REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 9 OF 2010

WILLIAM KIBET KIRUI …….. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(Appeal from the judgment of the Senior Principal Magistrate at Kericho, Hon. W. Nyarima given in Kericho SPM TR. C. NO. 554 of 2009)

JUDGMENT

On 2nd October, 2008 at about 6.30p.m at Kapsoit Trading Centre on the Kericho-Kisumu Road, motor vehicle registration number KAS 928R driven by **William Kibet Kirui,** the Appellant herein, knocked motor cycle Chasis No. KJB 282802977 and caused serious injuries to its rider, **REUBEN KIPKURUI ROGONY** who died in hospital thereafter. The Appellant had 14 passengers at the time in his said motor vehicle which was ostensibly a PSV matatu. He was subsequently charged with the offence of causing death by dangerous driving contrary to **Section 46** of the **Traffic Act, Chapter 406** of the laws of Kenya. **Section 46** of the **Traffic Act** states;

Section 46 "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 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".

The particulars of the said offence were stated in the charge sheet as follows

"William Kibet Kirui: On the 2nd day of October, 2008 at about 6.30p.m at Kapsoit trading Centre along Kericho-Kisumu road in Kericho District within the Rift Valley Province, being the driver of a motor vehicle registration No. KAS 928R make Toyota Hiace matatu, did drive the said motor vehicle on the said public road at a speed or in a manner which was dangerous having regard to all the circumstances of the case, including the nature, condition and the amount of the traffic which was actually at the time or might reasonably be expected to be on the road, knocked the off side of a motor cycle Chasis No. KJR 282802977 make Jialing causing serious injuries to its driver REUBEN KIPKURI ROGONY who died in hospital"

The appellant appeared in the Principal Magistrate Court at Kericho in Traffic Case No. 554 of 2009 and the case was heard by the Hon. W. Nyarima, the Senior Principal Magistrate who, after hearing the evidence, found the Appellant guilty of the offence of causing death by dangerous driving and convicted him under **Section 215** of the **Criminal Procedure Code, Chapter 75** of the Laws of Kenya and proceeded to sentence him to imprisonment for a period of three years and suspended his driving licence for three years during which period the Appellant would not be qualified to drive.

The appellant was aggrieved by this conviction and sentence and he lodged in this court the appeal herein. The Petition of Appeal contained six grounds. In summary, he stated in the said grounds:-

1. *That the trial court erred in not giving the Appellant an option of a fine.*

2. *The trial court erred in convicting the Appellant.*

3. *That the sentence was harsh and excessive.*

4. *That mitigation was not considered.*

5. *That the charge was defective.*

6. *That the evidence against the Appellant was inconsistent and uncorroborated and therefore not reliable.*

When the appeal came up for hearing before me on November, 3rd 2010, Mr. Siele Sigira, Advocate, appeared for the Appellant while Mr. P. Kiprop, State Counsel, appeared for the Respondent.

Mr. Siele Sigira submitted that the charge was defective because the particulars, he said, did not support the charge. He also took issue with the amendment of the charge by deletion of the word ***"vehicle"*** and insertion of the word "***cycle"*** because there was no signature or initial to show who had effected it or when. He also argued in the alternative and if I understood him well, he said that the sentence was excessive and that if it was not, then it was unlawful not least because the date of suspension of the Appellant's licence was not specified. He relied on the following cases whose decisions I have perused.

Mr. Kiprop opposed the appeal and contended that the conviction was proper as it was supported by evidence that met the standard of proof of beyond any reasonable doubt. It was his further submission that the charge was not defective as all the ingredients necessary were captured in it. As regards the cancellation of the word ***"vehicle"*** and insertion of the word ***"cycle"*** in the particulars of the charge, he submitted that no prejudice was caused to the Appellant. In response to the authorities cited by counsel for the Appellant, Mr. Kiprop submitted that they had no application as they dealt with circumstances different from those in the Appellant's case. For instance, he said, the appeal in case No. 283 of 2003 was allowed because the prosecutor was not qualified under the law to prosecute!

I have perused the record and the evidence adduced in the trial court and I have duly considered the grounds of appeal and the submissions made by the learned counsel for the Appellant, Mr. Siele Sigira, and the learned State Counsel, Mr. P. Kiprop. As this is the first appellate court, it behoves me to re-evaluate the evidence again and to make my own findings, inferences and conclusions with a view to giving the Appellant a fresh reconsideration of the case.

The evidence of **Vincent Kipkoech** who testified as PW1 shows that the point of impact on motor vehicle ***(which I shall hereinafter refer to as "the matatu"***) was on the left side and that the motor cycle was keeping to the correct left side of the road when it was knocked by the left side of the matatu. The evidence of **Priscah Nakabwa**(PW2) a passenger in the matatu shows, *inter alia*, that the accident occurred at 6.30p.m. PW2 was sitting in the second seat from the driver. PW2 told the court that the driver was doing high speed. She saw the motor cycle ahead of the matatu. Then suddenly she heard screams and the matatu went off the road. The motor cycle was hit by the left side of the matatu as the matatu speeded down hill. PW2 suffered injuries. The manner in which the vehicle went off the road and landed into a water trench before stopping exemplifies the high speed it kept. The evidence of Police Constable **Alfred Odhiambo,** PW4, shows that the road was wet as it had rained and yet the skid marks of the matatu were later visible outside the road. The matatu had stopped thirty metres from the point of impact, a fact that shows that the matatu must have been at a high speed. The helmet worn by the rider of the motor cycle was broken in the accident, a factor that shows the impact was considerable due to the high speed of the matatu. There was a sketch plan produced as evidence by PW4. The motor cycle was on its correct left side of the road. The matatu skidded and hit it and went off the road landing in a water trench 30 metres away.

