IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO.194 OF 2011

(CORAM: OTHMAN, C.J., MBAROUK, J.A., And BWANA, J.A.)

LABAN NTABANGALALA ..... APPELLANT
VERSUS
THE REPUBLI.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Mipawa, J.)

dated the 24th day of August, 2011

in

Criminal Appeal No 49 of 2010

JUDGMENT OF THE COURT

28th June & 2nd July, 2012

MBAROUK, J.A.:

In the Resident Magistrate's Court of Mtwara at Mtwara, the appellant, Laban s/o Ntabangalala, was charged with two counts. **First,** causing damage through reckless driving, contrary to sections 42 (a) and 63 (2) of the Road Traffic Act Cap 168 R. E. 2002. **Two**, driving a motor vehicle on the Public road while under the influence of drink, contrary to section 45(1) and (4) of

the Road Traffic Act Cap. 168 R. E. 2002. The trial court convicted and sentenced the appellant to serve thirteen (13) months imprisonment on each count. The sentences were ordered to run concurrently. His appeal before the High Court was dismissed, but the sentence of thirteen months imprisonment on each count was set aside and substituted thereof with the sentence of six (6) months imprisonment on each count. The High Court ordered the sentences to run concurrently. Dissatisfied, the appellant has preferred this appeal.

The facts leading to the conviction of the appellant at the trial court were that, on 18th January, 2010 at 23:00 hours at Kiyangu area along Sabasaba road within the Municipality of Mtwara being the driver of motor vehicle Registration number STK 5957 make Toyota Land Cruiser Station Wagon recklessly did drive on the public road and failed to control well the motor vehicle, overturned and caused bodily damage to the said motor vehicle a property of the State Attorney of Mtwara. It was also alleged that on the same day, time and place, the appellant did drive the said

motor vehicle on the public road while having consumed 130 miligrams of blood alcohol concentration above the prescribed limit of 80 miligrams.

At the trial court, PW1, Ms. Angela Kileo, the State Attorney incharge of Mtwara zone testified that she instructed the appellant on the material day during evening time to take an office guest for dinner. On the following day, PW1 was surprised to receive a call from a police officer one Rashid informing him that the motor vehicle STK 5957 overturned. PW1 rushed to the scene of the accident but found the vehicle parked at "London Bar". The vehicle was damage on the side front and rear tyres were burst, site mirror was damaged and left side of the body was deformed. The appellant was later on taken to police for alcoholic testing where PW2, E. 1133 Sergeant Baraka tested the appellant by an alcoholic tester device on the 19th January, 2010 and he was found to have consumed the extent of 130 miligrams of blood alcohol concentration above the prescribed limit of 80 miligrams.

The appellant's defence generally dispute all the allegations against him. He contended that on the material day while at Villa Park with PW3 received a call from Mr. Kahangwa. He went to pick him at Forest Guest House to Villa Park where he joined PW3, Renatus Mathias Mkude at around 22:30 hours. He was then asked by PW3 to take back Mr. Kahangwa to Forest Guest House. On his way back to take PW3 when he arrived at the road hump at Kiangu area driving at speed below 30 kilometres per hour, the motor vehicle got a tyre burst and went off the road and overturned. He then got assistance from the public and managed to return the car to its normal position. The appellant testified that there was no recklessness on his part, instead, the accident was caused by front and rear tyres puncture. He also denied to have taken alcohol, otherwise he could not have been able to cooperate to prepare exhibit P3 (sketch map of the scene of accident) if he was drunk. The appellant also challenged the evidence of PW1 and PW3 as contradictory because PW1 said Mr. Kahangwa left Villa Park to his residence at around 19:30 hours, whereas PW3 said Mr. Kahangwa left Villa Park between 20:00

hours and 23:00 hours. The appellant also testified that he was tested the alcoholic percentage on the following day at around 12:00 hours and not the same night when the accident occurred.

In this appeal, the appellant was represented by Mr. Msafiri Mlanzi, learned advocate, whereas the Mr. Peter Ndjike, learned Senior State Attorney represented the respondent Republic.

Earlier on, the appellant filed his memorandum of appeal containing eleven grounds of appeal, but at the hearing, Mr. Mlanzi opted to consentrate on the only one ground, namely:-

1. *That the Hon. Judge of the High Court erred both in law and fact when he failed to hold either that the prosecution case was not proved beyond reasonable doubt or that the appellant was convicted on weakness of his defence case.*

Mr. Mlanzi submitted that, the appellant was found guilty and convicted on two counts, namely causing damage through reckless driving and secondly, driving a motor vehicle on the

public road while under influence of alcohol. However, Mr. Mlanzi contended that those two counts were not proved beyond reasonable doubt by the prosecution. He further submitted that, there was no eye witness among the five prosecution witnesses called to testify on how the accident occurred.

