

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE AND NDOLA
(Criminal Jurisdiction)

Appeal No.196/2022

BETWEEN:

GIVEN NGOMBE

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Mchenga DJP, Banda-Bobo, Sharpe-Phiri, JJA

On: 10th October 2023 and 17th November 2023

For the Appellant: M. M. Nyimbiri, Legal Aid Counsel, Legal Aid Board.

For the Respondents: M. Phiri, State Advocate, National Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. The People v. Patel [1968] Z.R. 167

Legislation referred to:

1. The Road Traffic Act, No. 11 of 2002
2. Court of Appeal Act, No. 7 of 2016

1. INTRODUCTION

1.1. The appellant appeared before the High Court (Limbani, J.), charged with two counts of the offence of causing death by dangerous driving contrary to **Section 161(1) of The Road Traffic Act.**

1.2. He admitted the charges in both counts and the circumstances in which the offence was committed, as they were presented in the Statement of Facts.

1.3. He was sentenced to 9 months simple imprisonment on each count. The sentences were to run concurrently.

1.4. In addition, his driver's licence was suspended for a period of 18 months.

1.5. He has appealed against the sentence only.

1.6. When the matter came up for hearing, Mr. Phiri, who appeared on behalf of the State, correctly so in our view, indicated that he did not support the conviction.

2. CASE ACCORDING TO THE STATEMENT OF FACTS

2.1. The material part of the Statement of Facts read as follows; on the 14th of March 2022, the appellant drove a Toyota Hiace along Great North Road, in a

north-south direction, in Kapiri-Mphoshi. When he got to Zambia Compound, a built up area, "in trying to avoid hitting a cyclist, the accused neglected to pay attention to other road users and went off the road, in the direction where the deceased persons were walking". He hit the two pedestrians who suffered injuries that proved fatal. The motor vehicle was not tested for defects.

3. COURT'S CONSIDERATION AND DECISION ON THE APPEAL

3.1. Although this is an appeal against the sentence only, **Section 16(4) of the Court of Appeal Act**, allows us to delve into the propriety of the conviction.

3.2. The offence of causing death by dangerous driving is set out in **Section 161(1) of the Road Traffic Act**. It reads as follows:

"Any person who causes the death of another person by the driving of a motor vehicle on the road recklessly, or at a speed, or manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be, expected to be, on the road commits

an offence and shall be liable, upon conviction, to a fine not exceeding thirty thousand penalty units or to imprisonment for a period not exceeding five years, or to both"

- 3.3. In order for a charge of causing death by dangerous driving to be sustained, in addition to proving that there was death, it must also be established that the accused person either drove recklessly, or at a speed or in a manner, which was dangerous to the public.
- 3.4. In the facts that were presented in this case, there was no evidence of what was reckless or dangerous with the appellants driving. Neither was there evidence of the speed at which he drove.
- 3.5. According to the facts, the 'accident' occurred when the appellant went off the road as he was avoiding hitting a cyclist.
- 3.6. On the facts as they were presented, it is our view that the manoeuvre by the appellant, who was avoiding hitting a cyclist and which resulted in him knocking down and fatally injuring two pedestrians, did amount to dangerous driving.

3.7. As a result, we find that the facts did not prove dangerous or reckless driving, an essential ingredient of the offence the appellant was convicted for.

3.8. In the High Court decision of **The People v. Patel**¹, it was held that where there is a plea of guilty and the facts presented by the prosecutor do not, prima facie, support the charge, the prosecutor must be asked to clarify the facts, and where necessary, the court can amend the plea to one of not guilty.

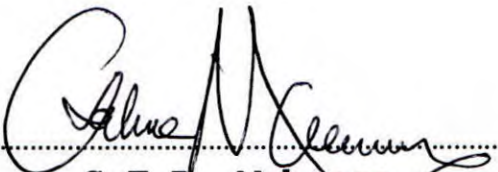
3.9. We are persuaded by that decision and it is our view that the trial Judge should have brought the deficiency in the facts that we have outlined, to the prosecutor's attention. Failure to cure the deficiency, should have resulted in a plea of not guilty being retained.

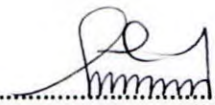
4. VERDICT


4.1. In the circumstances of this case, we find the conviction to be unsatisfactory and we set it aside.

4.2. Further, it is our view that this is a case in which it is appropriate to order a retrial.

4.3. We remit the case back to the High Court for that purpose.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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A.M. Banda-Bobo
COURT OF APPEAL JUDGE


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N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE