IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Appeal No. 0002 of 2017

In the matter between

UGANDA **APPELLANT**

And

1. JOHN OKUMU BISMARK

2. OCHENG GEORGE **RESPONDENTS**

Heard: 23 June, 2020
Delivered: 14 August, 2020.

Criminal Law *— Causing Death by Careless Use of a Motor vehicle C/s 109 of The Traffic and Road Safety Act — There should be proof that; Death of a human being occurred, the death was caused by a motor vehicle, that the motor vehicle was being driven carelessly and that the accused was driving the motor vehicle at the material time. — "motor vehicle" means any self-propelled vehicle intended or adapted for use on the roads. This definition requires the vehicle to be one that is normally used on a highway. It is not enough that the vehicle, at the time in question, was in use on a highway. — Death may be proved by production of a post-mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body — A person is regarded as driving "carelessly" if (and only if) the way he or she drives falls below what would be expected of a competent and careful driver. This requires the accused to have been driving at a speed or in a manner that was dangerous to the public having regard to all the circumstances of the case. The driving may be "careless" either because it was intrinsically dangerous in all circumstances, or it was dangerous in the particular circumstances surrounding the driving.*

Evidence*—Circumstantial evidence— Circumstantial evidence is that which establishes the fact to be proved only through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of*

circumstances is present. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondents were jointly charged with two counts; in the first Count, the 1st respondent was charged with the offence of an Employer failing to keep records of a driver C/s 148 and 176 (1) of *The Traffic and Road Safety Act*. It was alleged that the 1st respondent on 17th October, 2015 in Gulu District, employed another person as driver of motor vehicle registration number UAR 777 L, a RAV 4 Silver in colour, and failed to keep a written record, to wit the name and driving permit number, of that person. In the second Count, the 2nd respondent was charged with the offence of Causing Death by Careless Use of a Motor vehicle C/s 109 of *The Traffic and Road Safety Act*. It was alleged that the 2nd respondent on 17th October, 2015 at Pier Bar, along Cemetry Road in Gulu District, drove vehicle registration number UAR 777 L, a RAV 4 Silver in colour, carelessly and caused the death of Ocaya Fred Kinyera, a male adult aged 23 years, a student of Gulu University.

[2] The 1st respondent pleaded guilty to Count one, was convicted and sentenced to a fine of 30 currency points (shs. 600,000/=) or eight months' imprisonment in default. The 2nd respondent was tried in respect of the 2nd Count and was acquitted. The appeal is against the acquittal of the 2nd respondent.

[3] The prosecution case was that the late Ocaya Fred Kinyera was a student at Gulu University. On the fateful night, he was returning to the university on foot and he returned from a "campus night" theme night in one of the night clubs in Gulu Municipality, when he was knocked by a hit and run motorist. He was carried to Gulu Regional Referral Hospital in a critical condition and unfortunately

passed away three days later. The traffic police began its investigations which led to the recovery of the suspected motor vehicle a week later from one of the motor repair garages in Gulu Municipality. This led to the arrest of the 2nd respondent being the person who had driven the vehicle to that garage. Later the 1st respondent too was arrested as the owner of the motor vehicle. Each of them denied having been the driver of the vehicle on the fateful night. At the trial, the 2nd respondent chose to remain silent in his defence.

Judgment of the court below:

[4] In his judgement, the trial Magistrate found that the accident occurred at around 4.00 am. There was no eyewitness to the accident. Although there was evidence to show that it is the 2nd respondent who drove the damaged vehicle to a motor repair garage on 23rd October, 2015 there was no evidence to show that it was the 2nd respondent who was driving it at the time of the accident on 17th October, 2015. There was neither direct nor circumstantial evidence linking the 2nd respondent to the causation of the accident. He was accordingly acquitted.

