IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA).

AT KIGOMA

APPELLATE JURISDICTION

(DC) TRAFFIC APPEAL NO. 1 OF 2020

(Arising for Traffic Case No. 8 of 2019 of the District Court of Kigoma at Kigoma)

ABDALLAH RAMADHANI @ HETA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order: 26/5/2020

Date of Judgment: 2/6/2020

Before: Hon. A. Matuma, J

The appellant Abdallah s/o Ramadhani @ Heta stood charged in the District Court of Kigoma for four counts of causing death through careless driving contrary to section 41, 27 (1) (a) and 63 (2) (b) of the Road Traffic Act, Cap. 168 R.E 2002.

He also faced other nine counts of causing bodily injury through careless driving and one count of careless driving all contrary to the same provisions herein above as reflected in the first-four counts.

It was alleged in the particulars of each count that the appellant on the 23rd day of January,2019 during night hours along Tabora- Kigoma Road at Mlima area within Uvinza District in Kigoma Region, being the driver of a motor vehicle with Registration No. T. 400 AVU make Scania bus, did drive the same on the Public Road carelessly to wit; he drove with high speed at the road's corner as a result he failed to control it thereby causing

the same to turn over resulting into four deaths, nine bodily injuries and damage to the vehicle in question.

After a full trial, the leaned trial Magistrate was satisfied that the prosecution proved its case beyond reasonable doubts in respect of the four counts relating to deaths, three counts in respect of bodily injuries and the last count of careless driving. The appellant was acquitted of the rest counts of causing bodily injuries through careless driving as no evidence was given in its favour.

In all the counts under which the appellant was convicted, he was sentenced to serve a custodial sentence of two years in each, the sentences were ordered to run concurrently.

The appellant was further disqualified from driving any vehicle for three years and his driving license cancelled to such period of three years.

The appellant was aggrieved with such findings, sentence and order hence this appeal with five grounds all of which contains two major grounds of complaints namely:-

i. *That the prosecution case was not proved beyond reasonable doubts.*
ii. *That the sentences imposed against him after his conviction was not legally grounded.*

At the hearing of this appeal, the appellant appeared in person while the Respondent was represented by Benedict Kivuma learned State Attorney.

The appellant argued that the allegation that he was driving the vehicle at the high speed was not proved because the vehicle had a decoder (king'amuzi) which is a speed controller. He further argued that after the accident SUMATRA went at the scene to check their decoder and see if he drove at the high speed but they found him to have been driving

normal and that is why they did not even come to testify against him in Court about the speed.

The appellant further argued that he has been driving for thirteen years without any accident and was very much familiar with the road of Kigoma -Tabora including the accident area for more than ten years.

The appellant finally argued that even though on the material date he was driving to Mwanza from Kigoma but when he reached at Tabora he was directed by his boss to exchange the bus with the driver of another bus which was from Mwanza to Kigoma. They thus exchanged and he took that bus from Mwanza and turned to Kigoma the bus of which led to the accident in question.

He lamented therefore, that he did not knew whether that bus was in a good mechanical order as the cause of the accident was a steering lock.

Mr. Benedict Kivuma learned State Attorney on his party opposed this appeal arguing that the same is without any merit.

He argued that the appellant drove at the high speed as it was authenticated by PW3 and PW5 one of whom was a passenger in the vehicle. He also argued that even the sketch plan as analyzed by the trial Magistrate indicated that the vehicle veered about 43 meters and therefore, he was at a high speed.

The learned state Attorney disputed the averments of the appellant that the cause of accident was a steering lock because there was no evidence to that effect, but that it was a result of careless driving at a high speed.

This appeal can only be disposed off by determining one issue as to whether the prosecution case was proved to the required standard i.e beyond reasonable doubt.

During trial, it was alleged that the cause of accident was the high speed of the vehicle which resulted into the appellant failing to control it at the corner of the road hence the accident. The appellant on his party stated that it was not a speed but a steering lock.

I have carefully read the records of the trial Court and the judgment thereof. I have as well considerately listened to the arguments of the parties at the hearing of this appeal.

I am of the firm view that the prosecution case depended on the proof that really the appellant was driving the bus at the high speed which resulted into him failing to control it at the corner hence the accident in question. The piece of evidence from which the high speed was inferred came from the sketch map exhibit A1 which was tendered in evidence by PW3 F. 185 D/CPL Frank and that of PW5.

In Exhibit A1, the trial Magistrate inferred what he termed that ***the vehicle veered 43 meters*** and thus it was over speeding.

