain whether at the time of the accident the bus was stationery or not.

15. He submitted further that there is no contention that the bus was being driven on its recommended side of the road or whether it was being driven recklessly and that therefore, the Appellant followed all the traffic rules and could not do anything more to prevent the accident which was solely caused by the rider. He cited several authorities and submitted that the rider having seen that the bus was slowing down with its left indicator on suggesting that it was preparing to stop, did not take any measures to also slow down given the conditions of the weather, which, it was testified, was misty. In conclusion, he submitted that the lack of awareness of the rider is what caused the accident, and that the trial Magistrate failed to consider the evidence on record and instead, relying on hearsay.

Respondent's Submissions

16. Prosecution Counsel cited Section 46 of the *Traffic Act* and also the case of Shah vs Republic (1969) and submitted that Section 46 creates 4 separate offences, namely causing the death of another by driving a motor vehicle on a road; (a) recklessly, or (b) at a speed, or (c) in a manner, or (d) by leaving a vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public. He submitted that in this case, the Investigating Officer (PW1) testified that he visited the scene of the accident and established that the motor vehicle was 15 meters away from the point of impact, that there were blood stains at the scene and he concluded that the Appellant, being the driver of the bus, stopped on the road and thus obstructed other road users.

17. He submitted that in cross-examination, PW1 testified that the deceased was riding on the left side of the road facing Eldoret, the bus was dropping students, there was no stage in the area and that the rider hit the bus on the left side from behind. He also referred to the produced exhibits, including sketch plans, legends and inspection reports.

18. He also pointed out that the doctor (PW2) examined the deceased and concluded that he suffered multiple injuries, the main injury being the fracture of the scalp, and concluded that the deceased died of head injury consistent with the road traffic accident, and that he produced the P3 forms and Post mortem form. He urged that the Appellant and his witness did not dispute that the Appellant was the driver of the bus and that at the time of the accident, he was dropping students, that they both testified that the bus was about to stop when it was hit from behind by the motor cycle, and that they stopped and took the deceased to hospital. He also pointed out that the Investigating officer blamed the Appellant for obstruction. According to him, this constituted dangerous driving as contemplated under Section 46 of the *Traffic Act*.

19. Counsel cited the case of Atito vs Republic [1975] EA 281 and urged that the Appellant failed to take regards to all circumstances including the nature, condition and use of the road and the amount of traffic which was at the time on the road, that based on the evidence presented by the Prosecution, the Court rightly held that the case was proved beyond any reasonable doubt and correctly convicted the Appellant. It was his further contention that the evidence of the Prosecution witnesses was credible and unshaken by the defence, that in fact the Appellant (DW1) aided the Prosecution's case by admitting that he was dropping students.

20. In respect to the sentence imposed, Counsel submitted that the trial Court considered the offence and mitigation by the Appellant and therefore, exercised its discretion judiciously and in accordance with the law.

Determination

21. The duty of an Appellate Court has been restated in many authorities, including for instance, in the Court of Appeal case of Gitobu Imanyara & 2 Others v Attorney General (2016) eKLR, in which the duty was reiterated as follows:

> " An appeal to this court from trial in the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must re-consider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

22. The issue that arises for determination in this matter is whether the Prosecution proved the case against the Appellant to the required standards.

23. Section 46 of the *Traffic Act* provides as follows:

> " 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, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be 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 whether or not the requirements of section 50 have been satisfied as regards that offence and be liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by Part VIII of cancelling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of three years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later."

24. As correctly submitted by the Prosecution Counsel, it has been said that Section 46 of the *Traffic Act*, as was held in the case of Shah vs Republic [1969], creates 4 separate offences, namely, causing the death of another by driving a motor vehicle on a road; (i) recklessly, or (ii) at a speed, or (iii) in a manner, or (iv) by leaving a vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public.

25. The Court of Appeal, in the case of Atito vs. Republic [1975] EA 281, further guided 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.

26. From the foregoing, it is evident that to prove a charge under Section 46 aforesaid, the Prosecution must demonstrate some "fault" on the part of the driver charged. Establishment of "fault" as contemplated under the Act was aptly analyzed in the case of Republic v Gosney (1971) All ER 220 and described in the following terms:

> " Fault" certainly does not 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 case 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 it might be slight, even though it is a momentary lapse, even though normally no danger would have arisen from it is sufficient."

27. In this case, the Prosecution did not call any eye-witness to the accident as the Investigating Officer (PW1) arrived at the scene after the accident had already occurred. Conviction of the Appellant therefore depended on the documentary evidence produced, interpretation of the circumstances established and lastly, the Appellant's own testimony or that of his witnesses, once placed on his defence. Did these other factors therefore, taken and considered together, establish the Appellant's culpability?

