Case Number:	Criminal Appeal 64 of 1993
Date Delivered:	02 Jul 1993
Case Class:	Criminal
Court:	High Court at Kisumu
Case Action:	Judgment
Judge:	John Amonde Mango
Citation:	Edward Jakoyo Ogutu v Republic [1993] eKLR
Advocates:	-
Case Summary:	**Edward Jakoyo Ogutu *v* Republic** High Court, at Kisumu July 2, 1993 Mango J Criminal Appeal No 64 of 1993 (From Original Conviction and Sentence in Traffic Case No 224 of 1992 of the Resident Magistrate's Court at Oyugis: S N Riechi Esq RM) ***Traffic offence*** *- dangerous driving-death by dangerous driving-appeal against a decision of the lower court finding the appellant guilty of running over the deceased-where the appellant had been trying to overtake the deceased who was on a bicycle-where the deceased made a sudden right turn and ran into the appellant-collision killing the deceased instantly-whether the collision was due to the negligence of the appellant-assessment of liability-whether the charge of dangerous driving was proved by the prosecution beyond reasonable doubt.*

Criminal Law *– dangerous driving – nature of the offence.*

Evidence *– burden of proof and standard of proof - in offence of dangerous driving - party on who the onus of proof lies – standard of proof in offence of dangerous driving.*

The appellant brought the appeal against a decision of the lower court convicting him for the offence of dangerous driving causing death. The prosecution's case had been that the deceased was riding a bicycle while the appellant was riding a motorcycle heading in the same direction. There was a collision between the two as a result of which both parties sustained injuries which the deceased subsequently died from. It was on that basis that the prosecution charged the appellant with the offence of dangerous driving.

In his defence the appellant had claimed that the deceased while riding his bicycle had swerved into the road in a bid to make a right turn while the appellant was attempting to overtake him. The appellant claimed that he had hooted to alert the cyclist of his intentions but that he still suddenly turned into the road thereby occasioning the collision. There was no dispute that the deceased died from the injuries sustained in the collision.

The issue for determination in the appeal was whether the charge of dangerous driving had proved by the prosecution beyond reasonable doubt.

Held:

1. The fact that there has been a collision as a result of which a person loses his life hardly means that that was some dangerous driving on the part of the one who did not die.

2. Dangerous driving is not an absolute offence. The prosecution must prove that there was some dangerous situation created by the manner of driving of the appellant and that as a result of that dangerous situation an accident was caused.

3. It was incumbent upon the deceased to ensure that all was safe before he decided to turn right.

	He would reasonably be expected to expect that traffic from behind may be overtaking or intending to overtake him. 4. The charge of dangerous driving was not proved beyond reasonable doubt against the appellant. *Appeal allowed.* **Cases** No cases referred to **Statutes** Traffic Act (cap 403) section 46(1).
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO 64 OF 1993

EDWARD JAKOYO OGUTU …..... APPELLANT

VERSUS

REPUBLIC……..…….....RESPONDENT

(From Original Conviction and Sentence in Traffic Case No 224 of

1992 of the Resident Magistrate's Court at Oyugis:

S N Riechi Esq RM)

JUDGMENT

Edward Jakoyo Ogutu hereinafter called the appellant appeals against his conviction and sentence of 18 months he was awarded for the offence of causing death by dangerous driving contrary to section 46(1) of the Traffic Act. The particulars of the charge stated that on the 2nd March, 1992 along Pala Kendu Bay Road in South Nyanza District of the Nyanza Province being the driver of motor cycle registration number KSY 784 he rode the said motor cycle in a manner which was dangerous to the Public and thereby caused the death of Morris Osumba Ongara.

The prosecution's case in a nut shell was that the deceased was riding a bicycle and the appellant was riding a motor cycle. Both were along the road view in the particulars of the charge and were going the same direction. There was a collision between the two as a result of which each sustained some injuries. The bicyclist subsequently died from his injuries and the appellant was charged with causing his death by dangerous driving.

The substance of the defence was that, the deceased was riding his bicycle on the left side of the road. The appellant was approaching from behind on his Yamaha motor-bike. He intended to overtake the bicyclist and hooted to signify his intention. Just as he got nearly parallel to the deceased, the latter without any signal turned right and the inevitable happened. There was a collision.

There seems to have no dispute that the deceased died from the injuries sustained in the collision.

The key prosecution witness for the prosecution was PW2 Yukabett Akoth Miseda. She happened to be at the scene at the time which she puts at 11.00 am. She said that the cicycle and the motor bike were going the same direction – she said that the bicyclist intended to make a turn to the right – to the road that the witness was on. She then saw the motory-cyclist hit this bicyclist. Her evidence could have been made clearer by cross-examination. It was not. She said the motorcyclist was speeding. This was a matter of opinion of course because it cannot be said what speed in her view would amount to speeding.

The police found the bicycle lying on the right side of the road and this, without much else, would seem

to buttress the evidence of PW2 that the bicyclist wanted to turn to the right and the appellant's word that the deceased turned to the right. As for the appellant's word that the turning was sudden and at a time, when he the appellant could not make any avoiding action, there was no word to contradict it. Seeing that it was supported as stated above, it may as well have been what happened. The learned magistrate in his judgment said that the main issue for determination was who had been at fault which led to the accident occurring. With respect, I am afraid that that was not the basic issue. This was a criminal charge and the standard of proof was the same as in most criminal cases. The prosecution was to prove the charge beyond reasonable doubt. The magistrate went on to analyse the evidence by stating this:-

"PW1 stated that the deceased was in front of accused – while riding. Accused himself stated that the collision occurred when he was just overtaking the deceased though he says he hooted to inform the deceased of his move. PW1 who was close to them denied ever hearing the accused hooting. In any case, the deceased was in front of the accused and the accused would be able to see his movement clearly. Had the accused been careful therefore he could have avoided hitting the deceased thereby causing his death".

On the basis of this reasoning, the learned magistrate found the appellant guilty and convicted him.

The point is that the appellant said he hooted. PW2 said that he did not. The learned magistrate does not seem to have resolved this. He did not in fact make a finding generally as to whether the word of the appellant was not credible or not. Appellant was behind deceased – that is given, and could therefore see deceased clearly, but suppose the deceased suddenly resolved to turn right and did so without ensuring that anything was coming from behind and as a result caused the collision, would the appellant be blamed for this – seeing that he was not given time to take avoiding action" I hardly think so. The fact that there has been a collision as a result of which a person loses his life hardly means that that was some dangerous driving on the part of the one who did not die.

Dangerous driving is not an absolute offence. The prosecution must prove that there was some dangerous situation created by the manner of driving of the appellant and that as a result of that dangerous situation an accident was caused.

The evidence herein seemed to establish that such a situation was created but not by the appellant, but rather probably by the deceased who decided suddenly to swerve right into the motor cycle of the appellant which was in the process of overtaking him. The appellant may have hooted or he may not have. I do not see that it makes much difference. It was equally incumbent upon the deceased to ensure that all was safe before he decided to turn right. He would reasonably be expected to execpt that traffic from behind may be overtaking or intending to overtake him.

The charge of dangerous driving was not proved beyond reasonable doubt against the appellant. Accordingly I quash the conviction for dangerous driving and set aside the sentence of 18 months awarded in this regard.

There were two other convictions appeals in respect of which were to all intents and purposes abandoned. For these the appellant was to serve a cumulative sentence of 6 months from the 16th March, 1993 if he did not pay a fine of 2000/=. I am therefore unable to order his release not being aware whether the fines were paid.

Dated and Delivered at Kisumu this 2nd day of July, 1993

J.A. MANGO

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JUDGE