In his elaboration, Mr. Mlanzi **firstly**, submitted that the prosecution relied on PW5 as their important witness when he tendered in court a sketch map of the area where the accident occurred (Exhibit P3). However, he said, PW5 went further giving his opinion on the issue of over-speeding, which was wrong. Mr. Mlanzi strongly submitted that PW5 was not an expert in the field of drawing sketch map. He added that when he (PW5) testified in court he was silent on where he got any expertise in that field. Mr. Mlanzi said it is dangerous for any police officer without having an expertise to be allowed to draw a sketch map of the scene of accident without having a proper training.

Secondly, Mr. Mlanzi submitted that PW2 tendered Exhibit P1 the alcoholic test form, but the record is silent on how

conversant he was in the field of examining alcoholic tests. Mr. Mlanzi added that, PW2 was not an expert in the field. He further submitted that, the record shows that the appellant was tested twelve hours after the accident occurred. He said, there is evidence on record to the effect that the appellant was seen drinking beer after the accident, hence that could also be a reason that the Alcometer device showed excessive reading of drinking alcohol. He contended that, the record shows that, the appellant objected to the tendering of exhibit P1, but the trial court without giving any reason admitted Alcoholic test form as exhibit P1. He urged us to find that the admission of the exhibit P1 was absolutely unfair and unprocedural.

Thirdly, as to the issue of the evidence adduced on the burst of the tyres, Mr. Mlanzi submitted that, the evidence on record does not specially state at what time during the accident the tryres bursted, was it before, during or after the accident. He added that, this being a Criminal case, the prosecution had a duty of proving their case beyond reasonable doubt. Hence, as the

prosecution failed to prove their case beyond reasonable doubt, he urged us to give the benefit of doubt to the appellant.

Fourthly, Mr. Mlanzi submitted that the prosecution failed to prove on the issue of excessive speed, because no expert on that field was brought to testify on whether there was excessive speed or not. Hence, he urged us to find that the issue of excessive speed was not proved beyond reasonable doubt

Finally, he prayed for the appeal to be allowed.

On his part, Mr. Ndjike supported the conviction and sentence imposed on the appellant by the trial court and confirmed by the High Court. In his reply, Mr. Ndjike submitted that the law does not state that a sketch map should be drawn by an expert. He said, what PW5 did was to tender the sketch map which he drew. He was of the view that a sketch map does not need a special expertise to be drawn.

On the issue of the evidence of PW2 relied up on by the trial court and the High Court, Mr. Ndjike, without any hesitation agreed that there is a gap/doubt as the alcoholic test on the

appellant was done twelve hours after the accident. He then agreed that, the said doubt should be resolved in favour of the appellant.

Mr. Ndjike also agreed that the prosecution failed to establish as to when the trye bursted. He added that no one saw the accident, hence no one can say with certainty as so when the tyres bursted.

Lastly, on the issue of excessive speed, he agreed on the findings of the High Court Judge when he said that the 30 kilometres per hour speed is a very slow speed by which a heavy motor vehicle like Toyota Land Cruiser could not have failed to stop or come to a standstill or stay to its normal position, if the driver was careful and not at a high speed.

All in all, Mr. Ndjike urged us to dismiss the appeal.

As pointed out earlier, the appellant was charged with two counts. Having examined the rival submissions, our approach is to examine the two counts, and see the merits and demerits of the submission of each side therein. Let us first examine closely as to

whether the offence of **Driving a motor vehicle on public road while under influence of drink** was proved or not. In this appeal, Mr. Ndjike conceded that the offence was not proved beyond reasonable doubt. Both Mr. Mlanzi and Mr. Ndjike submitted that, the record shows that the accidence occurred around 22:00 hours in the night of 18th January, 2010. However, according to PW2, E 1133 Sgt Baraka testified that on 19-1-2010 at 11:00 hours he took the alcoholic test using Alcometer device to find whether the appellant exceeded the normal limit of drinking alcohol. It is on record that after the accident the appellant took beer. We think, the act of the appellant to drink beer after the accident affected the result as found in Exhibit P1-Alcohol Test Report. For those reasons, we are of the view that it is not safe to rely upon the alcohol Test Report –Exhibit P1 in proving that the appellant excessively drunk alcohol at the time of the accident.

