THE REPUBLIC OF UGANDA

IN THE COURT OF UGANDA AT MASAKA DISTRICT REGISTRY

CRIMINAL APPEAL NO. MSK-00-CR-CV-0009 OF 1999

(Arising from Original Criminal Case No. NPT 514 of 1997)

ISINGOMA ASAFU APPELLANT

Versus

UGANDA RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGEMENT

[1] The Appellant, Isingoma Asafu, was convicted of two counts. Count 1 was reckless driving contrary to Sections 118 (1) (c) and 65(1) (a) of the Traffic and Road Safety Act 1970. Count 2 was causing bodily harm by reckless driving contrary to Sections 116 (1) and 138(2) (a) of the Traffic Road and Safety Act 1970. The trial Court sentenced the appellant to six months imprisonment; cancellation of the appellants driving permit for three years and disqualification from obtaining any other driving permit for three years on the first count. On Count 2, the trial court sentenced the appellant to two years imprisonment. The appellant now appeals against conviction and sentence on both counts.

[2] The prosecution called seven witnesses to prove its case. PW1 was Nsabiyunva Monday Vincent, twenty-six years old, and a resident of Kibaale village, Bukoto County, in Masaka District. PW1 testified that on the 3rd March 1997 at about 10.30 a.m. he was traveling in a vehicle from Kinoni to Masaka. The vehicle stopped at Kaboyo village and he alighted from the vehicle. He moved to the left side, away from the main road, to join the minor road going to Kibaale. A minibus, registration no. UAR 957, coming from Mbarara side came and knocked him. It did not stop but continued on to Masaka.

[3] PW2 was Debrah Karijja, a forty-year-old housewife, resident of Kaboyo village, on the main road between Masaka and Mbarara. She was at home on the 3rd March 1997 at around 10.30 a.m. She saw an Isuzu bus coming from Kampala towards Mbarara. Another vehicle, a taxi came from Mbarara side towards Kampala. Before the two vehicles reached each other the taxi from Mbarara side, stopped and PW1 came out. Behind this vehicle, a Posta bus following it slowed down and also stopped. A minibus registration number UAR 597, following behind the Posta bus slowed and then overtook the Posta bus on the left-hand side and knocked PW1. This vehicle did not stop but continued on its way. It was dry on that day. It had not rained.

[4] PW3 was Namatovu Mary, 45 years old and a resident of Kaboyo village. She was at home on the 3rd March 1997. She heard noise outside at around 11.00 a.m. She came out of the house. She saw that PW1 had been injured in the left leg. It was broken and bleeding. PW4 was Dr. Mary Lynch a medical practitioner for the last 36 years specialised in surgery and tropical medicine and attached to Kitovu Hospital for the last ten years. On the 30th March 1998(7) She received PW1 as a patient. PW1 complained of a severe injury on the left leg. She examined him and found that all the tissues of the leg were dead. He had a fracture of the thigh and lower leg. She amputated the leg to save the life of the patient. He became a cripple for life. She classified the injury PW1 suffered as grievous harm of a severe degree. A medical report made by the witness was admitted as exhibit P 1.

[5] PW5 was No. 24888 P.C. Ojara attached to Masaka Central Office. He received the report of the accident on 3rd March 1997 at the traffic office in Masaka. He recorded it and proceeded to the scene of accident. He did not meet anyone at the scene. Nor did he interview anyone there. He drew the sketch plan and left. The sketch plan was admitted in evidence as exhibit P2.

[6] PW6 was Masembe Saaka. On the 3rd March 1997 he was traveling in the same vehicle as PW1 from Kinoni to Masaka. When they reached Kaboyo the vehicle stopped and PW1 alighted. He moved to the murram road to Kibaale. A vehicle came from behind and knocked PW1. This vehicle did not stop. After the accident the witness took PW1 to Kinoni Health Centre. PW7 was James Christopher Opio, Inspector of Vehicles stationed at Masaka. His entire testimony was hearsay and inadmissible. I shall therefore omit it reproducing it here.

[7] The defence called one witness and this was the accused. He stated that on the 3rd March 1997 he was driving a vehicle 597 UAR from Mbarara to Masaka. When he reached Kaboyo, an accident occurred. He was following a Posta bus. There was a small vehicle ahead packed in the middle of the road. When the Posta bus reached this small vehicle it stopped. Accused tried to stop but failed because he was driving too close to the Posta bus. He swerved to the left. PW1 who was on that side slipped and fell. Accused drove over his left leg crushing it. He stopped suddenly but then drove on. He went and made a report to Masaka Police Station. It had rained on that day.

[8] The trial court was satisfied that the prosecution had adduced sufficient evidence to prove the two counts against the accused and found him guilty as charged. Appealing against that conviction and sentences the appellant sets forth seven grounds of appeal. At the time of arguing this appeal, ground 6 was abandoned. The first ground was to the effect that the trial Magistrate erred in law and fact when she came to the conclusion that the appellant act was reckless in absence of evidence to support the conclusion.