The motor cycle rider was a male aged 30 years with a height of 6 feet. He fractured his teeth and had massive bleeding and torn vessels, and had 3 litres of blood found in his stomach. He also had subdural bleeding in the spine and brain and on the head and on scalp. The cause of his death was given as massive bleeding from blunt trauma on abdomen by **Dr. Debra Langat.** He testified as PW5.

The Appellant gave an unsworn statement in defence. He conceded that it had rained and that the road was wet and slippery. He admitted that he swerved and hit the motor cycle as it was not possible to avoid knocking him due to the lorries parked beside the road. He feared, he said, that the accident would have been much worse if he avoided the motor cycle as many more people would have been killed. The Appellant told the trial court that he struggled with the matatu and swerved and still hit the motor cycle. The only witness called by the Appellant, **William Kibet Kirui,** (DW2), said in his testimony that he was in the matatu driven by the Appellant. He did not state where he was seated in the matatu, nor did he testify whether the motor cycle was not keeping to its correct side of the road. All he could remember was that the Appellant tried to avoid the motor cycle without success. He could remember, however, that the matatu landed in a ditch off the road which suggests that the matatu was at a high speed.

It is the trial court that saw and observed the demeanour of the witnesses who testified before it. While he was impressed by he demenour of PW2, the trial magistrate found the evidence adduced by the defence (***Appellant***) implausible. Said the Court:

"In his defence, the accused person contends that the motor cyclist left his side of the road and went to the accused's side. That accused tried to avoid knocking him but it was not possible because the road was slippery after rain. The accused did not however elaborate how the motor cyclist went to his side of the road yet both vehicles were on the same side of the road viz; the left when facing Kisumu direction. The accused's witness (DW2) told the court that the cyclist emerged from petrol station and crossed the main road to join a feeder road. What DW2 (Paul Kimeli) told the court is completely at variance with what the accused told the court"

"The evidence adduced does prove that the vehicle hit the motor cycle from behind. That the accident happened on the left side of the road as one faces Kisumu direction. The demeanour of PW2 was good and I am convinced that she gave an accurate statement of the events leading to the accident".

The evidence adduced in the trial court shows that the Appellant drove the matatu at a high speed and without due care or regard for the safety of other road users including the rider of the motor cycle. The road was wet at the time as it had rained but this did not deter the Appellant from driving at a high speed. It is clear from the evidence that if the Appellant had not kept high speed which in the circumstances was dangerous, he would have managed to avoid the motor cycle. Instead, he realized that he was at too high a speed and might endanger the lives of many more people, if he avoided knocking the motor cycle. In the circumstances of this case, the fact that the Appellant owned to the fact that he could not avoid the motor cycle without causing a more serious accident exemplified the dangerously high speed he drove the matatu and this in my view put paid the argument that he was not at speed. It was argued by counsel

for the Appellant that the charge was defective because its particulars did not capture all the ingredients of the offence. The said counsel did not allude to what was omitted. I have perused it and I am satisfied that the particulars in support of the charge were sufficient and were supported by the evidence adduced. The charge was not defective. As regards the cancellation of the word ***"vehicle"*** and insertion of the word ***"cycle",*** no prejudice was caused to the Appellant by the amendment which seems to have been there throughout the trial. The witnesses referred to the motor cycle in their evidence and not to a motor vehicle.

I hold that the evidence before the trial court supported the conviction and I see no ground for interfering with it.

The sentence meted out was both custodial and disqualification from driving. A careful perusal of the sentence shows that the Appellant was to serve a term of three years in prison and at the same time, the Appellant's driving licence was suspended for a period of three years during which period the Appellant would be barred from driving. The period of three year's suspension of the driving licence, like that of imprisonment, was to commence from the date of sentence on 2nd March, 2010. There was no need to state when the three year period would come to an end once its commencement was known. I am unable to find merit in the argument advanced by the Appellant's counsel that the sentence meted out was bad in law or excessive. However, the trial court omitted hard labour which is mandatory. This was a slip. Pursuant to **section 354(1) (ii)** of the Criminal Procedure Code, I order that the Appellant shall serve the 3 years imprisonment with hard labour.

In the result, the appeal fails. I dismiss it. The sentence meted out by the trial court shall be with hard labour.

DATED at **KERICHO** this 1st day of December, 2010

G.B.M. KARIUKI, sc

RESIDENT JUDGE

COUNSEL APPEARING

Mr. Siele Advocate for the Appellant

Mr. P. Kiprop State Counsel for the Respondent

Court Clerk – Mr. Bett