

KELVIN KAMUTSAMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KAMOCHA AND MAKONESE JJ
BULAWAYO 11 AND 14 MAY 2015

Advocate L. Nkomo for appellant
Mr T Makoni for respondent

Criminal Appeal

MAKONESE J: The appellant appeared before a magistrate at Gweru charged with culpable homicide as defined in section 49 (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations against him being that on 19 April 2012 and at St Thomas Church, along the Midlands State University, (MSU) – Senga road, he drove a motor vehicle, a Ford Ranger double-cab, registration number ABT 0655, negligently, thereby causing the death of Pauline Mudehwe. The agreed facts are that the deceased was walking with her two friends towards the Midlands State University when the appellant was also driving in the same direction. As the appellant drove past certain speed humps, the canopy fell off from his motor vehicle and hit the deceased and her two friends. The deceased was hospitalized and later died at Parirenyatwa hospital as a result of injuries sustained in the accident. According to the Post Mortem Report the deceased sustained a fractured thoracic spinal injury. Her two friends suffered minor injuries.

The appellant denied the allegations but was nonetheless convicted and sentenced to pay a fine of \$400 in default of payment, three months imprisonment. In addition three months imprisonment was wholly suspended for 5 years on condition appellant was not convicted of any offence involving a contravention of the Road Traffic Act [*Chapter 13:11*].

The appellant's appeal, is indicative of his dissatisfaction with both conviction and sentence. The appellant contends that his guilt was not proved beyond reasonable doubt and that he gave an explanation of how the accident occurred which was reasonably possibly true and that in the event he ought to have been given the benefit of the doubt and acquitted. The state filed submissions conceding that the conviction was improper. After hearing argument we allowed the appeal and quashed the conviction and sentence. These are our reasons.

The particulars of negligence as alleged by the state were that the appellant was negligent in one or more of the following:

- (a) failed to keep a proper lookout.
- (b) Travelling at an excessive speed in the circumstances
- (c) Overtaking at a blind corner where there were speed humps.

In his defence outline, the appellant pleaded not guilty to the charge of culpable homicide and denied the alleged particulars of negligence and averred that on 19 April 2012 at around 8:30 hours he was driving along the Midlands State University – Senga road at a speed of about 30km per hour. The speed limit on the stretch of road is 60km per hour. On approaching a road opposite St Thomas Church, and after driving past a hump, he heard a sound. On checking in his rear view mirror he observed that the canopy of his motor vehicle had dislodged and had flown off onto the road side. He further noted that the canopy had struck pedestrians walking on the right side of the road. Appellant had stopped the motor vehicle about 7 metres from the point of impact and ferried the injured persons to the Midlands State University. An ambulance was called and took the injured to hospital. Appellant asserts in his defence outline that it was not his duty to secure fittings (canopy) on the vehicle. He stated that he was not a mechanic and it was not his duty to secure or service the vehicle and never did that. Furthermore, he could not have been reasonably expected to inspect and ensure that all accessories to the vehicle, and the canopy in particular were, properly fitted and secured before embarking on the trip. Appellant contended that he could not have reasonably foreseen that the canopy would dislodge and cause the death of a pedestrian. Appellant denied that he overtook at a blind corner and was over speeding.

The trial magistrate rejected the appellant's version and relied on the eye witness accounts of how the accident occurred. Debra Hundi stated that the accident had occurred as follows:

“As we were walking when we had just passed a corner I looked back and saw a twin cab which was moving at high speed. The twin cab was trying to overtake a commuter omnibus, and that commuter omnibus was also trying to overtake, within a minute I was knocked down by a car but I do not know which part but I saw Pauline being hit by a car.”

Debra Hundi maintained under cross-examination that the appellant was overspeeding at the time of the accident. She was asked these specific questions:

Q: “You mentioned that the accused was speeding?”

A: “Yes”

Q: “Why do you say so?”

A: “Like I have mentioned earlier on I turned back and I saw the accused overtaking, that is when we were hit and if accused was not overspeeding he could have avoided hitting the deceased and the canopy could not have fallen off.”