28. It is not disputed that the Appellant was the driver of school bus the subject of this matter. It is also not disputed that the point where the accident occurred was right on the road. The Appellant also conceded that there was no stage at the spot where the accident occurred. It is also not in dispute that there was some rain at the material time. Another matter that is not in dispute is that the deceased rider crashed into the bus from the rear. According to the Prosecution, the cause of the accident was the Appellant's action of stopping the bus on the road to drop students, at a spot where there was no designated stage. On his part, the Appellant insists that he had only slowed down while preparing to stop for the students to alight when he was hit from behind. He also insists that he did indicate that he was about to stop. In light of the principle that the burden of proof in criminal matters always lies on the Prosecution and never shifts, the question is therefore whether the Prosecution evidence sufficiently disproved the above narrative advanced by the Appellant.

29. From my analysis of the testimonies, and the sketch plans produced, I note that the Appellant (DW1) conceded that there was no bus stage at the point of the road where the accident occurred. He stated that the bus stage was about 20 metres away from where the accident occurred. His own words were that "I was slowing down to stop" when he was hit from behind while in the middle of the road. He stated further that "I did indicate to show that I was stopping the vehicle". The Appellant therefore never at any point in his testimony, state that he had slowed down to enable him get off or veer from the road so as to park the bus at the stage. The only testimony on record is therefore that the slowing down was intended "to stop" the bus right on the road, not to get off the road. The narrative that the Appellant had slowed down to park at the bus stage which was 20 metres away therefore never came from the Appellant's testimony, but was introduced by the Appellant's Counsel in his Submissions. There was nothing to that effect in the testimony of the Appellant or any other witness.

30. The Appellant also stated he never saw the motor-cycle rider before the accident. This, to me, is a curious statement. Assuming that the bus had both side and internal mirrors whose purpose was to ensure that the driver had proper rear-view, one wonders how therefore the Appellant, as the driver, failed to notice the motor-cycle trailing behind him at all. I would expect, before applying any slowing down manouvre, particularly since it is stated that it was raining, the driver would first ensure that he had proper lookout and view of all sides, particularly the rear. There being no explanation given for the failure to see the motor-cycle approaching from behind, I am persuaded to conclude that before slowing down to stop, or in fact, stopping, the driver never made any effort to ensure that he had a proper view of his surroundings. This points to the conclusion that the Appellant was therefore both careless and reckless.

31. From the above analysis, I am persuaded that the Appellant did not just slow down, but in fact stopped right on the road without ensuring the safety of other road users, particularly those approaching from behind. The extent of the impact and the injury caused to the deceased has all the hallmarks of ramming into a stationery barrier.

32. I may however also say that had this been a civil case, I would most probably have also found the rider to have been contributory negligent since it is also clear that he, too, did not maintain proper lookout and he, too, was reckless. He must have been speeding and must have failed to maintain a safe distance between him and the bus thus finding himself with no room to manouvre when the bus suddenly slowed down or stopped. I also notice that he was carrying up to 3 pillion passengers which, besides being illegal, is likely to have also contributed to his failure to safely steer or control the motor-cycle and to avoid emergencies such as the one he encountered herein. However, this being a criminal case with a specific charge facing the Appellant, the rider's contributory negligence would be of no assistance to the Appellant. Were he alive, he would have most probably also faced his share of traffic charges.

33. Regarding the Appellant's Counsel's assertion that the rider was unqualified, had no licence to ride on the road, or was not insured, those matters were not before the trial Court for determination and were thus never canvassed or interrogated at the trial. The conclusions alleged by the Appellant's Counsel as aforesaid are therefore made in a vacuum and without any evidence. Most important though, such allegations would not in any way have saved the Appellant from the charge facing him as it was him who was on trial, not the deceased rider.

34. In the circumstances, I am inclined to agree with the trial Magistrate's finding that the prosecution proved its case to the required standard. In light of the existence of the other circumstances present in the case, I find that the failure by the Prosecution to call an eye-witness of its own did not in any way diminish its case. Accordingly, the Appeal against conviction fails.

35. There is no ground of Appeal challenging the lawfulness of the sentence imposed or its severity. Nonetheless, the maximum sentence stipulated under Section 46 of the *Traffic Act* is a prison sentence of 10 years. The trial Court having sentenced the Appellant to pay a fine of Kshs 100,000/- or to serve a prison sentence of 6 months in default, was in whole honesty a relatively lenient sentence. In the premises, I also find no reason to interfere with the sentence.

Final Orders

36. The upshot of the above is that the appeal fails in its entirety and is dismissed.

37. Accordingly, the conviction and sentence are upheld.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF MARCH 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

N/A for the Appellant

Ms. Mwangi for the State

Kipkemboi for the Appellant

Court Assistant: Brian Kimathi