

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA IN THE APPELLATE JURISDICTION - (Tabora Registry) CRIMINAL APPEAL NO. 85 OF 1976 ORIGINAL CRIMINAL CASE NO. 55 OF 1975 OF THE DISTRICT COURT OF KIGOMA DISTRICT AT KIGOMA Before J. -E. C. Masanche, Esq., H/Magistrate. JUMA RAMADHANI APPELLANT versus THE REPUBLIC RESPONDENT CHARGE: 1st Ct: Causing death through-careless driving c/s 41 and 63 (2) (b) of the Road Traffic Act No. 30 of 1973. 2nd Ct: Failing to report an accident c/s 57(1) and 63(2) (d) of the Road Traffic Act No. 30/73. JUDGE: D. G. M. E. N. P. SISYA, J: The appellant was charged with and convicted of causing death through careless-driving and of failing to report an accident. - These are offences under the Road Traffic Act, No. 30 of 1973. However, apparently through sheer inadvertence on the part of the learned Resident Magistrate who tried and convicted the appellant only one sentence of eighteen months imprisonment as imposed. The appellant is now appealing. - ... Evidence as adduced at the trial, shows that on a date, which would appear to be 31/3/75 during the night a report was made to the Police by undisclosed persons that a person had been knocked down to death along the Lumumba Road. It was not disclosed when the report was made. One Major Salum (PW.1) a motor vehicles inspector then proceeded to the scene of the alleged homicide. It was at the junction of the Xwandiga and Lumumba Roads, He found a dead body lying in the middle of the road. There was no vehicle around. - Nevertheless he drew a sketch plan. According to Major Salum the time was then 11.00 P.M. The said sketch plan was tendered and admitted in evidence at the trial (EXH. A). The said sketch plan shows: - 1. Point where the deceased's clothes were found. Where the dead body was found. 2. Where one shoe of the deceased was found lying. The nearest point from the dead body to the kerb on the right hand side as one faced the direction of Kigoma. The nearest point from the dead body to the kerb on the left hand side as one faced the direction of Kigoma. The nearest point from where the deceased's clothes were lying to the kerb on the right hand side as one faced the direction of Kigoma. The nearest point to the kerb from where the deceased's clothes were lying, on the left side of the road as one faced the direction of Kigoma. The nearest point to the kerb on the right hand side as one faced Kigoma from where the plastic pouch was lying. Major Salum, with the assistance of one Sgt. James who did not testify also took measurements. Eventually he took the dead body to the hospital. The Regional C.I.D. Officer, one Joseph Kinong'o (PW.3) was instructed by his Regional Police Commander, who did not testify, to take up the investigation in the case. On 3/4/75 acting upon information received Mr. Kinong'o instructed one Sgt. James to go and seize the appellant's motor vehicle at Gun. gi. This, apparently, was done. The motor vehicle is a Peugeot 404, registration