First of all, exhibit A1 was illegally tendered in evidence. It was read out its contents before being cleared for admission and actually be admitted in evidence. After its admission it was not read out. In the case of ***Robinson Mwanjisi and 3 others versus Republic [2003] TLR*** **218,** the Court of Appeal set a principle under which documentary evidence should be produced in evidence. The same provides clear directives on how documentary exhibits should be admitted in evidence and what to follow after its admission. It held that a document must first be cleared for admission before the contents thereon are read out. Once it has been cleared and subsequently admitted in evidence, it must be read out to reveal its contents to the accused person.

In the instant appeal that procedure was not followed. Exhibit A1 was first read out its contents before being cleared for its admission. After the contents were read out, it is when the accused was asked whether he had objection to its admissibility. Finally it was admitted in evidence as exhibit. Thereafter its contents were not read out.

In the case of **John Mghandi @ Ndovo Versus Republic, Criminal Appeal No. 352 of 2018 the** Court of Appeal in insisting that the contents of documentary evidence should only be read out after its admission in evidence held;

> *"We should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain contents so that the accused is kept posted on its details to enable him/her give a focused defence".*

The Court of appeal held that the documentary exhibits whose contents were not read out after its admission in evidence is liable to be expunged from the evidence on record.

It is thus my settled view that the value of a documentary exhibit for determination by the court is there; only if;

i. Its execution has been well established i.e. it has been clearly cleared for its admission i.e. it undergoes all the due procedures for admission of documentary exhibits.
ii. After its clearance, it must and actually be admitted in evidence and marked as exhibit.
iii. After its admission, its contents must be read out to the accused person to keep him informed of it for his/her focused defence and even for his thorough cross examination on it.

The document produced in evidence contrary to the herein procedures is valueless and liable to be expunged out of record as held in **Robinson Mwanjiri's** case (supra) as well as that of **John Mghandi** (supra). I personally in a number of cases followed that Court of appeal decisions and expunged documents unprocedurally tendered in evidence. Some of those cases are ***Sikini Mharuka and antoher versus Republic, Criminal Application No. 31/2019*** (HC) Kigoma, and ***Omary Shabani versus Republic, Criminal Appeal No. 49/2019*** (HC) Kigoma.

I have thus no other option in the instant appeal but to expunge exhibit A1 out of evidence on record, and I accordingly so expunge.

The remaining evidence on the allegation that the appellant drove the bus at the high speed is that of PW5 **Yohana s/o Lushona** who stated in evidence at page 17 of the proceedings that;

> *"I boarded a bus named Fikoshi bus service from Mwanza to Kigoma the bus No. T. 400 AVU... The accused person was over speeding, the bus was involved in accident after the accused person failed to control the bus at the sharp corner".*

The evidence of this witness was impeached though cross examination when he was asked to state his seat number. He did not remember the seat number and thus replied;

"I was seated on a seat but don't remember the seat number".

The question by the appellant against this witness tendered to doubt whether PW5 was really a passenger in the vehicle. I also doubt whether PW5 was a passenger therein. This is because he could not have remembered registration number of the bus but fail to remember his seat number. What was so special with the registration number of the bus to

the extent that the witness remembered it, but did not remember his seat number. The doubts are further cemented by the fact that in his evidence PW5 stated that he sustained injuries as a result of such accident;

"I sustained injury on my left hand that paralyzed".

Bu he is not among the victim in the charge sheet. He is not named in the charge sheet to have been a victim of the accident. Those who were injured in the accident are named from the fifth count to twelveth count to be ***Rashidi Nyakimwe, Taus Musa, mbeko Shabani, Asia Barnaba, Fredrick Bimba, Peter Aloyce, Elizari Ngozi, Robert Lucas and Mwamini Fredrick.*** PW5 is not among them. Doctors and clinical officers who examined dead bodies and the victims came as witnesses for the prosecution and tendered Post Mortem Examination Reports and PF3s respectively. None came for PW5 nor his PF3 was produced in evidence to authenticate that he was a victim of the accident in question. Not only that but also even during the Preliminary Hearing, PW5 was not named to have been a passenger in the vehicle nor to have been involved in the accident. The dead bodies and the survived victims of the accident are named in the facts of the case at page 5 of the proceedings, PW5 is not among them. Therefore, it is doubtful whether PW5 was really a passenger in the bus which the appellant drove on the material date.

Even if it was to be delivered that he was actually a passenger in the vehicle, his testimony about over speeding is not substantiated because he could not state the exact speed of the vehicle at the time of accident.

In the case of ***Anatory Mutafungwa versus The Republic, Criminal Appeal No. 267 of 2010,*** the Court of Appeal rejected to act on mere opinion of a passenger in the vehicle that the same was being driven at a high speed. At page 13 of the judgment the Court of Appeal held;

"The issue of high speed is difficult to substantiate by evidence because the Land Cruiser was going down the steep hill and ***it is doubtful whether the prosecution witnesses had a chance to read the speedometer*** *to determine the exact speed the vehicle was being driven before the accident".*

The Court then remarked;

"The question of speed could not therefore, have been decisive in determining whether the appellant was careless which is the real issue in this case".