Q: “The dislodging of the canopy does not have any bearing to the speed of the car but the fastening thereof?”

A: “I cannot dispute it because the road in Senga has a lot of humps and if one does not reduce speed the canopy can dislodge.”

It seems to me, that the appellant’s version that he was speeding at the time and that he was not overtaking was not rebutted. The state witnesses, including the deceased were walking on the edge of the road and looking at the road ahead. They were hit by the canopy and that is when they realized that there was an accident. They were obviously shaken by the accident and were somewhat confused.

The critical part of the appellant’s defence is that he could not be held responsible for failing to secure the canopy. He stated that it was not his job to secure the canopy and was not expected to inspect the motor vehicle before embarking on his journey. I do not agree with this line of reasoning for the simple reason that any reasonable motorist is expected to ensure not only that his motor vehicle is in sound mechanical condition, but that any accessories attached to the vehicle do not pose a danger to other road users, including pedestrians. The driver of a motor vehicle has a general duty of care towards other motorists and pedestrians and cannot be heard to say that he did not inspect the motor vehicle before using it on a public road. Similar views were

expressed in the case of *London Passenger Transport Board Upson* [1994] 1 ALL ER 60 (HL) at 70 F where LORD UTHWATT stated as follows:

“I dissent from the view that drivers are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, will behave with reasonable care. It is common experience that many do not. A driver is not of course bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the forms those follies may take.”

See also *Berril v Road Haulage Executive* [1952] 2 Lloyds Rep 490 at page 492 where SLADE J expressed similar sentiments thus:

“You are not bound to foresee every extremity of folly which occurs on the road. Equally, you are certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. You are bound to anticipate any act which is reasonably foreseeable that is to say, anything which the experience of road users teaches them that people do albeit negligently.”

The appellant further argued that negligence being an essential element of the offence of culpable homicide as defined in section 49 (a) of the Criminal Law (Codification and Reform) Act had to be proved beyond reasonable doubt. The appellant contends that the state failed to prove the particulars of negligence namely that he:

- (a) failed to keep a proper lookout
- (b) was travelling at an excessive speed in the circumstances
- (c) was overtaking at a blind corner where there are speed humps.

I would tend to agree that the state failed to prove each of the particulars of negligence beyond a reasonable doubt. There appears to have been two versions of how the accident occurred. The first version is that appellant drove at an excessive speed where there were humps and the canopy of his motor vehicle dislodged and struck the victims as well as the deceased. The second version is that appellant travelled at an excessive speed trying to overtake kombis which were racing, veered off the road, hit the deceased and his canopy fell off, hitting the two state witnesses as well.

It is glaringly apparent that the two versions cannot be reconciled. It is unclear which version the court relied on as the basis for the conviction. The fact that the court *a quo* relied on both versions of events in convicting the appellant indicates that the guilt of the appellant was not proved beyond reasonable doubt. I am of the view that for a judgment to hold differing

versions of how an accident occurs and to convict on that basis is a misdirection. It would be a travesty of justice to uphold the conviction under the circumstances.

The failure by the court *a quo* to make a single consistent finding of fact on how the accident occurred placed the court in an ambivalent position in deciding whether or not negligence on the part of the appellant had been proved at all. The court *a quo* appeared to have resorted to taking a middle of the road approach by deciding the issue of negligence on the basis of accepting as true what the state witnesses had testified and what the appellant had averred in his defence version. The learned magistrate ended up concluding as follows:

“so taking the evidence, or rather the accused’s version of the sorry (sic), either way accused person was negligent. He drove at an excessive speed where they (sic) were humps and the canopy of his motor vehicle dislodged and struck the victims as well as the deceased.”

Regrettably, the learned magistrate could not have reconciled the versions of the state witnesses and the appellant. The two versions are at variance with each other. The learned magistrate fell into error and the conviction is unsafe in the circumstances.

In the result, the appeal succeeds and the conviction and sentence are hereby quashed and set aside.

Danziger and partners, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners

Kamocha J.....agrees