[5] Counsel for the appellant filed a notice of appeal but did not file a memorandum of appeal nor submissions in support of the appeal, despite having been notified and given a month's period to do so. Consequently, neither did the respondents file submissions. However, considering that under section 28 (1) of *The Criminal Procedure Code Act*, a criminal appeal is commenced by a notice in writing signed by the appellant or an advocate on his or her behalf, it was incumbent upon this court to consider the merits of the appeal, despite the lapses of the appellant.

[6] This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C.*

Criminal Appeal No.1 of 1997 and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it").

[7] An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

Ingredients of causing death by careless use of motor vehicle.

[8] For the 2nd respondent to be convicted of the offence of Causing Death by Careless Use of a Motor vehicle C/s 109 of *The Traffic and Road Safety Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. Death of a human being occurred.
2. The death was caused by a motor vehicle.
3. That motor vehicle was being driven carelessly.
4. The accused was driving the motor vehicle at the material time.

1st issue; whether death of a human being occurred.

[9] Death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. P.W.1 Mwaka Michael testified that the victim did not die instantly. He sustained a deep cut wound on the head and bled. He was taken while unconscious to Gulu Regional Referral Hospital, from where he died three days later on 20th October, 2015. This evidence was not discredited by cross-examination and neither was any other evidence adduced to controvert it. I therefore find that the trial court came to the right conclusion when it found that the prosecution had proved beyond reasonable doubt that Ocaya Fred Kinyera died on 20th October, 2015.

2snd issue; whether that death was caused by a motor vehicle.

[10] According to section 2 (1) (oo) of *The Traffic and Road Safety Act, Cap 361*, "motor vehicle" means any self-propelled vehicle intended or adapted for use on the roads. This definition requires the vehicle to be one that is normally used on a highway. It is not enough that the vehicle, at the time in question, was in use on a highway. P.W.3 ASP Labeja Washington testified that on 23th October, 2015 he recovered a motor vehicle, a Toyota RAV 4, Silver in colour, registration number UAR 777 L from a motor vehicle repair garage. It had a crushed windscreen and dented bonnet. It was a vehicle that was normally used on a highway.

[11] It had to be proved further that it was the dangerous driving of that vehicle that caused the death of the victim on 20th October, 2015. Issues of causation arise where the result is removed from the supposed caution by a number of days. In this case, the collision is said to have occurred on the night of 17th October, 2015 yet death occurred three days later on 20th October, 2015. In those circumstances, for the driver's careless conduct to have "caused" the death, it must have "contributed significantly" to that result, or been a "substantial and

operating cause" of it. The alleged careless act must have been the substantial and operating cause of the events leading to the death of the deceased. The driver's acts do not need to be the sole cause of the death.

[12] Cases in which causation will be a live issue include where: there were multiple possible causes of the death; the death was delayed; there were intervening acts between the accused's actions and the victim's death; or the accused is alleged to have caused the death indirectly. A person can be criminally liable for a death that has multiple causes, even if he or she is not responsible for all of those causes. So even if another driver's mistakes contributed to the collision, the accused's culpable driving will have caused the death if the court finds it was a substantial and operating cause of the collision. However, where there are other possible causes of the death that are inconsistent with the death having been caused by the accused's culpable driving, these must be excluded beyond reasonable doubt. While the driving does not have to be the sole cause of death, it does have to be a cause (see *R v. Hennigan [1971] 55 Cr App R 262*).

[13] It was the testimony of P.W.3 ASP Labeja Washington that 17th October, 2015 at around 2.00 – 3.00 am he received a report of a traffic accident involving a pedestrian that had occurred at Cemetery road and the vehicle involved was a RAV 4 Silver in colour, registration number UAR 777 L. A motor vehicle mechanic, P.W.2 Otyang Jimmy, testified that when the suspected vehicle, a RAV 4 Silver in colour, registration number UAR 777 L, was on 23th October, 2015 at 8.00 am driven to his motor vehicle repair garage, it had a crushed windscreen and dented bonnet. The vehicle was towed away by the traffic police before the repairs could begin. P.W.1 Mwaka Michael testified that the victim did not die instantly. He sustained a deep cut wound on the head and bled. He was taken while unconscious to Gulu Regional Referral Hospital, from where he died three days later on 20th October, 2015. There is thus no direct evidence of causation. All that was led was circumstantial evidence.