In the like manner, in this case, it is difficult to determine the carelessness of the appellant in his driving of the vehicle in question at the time of accident by examining the fact of speed. I find that it was necessary to have specific evidence on the exact speed the vehicle was at the time of accident and expert opinion in regard to the reasonable speed that a prudent driver would use at the locus in quo.

I join hands with the appellant that SUMATRA Officers should have been summoned to give evidence on the speed of the vehicle before and after the accident because the vehicle had a decoder which detects the speed of the vehicle at all time. That fact that the vehicle had a decoder (king'amuzi) was not disputed. As such, it was imperative to bring the evidence relating to it.

I also doubt whether the vehicle was really in he high speed because the sketch map if it had to be used, indicates that **"HALI YA BARABARA NI VUMBI"** *i.e* it was rough road. PW2 **Mbeko Shabani** and PW4 **Rashidi Nyakimwe** who were indisputably passengers in the vehicle testified that at the time of accident they were asleep. The accident happened at night hours.

I don't grasp how the vehicle can be at the high speed on a rough road and yet some passengers get to sleep well without even knowing what was going on until when the accident awakened them.

Sleeping of passengers in a vehicle driven on the rough road presupposes that they were in well driven vehicle the driving of which did not disturb their sleeping. The circumstances of the case that it was night, the road was rough, and some passengers were asleep are incompatible with the allegation that the vehicle was so speedy.

In the case of ***Masumbuko Athuman versus Republic (1991) TLR 19,*** it was held that a Court cannot convict a person of careless driving when the finding of careless driving is based solely on opinion evidence about his speed where such opinion is arrived at, on quite insufficient data.

In the instant case the trial Court convicted the appellant basing on the opinion of lay person that the vehicle was so speed without there being sufficient data to substantiate that in fact it was driven at a high speed than what was reasonably expected.

PW5's testimony that the appellant was over speeding the vehicle was thus not sufficient to convict as it was further held in ***Masumbuko Athuman's*** case (supra) that;

> *"PW1's statement that the appellant was driving at high speed cannot suffice to prove the fact of speed".*

I would thus agree that the cause of accident was something other than the speed so alleged. The appellant stated in evidence that it was due to steering lock when he reached at the corner and his attempt to maintain the vehicle on the road failed resulting it to go off the road and subsequently turn over.

There was no evidence sufficiently to contradict the appellant's version over the steering lock. The driver who drove the vehicle from Mwanza to Tabora, in my view was material witness for the prosecution who would tell whether the vehicle was in a good mechanical order before it started its journey from Mwanza to Tabora. Also there was no evidence on record on whether such vehicle was inspected and issued a certificate to that effect. I therefore, agree with the appellant that he was driving in a normal standard speed and the accident resulted from steering lock which was beyond his control.

In the case of ***Hussein Kassim versus The Republic [1986] TLR 18*** it was held, the holding which I adopt in this case that;

> *"In so far as the appellant had the right of way and there was no traffic ahead and in the absence of evidence of departure from the standard of driving expected or reasonably prudent driver, the mode of driving adopted by the appellant before and or at the time of the accident cannot be faulted".*

I finally find out that the prosecution did not thorough investigate the cause of accident or they did but decided not to disclose the same due to undisclosed reasons. The appellant was thus prosecuted and convicted on mere speculations and conjectures that he drove the vehicle at the high speed. I had time to rule out in the case of ***Linaei d/o Venance Komba and Another versus Republic, Misc. Economic Application No. 4/2020*** HC at Kigoma that;

> *"Speculations and conjectures in criminal trials have not at any time be the business of the Court".*

See also ***Mohamed Musero versus Republic [1993] TLR 290.***

With the herein above analysis, I find the trial Court to have been wrongly found the appellant guilty of all offences upon which he was convicted as the prosecution case was not proved beyond reasonable doubt.

I therefore, find out that the appellant is not guilty for all the offences he was convicted with, and I accordingly acquit him of them.

To that end, there is no need to dwell into his second set of complaint about the legality or otherwise of the sentences meted against him.

As I am informed that the appellant is currently serving a community service sentence, I order his immediate release from the community service works. I further order restoration of his driving license and set aside the order of his disqualification from obtaining another driving license. Whoever aggrieved is hereby informed that he has a right to further appeal to the Court of Appeal of Tanzania subject to the requirements of the guiding laws of appeals thereat; such as the Appellate Jurisdiction Act and the Court of Appeal Rules.

It is so ordered.

THE HIGH COURT OF TANZANIA

A. Matuma

Judge

2/6/2020