[9] Mr. Kamugunda, learned Counsel for the appellant, argued the appellant provided an explanation as to why he was not in control of the vehicle at the time of the accident. And that therefore in the circumstances he acted neither recklessly nor dangerously. Mr. Simon Khauka, learned Resident Senior State Attorney appearing for the respondent supported the conviction, arguing that there was sufficient evidence upon which the trial court acted to found a conviction. In my view there is ample evidence on record to prove that the appellant was reckless in his management of the motor vehicle in question at the material time. On his own admission he

failed to bring his vehicle to a stop. When it became evident that having failed to do so, he would have to swerve off the road on the left or the right side of the road, to avoid hitting the Posta bus that he had been following, he chose to swerve to the left off the road. Of course he avoided swerving to the right for there was an on coming Isuzu bus from Masaka.

[10] In ground 2 the appellant complains that the learned trial Magistrate erred in law when she convicted the appellant of the offence with which the appellant was not charged. Mr. Kamugunda learned counsel for the appellant, submitted that the appellant was charged with reckless driving contrary to sections 118 (1) (c) according the judgement of the court below. He had in fact been charged with dangerous driving, according to the section referred to in the charge sheet. He was then convicted of the offence of reckless driving with which he had not been charged. Mr. Kamugunda submitted that as the offence of reckless driving was not a minor or cognate offence to the offence of dangerous driving, the court below erred in convicting the appellant of reckless driving.

[11] Mr. Khauka, in response to these arguments submitted that the appellant had been charged under the section for dangerous driving. The trial court treated the charge as one of reckless driving and convicted him accordingly. This conviction was proper in law in respect of the offence of dangerous driving and ought to be upheld.

[12] I think it is useful to set out the charges as they appeared in the charge sheet.

"Charge Uganda
Versus Isingoma Asafu, m/a aged 25 years, Uganda of Mbarara in the District of Mbarara.
Statement of Offence CT 1:
Reckless Driving c/s 118 (1) (c) and 138 (2) (b) and 65 (1) (a) of the Traffic and Road Safety Act, 1970.
Particulars of offence Isingoma
Asafu, on the 3rd day of March 1997 at about 1115 hrs at I km after Kinoni along Masaka Mbarara Road, in the District of Masaka, did drive a motor vehicle Reg. No. 597 UAR Toyota Hiece Omini Bus, on the road, in such a manner which was or might have been dangerous to the public having regard to all the circumstances of the case.
Statement of Offence CT. 11.
Causing Bodily Injury By Reckless driving c/s 116 (1) and 138 (2) (a) of the Traffic and Road Safety Act, 1970.
Particulars of Offence Isingoma
Asafu, on the 3rd day of March 1997 at about 1115 hrs at 1 km after Kinoni along Masaka Mbarara Road, in the District of Masaka, caused bodily injury to (Monday Vincent) by the driving a motor vehicle Reg. No. 597 UAR Toyota Omini Bus recklessly."

[13] Section 118 (1) (c) of the Traffic and Road Safety Act, 1970 actually refers to the offence of dangerous driving, rather than the offence of reckless driving which is created under section 118 (1) (a) of the Traffic and Road Safety Act, 1970. The particulars of the offence in count 1 refer or attempt to make out the offence of dangerous driving rather than reckless driving which appears in statement of the offence. It would appear that the intention of the prosecution was to charge the appellant with the offence of dangerous driving but inadvertently mentioned the offence to be reckless driving in the statement of offence, even if the section referred to was for dangerous driving and the particulars were for dangerous driving too.

[14] The trial court examined the evidence on record, considering this to be a case of reckless driving and purported to convict the appellant of the offence of reckless driving. In doing so, the court referred to Section 118 (1) (c) of the traffic and Road Safety Act, 1970 as the section under

which appellant was being convicted. This section created the offence of dangerous driving. In the circumstances of this case, I am unable to let the conviction on this count stand. The trial court was under a duty to make sure the charge was proper under the law, including the correct reference to the proper sections of the law before the proceeding with the trial. It did not do so here. Even in conviction, the court failed to state the proper section under which the offence of reckless driving arises from, which is what I presume, the court intended to convict the accused of.

[15] If I were to accept Mr. Khauka's submission that the appellant was charged with the offence of dangerous driving and that the conviction was for dangerous driving, presumably because the section referred to is the section that creates the offence of dangerous driving, this would be ignoring the fact that the trial court in consideration of the facts and the law dealt with them on the basis that the appellant was answering a charge of reckless driving. The two offences of dangerous driving and reckless driving are two different offences, though there may be similarities. The legislature created two different offences, which must be prosecuted as different offences. In part I am in agreement with Mr. Kamugunda that the appellant was charged with one offence and tried and convicted of another offence that was not minor or cognate to the one charged. The conviction in count 1 must therefore be set aside. Ground 2 succeeds.