[14] Circumstantial evidence is that which establishes the fact to be proved only through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present. In a case depending exclusively upon circumstantial evidence, the court must find before making a finding of fact regarding causation that the known facts are incapable of explanation upon any other reasonable hypothesis of causation. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of causation from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

[16] In the instant case, the injuries sustained by the deceased were consistent with being run over by a motor vehicle. He died within three days of sustaining those injuries,. There was nothing to suggest that he suffered from any ailments before that collision. A vehicle is recovered three days later from a motor vehicle repair garage within the same municipality with external damage to its bonnet and windscreen that are consistent with a collision. Its description matched the description given to the traffic police by an anonymous informer claiming to have witnessed the collision. The only rational inference that those circumstances would enable the court to draw is that the collision between that motor vehicle and the deceased was either "the cause," or it must have "contributed significantly," or was a "substantial and operating cause" of his death.

3rd issue; <u>whether that motor vehicle was being driven carelessly at the material time.</u>

[17] To be "driving," a person must generally have control over the propulsion of the vehicle. Before a person can be considered to be driving, he or she must at least be in a position to control the movement and direction of the vehicle. A person may or may not have been driving, depending on the degree of control he or she had over the propulsion, movement and direction of the vehicle. The offence is

committed by a person who “carelessly uses a motor vehicle” thereby causing death of another. A person drives “carelessly” for the purpose of this offence if he or she fails unjustifiably and to a gross degree to observe the standard of care which a reasonable driver would have observed in all the circumstances of the case, or when he or she consciously and unjustifiably disregards a substantial risk that death of another person or the infliction of grievous bodily harm upon another person may result from his or her driving.

[18] A person is regarded as driving “carelessly” if (and only if) the way he or she drives falls below what would be expected of a competent and careful driver. This requires the accused to have been driving at a speed or in a manner that was dangerous to the public having regard to all the circumstances of the case. This may be satisfied even if the accused was driving at his or her (incompetent) best (see *R v. Evans [1963] 1 QB 412*). This requires the prosecution to prove beyond reasonable doubt that: the driver was aware of a risk that death or grievous bodily harm may result from his or her driving, that risk was substantial rather than remote, the accused consciously disregarded that risk, and the decision to disregard that risk was unjustifiable. All matters concerned with the control and management of the vehicle are part of the accused’s manner of driving. This includes speed, navigation and communication with other drivers and road users. It is not necessary to prove that the accused intended to drive dangerously, or was aware that his or her conduct was dangerous to the public.

[19] The driving may be “careless” either because it was intrinsically dangerous in all circumstances, or it was dangerous in the particular circumstances surrounding the driving. The accused’s driving must have created risks that significantly exceeded the risks which are ordinarily associated with driving. The condition of the road, the condition of the vehicle, the time of driving, lighting conditions, the size and speed of the driver’s vehicle, may all be relevant to the court’s determination. Any harm caused by the accused’s driving may be used as evidence of the seriousness of the breach. It is not necessary for the prosecution

to identify a particular person who was endangered by the driving. The public includes actual or potential road users. The level of “carelessness” required must be of a high order. It must involve a great falling short of the standard of care that a reasonable driver would have exercised in the circumstances and involves a high risk of death or serious injury resulting from the relevant conduct. In assessing the extent of the risk, the court must consider both the likelihood of a collision and the seriousness of any likely injuries if a collision does occur.

[20] P.W.1 Mwaka Michael testified that from information, the vehicle hit the deceased and the impact threw him a distance away, it collided with a Bajaj motorcycle, registration number UAB 564 N as well as another vehicle, a Toyota Spacio registration number UAR 453 N, before speeding away. P.W.3 ASP Labeja Washington testified that the eye witness was a night guard at Pier, a one Owot, who unfortunately was never called to testify. P.W.2 Otyang Jimmy testified that when the suspected vehicle, a RAV 4 Silver in colour, registration number UAR 777 L, was on 23th October, 2015 at 8.00 am driven to his motor vehicle repair garage, it had a crushed windscreen and dented bonnet.