Number LD. 3263 was then brought to the Police Station. On 5/4/75 Major Salum (P.i) inspected it in the presence of the appellant. Among other thing-he, Salum, found that the bonet on the right hand side was dented. He also noticed that the paint at the same spot was different from that of the rest. of the motor vehicle. According to Salum the said spot had recently been painted. He, however, did not say how recently the spot had been painted and how he knew that the spat' had recently been painted. ks a matter of fact Salum did nat even attempt to describe what colour was the paint of the vehicle as a whole and that on the Spot under querry, Be it as it may, -Salum further noted that a new head lamp on the same side had, 'on\;iontly., ecn ficed;• it was fitted with plast- rub 1 "r mate'IaI to keep in position0 Salum also s a id in his eviden'e that he found some pieces LI '- k- ----- Ni inon'go removed the two heac' lamps f orn the motor vehicle in question (Exh. " J Tt) He placed these in 4 package together with the broken pieces bf glass, Exh... "F",. and sent.ther, to the Identification Bureau, Dar es Salaam, by the hand of Det. Sgt. Major Chri'sp.n (Pi.2) on 10/4/75. On 19/5/75, armed with a search order (Exh. "G't) Det. Sgt. Major Chrispin went and conducted a search in the appellant's store at Gungu. He found and seized a hea,d lamp housing whose glass was broken. There, however, remained some pieces on parts of the sides. This was tendered, as Exh. "H". Thereafter, Chrispin sent this head lamp housing •too to the Idenfication Bureau. ,. . The two head lamps (Exh. J.) and the head lamp housing (Exh.' "FI") were.received' and dealt with by Superintendent of Police Nathaniel Marwa Ketang'enyi (PW5) who described 'mself as an expert in-photography and attached to the dentificati6n Bureau, Dar es Salaam. Supt. Ketang'enyi examined the head lamps and the head lamp housing and the broken pieces., of glass. lie found that one ofthe.head lamps (Exh. ttJ1?) was of the same type and make as the head lamp housing (Exh."H"). Five - pieces out of the broken ices (Exh. F) could be fitted with precision on the rim of,the; head lamp housing (ixh. "H"). He prepared a report which he signed. ThIs.was tendeed and admitted in eviden6e (Exh. He also prepared 6nlarged photorahs to illustrate his findings.' The said - photograhs were mounted in a book of p oto graphs - which was also tendered and' admitted in evidence (Exh. "K"). The appellant': elected not to say anything in his defence id he did not call any witnesses on"his behalf. The learnedResid6nt Magistrate reviewed the f66ts and directed himself in the following terms:- "What is the prosecution case? I think essentially, it is that the lamp house found in the house of the accused came out of the motor vehicle suspected to have hit the pedestrian. This has been evidenced bythe glass particles picked from the scene of crime

- fitting into the broken spaces on the walls of this .. broken head lamp. I myself would find a lot mor interesting inferences in this case. One other inference I find is- that it could not be' mere V •' coincidence that accused had a broken head, lamp similar to one found on his car (sic). It certainly must have been the head lamp belonging to hi-scar. VV When vehicle Inspector Salum, PW.1, examined the . vehicle it was found to have, fresh 'di'ffer6nt pint on the car. This- would certainly suggest. that-.fter ' ie cc -4- It was a trpical hit and. run case. The accused after hitting this pedestrian did not report the matter to the Policee I find that accused is guilty on both counts and I convict him on them accordingly?. 1n his petition of appeal which was drawn on his behalf by learned Counsel the appellant has advanced five grounds of appeal, viz:- "1. That the court erred in holding that the pieces of

- glass picked at - the - scene were broken when the deceased was --run down by a motor vehicle. That there was no evidence that the broken head lamp seized in the appellant's store was fitted on his motor vehicle at the time • of the accident. That the court erred in holding the appellant careless while it was satisfied that the deceased was hit i-n the middle of the road0 - That there was no evidence to show that the appellant's motor vehicle was freshly painted0 - That the Court erred in imposing an omnibus sentence". Section 41 of the Road Traffic Act, 1973 under which the appellant was charged and convicted provides as follows:- "41. Any person who causes bodily injury to or the death of any person by carelessly using a motor vehicle or
- trailer shall be guilty of an offence." It seems to me that for an offence to be established under this Section three essential ingredients must be established, beyond doubt, by the prosecution and these are: 1) that a person has died or suffered bodily injury, (2) that this was caused by the person in the accused's dock and (3) by his carelessly using a motor vehicle or trailer. The evidence in the case is admittedly purely circumstantial. In arguing out this appeal before me the learned Counsel for the appellant, Mr. Kwikim: contended that this is a case in which circumstantial evidence was stretched to a ridiculous extent or absurdity. With respect I find that this is not without merit. Mr. Kwikima for the appellant went on to argue that there were no facts in the case: What happened was that a dead body was found at a road junction. It was not known how the deceased met his death but the Police assumed that he must have been hit by a motor vehicle. Mr. Kwikirna went on to argue that what brought misfortune to the appellant is that some pieces of glass were picked up at the junction - The said A - 5-. It is trite law that for a conviction to stand on circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The duty to prove the inculpatory facts beyond doubt rests wholly on the Prosecution and it never shifts to the accused. In the instant case, as can be observed from the passage from the judgment of the lower court quoted hereinabove the learned Resident Magistrate did not direct himself on circumstantial evidence. No where in the whole of his judgment did he direct himself on this issue and its test. Another unsatisfactory feature in the judgment of the lower court is that the learned Resident Magistrate did not make any specific findings of fact. In this connection one would not, therefore, fail to appreciate Mr. Kikitha's remark that there are no facts of the case. It is incumbent upon every Magistrate or Judge to make specific findings of fact in any given case before applying the law to them. In failing to make specific findings, of fact or in coming to conclusions which are nebulous the learned Resident Magistrate erred. Be it as it may, sitting in the first appellate court I feel I am in as good a position as the trial court to make my own findings of inculpatory facts and to draw inferences from the circumstantial evidence on record and this is what I now propose to do.'