[16] Ground No. 3 was to the effect that the trial Magistrate erred in law when she convicted the appellant on the count 2 basing her conclusion on count 1. Mr. Kamugunda submitted that if ground 2 succeeds then ground 3 ought to succeed too. I do not think so. Notwithstanding the confusion that arose with respect to the offences appellant was charged with, tried for and convicted of , this does not render the conviction in respect of count 2 automatically untenable. Even if the trial magistrate bases her reasoning on the fact that a conviction on the count 1 enabled her to find, for purposes of count 2, that the appellant had caused bodily injury to PW1 by driving the vehicle in question recklessly, the setting aside of the conviction on count 1, compels this court to determine if there is enough evidence to find that the appellant committed count 2, rather than necessarily upsetting a conviction on count 2.

[17] As noted above in consideration of ground no. 1 above, I think there is enough evidence, that the appellant drove motor vehicle 597 UAR recklessly. The appellant was following the Posta bus. The Posta bus came to a stop. The appellant ought to have also brought or otherwise managed his vehicle that it stopped behind the Posta bus. He did not manage to do this. And the explanation is that he was driving too close to the Posta bus to bring his own vehicle to a stop. This explanation arises from his own testimony. This was in my view sufficient evidence of reckless driving. That is not all. He left the main road, attempted a manourve, on the left side of the road, to overtake the vehicles ahead of him, on the wrong side of the road, and while there knocked down PW1. He acted in reckless disregard for the safety of other people. He ought to have brought his vehicle to a stop, behind the Posta bus.

[18] PW3 and PW4 testified as to the injuries sustained by PW1. PW3 saw PW1 just after the accident. She noticed that his leg was broken and bleeding. PW4 was a surgeon who amputated the PW1, removing the limb, after all tissue had died. She classified the injury as grievous harm of the most severe degree. PW1 is now a cripple. I think the evidence that PW1 suffered bodily

injury as a result of being knocked by a vehicle driven recklessly by the appellant is overwhelming. I am satisfied that count 2 was proven. The conviction for the same shall stand.

[19] Ground 4 was to the effect that the trial magistrate erred in law and fact when she based her conclusion on matters not proved by prosecution evidence. In his address to this court Mr. Kamugunda, learned counsel for the appellant, submitted that no prosecution witness referred to the appellants driving as reckless or dangerous. He therefore submitted that the ingredients of the offences in both counts had not been proved. As I have noted above there was sufficient evidence available on the record to conclude that the appellant drove his vehicle recklessly. He drove without caution and in a rash manner. He evidently managed his vehicle in complete disregard of the consequences of his conduct. The evidence of PW1, PW2 and the testimony of the appellant are sufficient proof to arrive at this conclusion.

[20] Ground 5 was to the effect that the trial magistrate erred in law when she admitted in evidence and relied on Exhibit 1, which was improperly tendered in evidence. Mr. Kamugunda learned counsel for the appellant submitted that the exhibit in question, which was an inspection report of a motor vehicle, had not been proved in law. Its maker did not tender it in, and no basis was laid for someone else to tender the same in. I entirely agree. This exhibit was not proved, as its maker was not brought. It should not have been admitted into evidence. Nevertheless, its exclusion does not weaken the case against the appellant.

[21] The last ground is to the effect that the appellant was sentenced to an extremely harsh punishment without an option for a fine. Mr. Kamugunda submitted that the appellant was sentenced under Section 138 (1) (b) of the Traffic and Road Safety Act, 1970, whereas he should have been sentenced Section 138 (2) (b) of the same Act. He submitted that sentences of 6 months and two years of imprisonment were very harsh for a young man of twenty-five years. He ought to have been given an option for payment of a fine. Mr. Simon Khaukha supported the reasoning and orders of the trial court on sentencing. The option of a fine had been considered but rejected.

[22] As I have set aside the conviction on Count 1, the sentence of six months imprisonment; cancellation of driving licence and disqualification from applying for a driving licence are accordingly quashed. With respect to the sentence on count 2, the trial court referred to the contents of Section 138 (2) (a) of the Traffic and Road Safety Act, and found that a sentence of two years imprisonment was the adequate punishment for the offence. The maximum punishment was five years imprisonment. Two years was the minimum custodial punishment. I cannot fault her reasoning. I am not persuaded that the trial court either applied the wrong principles or that the sentence is so manifestly excessive that as an appellate court I ought to interfere. This ground to this extent fails.

[23] This appeal succeeds in part and fails in part. The conviction and sentence on count 1 is quashed. The conviction and sentence on count 2 is upheld.

Dated, Signed and Delivered at Masaka this 25th day of August 1999.

FMS Egonda-Ntende
Judge