



REPUBLIC OF KENYA



**Nyamboki v Republic (Criminal Appeal 83 of 2022)
[2024] KEHC 257 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 83 OF 2022
AC MRIMA, J
JANUARY 25, 2024**

BETWEEN

DANIEL WESONGA NYAMBOKI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. C. M. Kesse (Principal Magistrate) in Kitale Chief Magistrate's Court Traffic Case No. 63 of 2019 delivered on 17 th November, 2022)

JUDGMENT

1. The main contention in this appeal is that the Appellant was charged with an offence not known in law. The Appellant was represented by Messrs. Munialo & Company Advocates both at the trial as well as in this appeal.
2. The Appellant herein, Daniel Wesonga Nyamboki, was on 9th January 2019 charged before the Chief Magistrates Court at Kitale in Traffic Case No. 63 of 2019 with with the offence of Careless Driving contrary to Section 49(1)(a) of the [Traffic Act](#), Cap. 403 of the Laws of Kenya.
3. The particulars of the offence were as follows: -

Careless Driving contrary to Section 49(1)(a) of the [Traffic Act](#):

On the 6th day of December 2018 at about 7:45 p.m. along the Kitale – Mumias Highway in Trans Nzoia County, being the driver of motor vehicle registration number KBS 295F make Toyota Wish Station Wagon, did drive the said motor vehicle along the said public without due care and attention to other road users lost control of the motor vehicle and veered off the road to the right side and rammed onto a parked motor vehicle registration number KCL 245F Nissan



Vanetta and also knocked down eight pedestrians and as a result of the accident they all sustained injuries.

4. The Appellant denied the charge.
5. On 29th July 2019, and before the trial began, the particulars of the charge were amended to read as follows: -

Careless Driving contrary to Section 49(1)(a) of the Traffic Act:

On the 6th day of December 2018 at about 7:45 p.m. along the Kitale – Mumias Highway in Trans Nzoia County, being the driver of motor vehicle registration number KBS 295F make Toyota Wish Station Wagon, did drive the said motor vehicle along the said public without due care and attention to other road users hit a pot hole and lost control of the motor vehicle and veered off the road to the right side and rammmed onto a parked motor vehicle registration number KCL 254F Nissan Vanetta and also knocked down eight pedestrians and as a result of the accident they sustained some injuries.

6. The Appellant still denied the amended charge and he was subsequently tried.
7. At the completion of the trial, he was found guilty as charged and was convicted. He was sentenced to pay a fine of Kshs. 30,000/= and in default to serve a term of 6 months in imprisonment.
8. Dissatisfied with the findings of the trial Court, the Appellant filed the present appeal.
9. He faulted the trial Court for failing to find that the charge was non-existent in law and further that the charge sheet was incurably defective. He also contended that the charge was not proved.
10. The appeal was heard by way of written submissions. Both parties duly complied and filed their respective submissions. Counsel, however, briefly highlighted on the submissions.
11. Whereas the Appellant prayed that the appeal be allowed, the State prayed that it be dismissed. Several decisions were referred to.
12. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono v Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.
13. Having carefully perused the record, this Court is now called upon to determine whether the offence of careless driving is an offence known in law and if so, whether it was proved.
14. Section 49 of the Traffic Act provides for the offence of Driving without due care and attention.
15. The provision states as follows: -
 - (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—
 - (a) for a first offence, to a term of imprisonment not exceeding one year or a fine not exceeding one hundred thousand shillings;



- (b) for a second or subsequent offence, to a term of imprisonment not exceeding two years or to a fine not exceeding two hundred thousand shillings,

and the court may exercise the power conferred by Part VIII of suspending any driving licence or provisional driving licence held, by the offender disqualified from holding or obtaining a driving licence for a period of twelve months starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later.

- (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.

16. Initially, Section 49 of the *Traffic Act* created the offence of Careless Driving. Through Section 16 of the *Traffic (Amendment) (No. 2) Act*, No. 38 of 2012, the offence of Careless Driving was deleted and substituted with the offence of Driving without due care and attention.
17. Therefore, as at the time the Appellant was charged in January 2019, a period of around 7 years later, the offence of Careless Driving was non-existent under the *Traffic Act*.
18. Article 50 of the *Constitution* is on the right to a fair trial. Sub-Article (2)(n) provides that an accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law.
19. As it has been demonstrated above, that the offence of Careless Driving was not an offence known in any law in Kenya in 2019, then the charge sheet as well as the entire prosecution of the Appellant went against the dictates of the *Constitution*. In other words, they all contravened the *Constitution*.
20. The charge sheet was, hence, fatally defective and such constitutional infractions could not be cured by the application of Section 382 of the *Criminal Procedure Code*. Article 2(4) of the *Constitution* does not allow as much. [See also *Henry O. Edwin v Republic* (2005) eKLR and *Peter Ngutu v Republic* (2021) eKLR].
21. Having found as much, there is no need of dealing with the other ground on whether the offence was proved since there was no valid and competent charge sheet in the first instance. Dealing further will only be an academic exercise. This Court opts to stop here.
22. Drawing from the above discussion, it is apparent that the appeal is wholly successful.
23. In the end, the following orders do hereby issue: -
- a. The appeal is wholly allowed. The conviction is quashed and the sentence of a fine of Kshs. 30,000/= and in default the Appellant to serve a period of 6 months in prison is hereby set-aside.
 - b. The fine of Kshs. 30,000/= paid by the Appellant on 17th November 2022 be refunded forthwith.
 - c. The file is marked as closed.

Orders accordingly.



DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JANUARY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Miss. Munialo, Learned Counsel for the Appellant.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