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- It T, ould ap-p'ear thti the evidence which the ros.ecu' ion - relied upon as cdnnectiriTg: the appellant with the death of the leceased is" that o' the pieces of glass which PW.5' establ,ished - - fitted to the head lamp housiii"g which""was found in arid seized -- from the store at the ppellant's house. As to the ,fing of the pieces '(E'xh. F) to the head lamp 'housing (Exh. H) there can be;-no dGubt. - However, - it 'is not known how far the said pieces, Exh. F, were found from the deceased's body. Salum (PW01)- who claimed to have picked them up appear'to have mentioned about them casually -Iii his evidence-iü-chief. Important as-these - pieces of brokeh glass(Exh. F) w6ild appear to be as the connecting evldence --on@ would certainly have expected Salum to be precie-'in his referencO to them and the position he found them vi-ávi'thc deceased's body. This he ncvr did.' 'ht i, p'ras, even r'-.ro rriro' 13!Yt rcv, c' -ie -7- - 'L.o court cannot speculate therefore whether it was coming from Kigoma or Ujiji or Gungu. It cannot speuiate'howver'. where it was going." LI With the greatest respect by saying that the deceasdwas hit by a vehicle in the middle of the road the trial court as in fact sp6ü1ating. There was no evidence before i ttb show. this. As a matter of fact how the learned Resident Magistrate came to the conclusion that the deceased had.been hit by.a motor vehicle let alone in the middle of the road be&ts my comprehension. No medical evidence 1 oral or docuthéntary was produced in the case. The Medical ovience wouidhavedisciosêd : what sort of injuries if any were on the decesed's body and, more important, whether the said injuries were consistent witli motor accidents. In the absence of such evidence I very much doubt whether, in the modern world of; thuggery4 it can in the .Lrcumstancos be said with moral certainty and to the exclusion of every peradventure of doubt that the deceased could nt have died in any other way, 'e.g. murdered by robbers and damped on the road as a csmouflage, other than by a motor accident. Accordin', to the evidence tt deceased was almost stripped naked and the sketch plan shows that his pouch was lying 26 feet away from his body. The evidence .is silent as to whether or not there was anything of value in it when it was picked up by the Police. On my evaluation of the evidence on record I find that nothing conclusive can be deduced from it except, perhaps, mere suspicion that the accused's vehicle was the one involved &n the collision with the deceased, if at all there was any mpact. The offence under section 'U of the Road Traffic Act is not an offence of absolute or strict liability. It involves the finding of carelessness on the part of the accused. person. This is a question of fact and the test required is, no doubt, the objective test. It is that of the standard required of a reasonabky prudent driver. In short I do not think that the learned Resident 1 agistrato appraised the evidence with the judicial objectiv*ty which he was supposed to do, Further, in failing to direct himself on circumstantial evidence and its recognised standard of proof the learned Resident lagistrate erred. There simply any sufuiciat ovience to establish the car La nt clucien, mtic - / tj Had the convictions been upheld then, as both learned 'Counsels, said the omnibus sentence imposed by the learned Resident agistrate is improper, but the error is curable under section 546 of the Crininal Procedure Code. Hcwevor, *'3's.a mot . point. this now In the final result I allow this appealo The convictions

- are quashed and the sentence imposed by the lower court is set aside. • It is further directed that appellant should be at liberty forthwith unless he is otherwise lawfully being held.
- , • • • • • Delivered at Tabora this 21st day of May, 1977.

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