On the issue of whether PW2 was competent or not to conduct alcoholic test and testify in court, we agree with Mr.

Ndjike that any police officer can do that test as per section 46 (1) of the Road Traffic Act, Cap. 168 R. E 2002 which states that:-

> *"A police officer may require any person driving or attempting to drive or in charge of motor vehicle or trailer on a road or in any other public place to accompany him to a police station or the surgery of a medical practitioner to provide a specimen of blood for a laboratory test there if the police officer has reasonable cause;-*
>
> *a) to suspect him of having alcohol in his body; or*
>
> *b) to suspect him of having committed a traffic offence while the motor vehicle or trailer was in motion".*

According to section 2 of the Police Force and Auxiliary Services Act [Cap. 322 R. E. 2002] a police officer is defined as:-

> *"means any member of the force of or above the rank of constable".*

Even section 2 of the Criminal Procedure Act [Cap. 20 R. E. 2002] defines police officer as:-

> *"includes any member of police force and any member of the people's militia when exercising police functions in accordance with the law for the time being force."*

As per those definitions of the term police officer, we are of the view that PW2 being a sergent was justified to do the test and testify as to what he did.

All in all, we are of the considered opinion that, as the test was done twelve hours after the accident, anything could have happened in between that period. As the record shows, in between the period of the accident and the time when the appellant was tested next day, the appellant drunk beer. We think, drinking beer after the accident and before being tested culminated to the result of excessive drinking test taken by PW2. We are of the firm view that, the appropriate time to take such a test should be on the spot and not allowing time for other factors to intervene.

For those reasons, we find that the prosecution failed to prove the second count of **Driving a motor vehicle while under influence of drink beyond reasonable doubt** at the trial court. In the event, we find this ground of appeal with merit.

Secondly, let us examine closely on the submissions directed to the first count of **causing damage through reckless driving**. To start with, let us examine the ground of complaint concerning the sketch map (Exhibit P3) and the Vehicle Inspection Report (Exhibit P2) as submitted by Mr. Mlanzi. We agree with Mr. Mlanzi to the extent that, it was wrong for PW5 to give his opinion concerning the issue of over speeding when he tendered Exhibit P2, because he was not an expert in that field.

However, on the other hand, we agree with the findings of the High Court Judge in his analysis of the evidence on the issue of over-speeding leading to the accident as he stated at page 46 of the record where he stated that:-

> *" However, at such a very low speed the appellant wanted the trial court to believe*

him that eventually at that speed of less than 30 kms per hour., the front and the rear tyres bursted and the motor vehicle overturned. In my view and I think rightly that it was impossible for the motor vehicle which the appellant was driving at a speed of less than thirty (30) kilometers per hour to overturn even if its tyre had busted. The speed of less than 30 kilometres per hour is such a very small speed that a heavy motor vehicle like Toyota Land Cruiser could have failed to stop and came to a standstill in its normal position if the driver was careful and was not at a high speed".

Apart from that analysis and the finding of the High Court Judge, the appellant himself at page 13 of the record testified to the effect that "it is possible to stop the motor vehicle in case it got burst at the speed of 30".

Looking more closely, the record shows that when the sketch map (Exhibit P. 3) was tendered at the trial court, the appellant had no objection. Hence he cannot at this stage say otherwise, because his no objection to the tendering of a sketch map meant that, he had also accepted the contents found therein. We are of the view that Exhibit P3 was rightly tendered in court, hence can be validly used against the appellant.

We are of the considered opinion that, taking cumulatively,

1. The contents of the evidence found in Exhibit P3 (sketch map).
2. The findings of the High Court Judge stated above.
3. The appellant's own testimony on the issue of the possibility to stop motor vehicle at the speed of 30 kms per hour if the tyres got burst.

4. The contents of the evidence found in the Vehicle Inspection Report (Exhibit p.2) which was tendered without any objection from the appellant.

We think taking that all, in totality, proved the 1st count of **causing damage through reckless driving.**

From the analysis we have made, we agree with Mr. Ndjike that all grounds of complaint in connection to the 1st count are devoid of merit.

For the approach we have taken herein, we allow all grounds of complaint in connection with the 2nd count of **driving while under influence of drink** and find them with merit.

On the other hand, we find all the grounds of complaint in connection with the 1st count concerning **causing damage through reckless driving** devoid of merit.

To the extent stated herein above, we hereby partly allow the appeal.

DATED at **MTWARA** this 30th day of June, 2012

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

MBUYA R. M.
DEPUTY REGISTRAR