[21] For a motor vehicle to be driven at such a sped that it crashed into a pedestrian, a motorcycle and another vehicle at time estimated to have been 2.00 – 3.00 am in the night, the manner of driving must have created risks that significantly exceeded the risks which are ordinarily associated with driving at that time. Whoever was driving the vehicle at that time was driving in a manner that was either intrinsically dangerous in all circumstances, or dangerous in those particular circumstances, but certainly failed unjustifiably and to a gross degree to observe the standard of care which a reasonable driver would have observed in all the circumstances of the case. This evidence was not discredited by cross-examination and neither was any other evidence adduced to controvert it. I therefore find that the trial court came to the right conclusion when it found that the prosecution had proved beyond reasonable doubt that the motor vehicle was being driven carelessly at the material time.

4th issue; whether it was the respondent driving the motor vehicle at the material time.

[22] Proving this element requires adducing direct or circumstantial evidence placing the accused at the scene of crime as perpetrator of the offence. The 2nd respondent opted to remain silent in his defence. P.W.3 ASP Labeja Washington testified that he arrested the 2nd respondent on 24th October, 2015 based on information from the 1st respondent implicating him as the one who was driving the vehicle at the material time. Although the 2nd respondent admitted having caused the accident, he did not record a charge and caution statement from him.

[23] According to section 23 (1) (a) of *The Evidence Act*, no confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of a police officer of or above the rank of assistant inspector. Although P.W.2 ASP Labeja Washington, he did not comply with the requisite procedure laid down by the Judges Rules of England alongside the administrative instructions dated 2nd March, 1973, entitled "Recording of Extra-Judicial Statements" issued to all magistrates by the Chief Justice (see *Festo Androa Asenua v. Uganda, S.C. Criminal Appeal No. 1 of 1998* and *Namulobi Hasadi v. Uganda S. C. Criminal Appeal No.16 of 1997*). The trial court was therefore right when it disregarded that evidence.

[24] The implication was that there was no direct evidence left implicating the 2nd respondent as the driver of this vehicle at the material time. The only evidence implicating him was that of P.W.1 Mwaka Michael who testified that on multiple occasions before the accident, he had seen the 2nd respondent driving that very car, although he did not know who was driving it on the fateful night. The other evidence is that of P.W.2 Otyang Jimmy who testified on 23th October, 2015 at 8.00 am, six days after the accident, it is the 2nd respondent who drove the vehicle to his motor vehicle repair garage. The question was whether this

circumstantial evidence irresistibly pointed to the fact that he was driving the vehicle on the night of 17th October, 2015.

[25] A court will infer another fact from proven facts only if according to the common course of human affairs, there is such a high probability that the occurrence of those circumstances would be accompanied by the existence of that fact-in-issue that the contrary cannot reasonably be supposed. When the court finds that an inference or hypothesis consistent with innocence is open on the evidence, it must give the accused the benefit of the doubt necessarily created by that circumstance and acquit him or her. A reasonable doubt will necessarily arise where any other inference consistent with innocence is reasonably open on the evidence.

[26] When dealing with circumstantial evidence, the court must consider the weight which is to be given to the united force of all the circumstances put together. To find the accused guilty based only on circumstantial evidence, his or her guilt must not only be a reasonable inference; it must be the only reasonable inference which can be drawn from the circumstances established by the evidence. It is important that the court only draws inferences which can be properly deduced from the direct evidence (reasonable inferences), rather than making guesses or engaging in speculation. I find that the trial court correctly evaluated evidence relating to this ingredient. The circumstantial evidence did not incriminate the 2nd respondent to the required standard.

Order:

[27] In the final result, there is no merit in the appeal. The appeal is accordingly dismissed.

Delivered electronically this 14th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant

For the respondent