

REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 247 of 2010

WICK NGAIRA BARASA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against the judgment of [S. N. ABUYA, SRM) dated 12.11.2010 in Butali Senior Resident Magistrate's Court in Traffic Case No. 53 of 2009

J U D G M E N T

The appellant was charged with the offence of careless driving contrary to **section 49(1)** of the Traffic Act Cap 43 Laws of Kenya. The particulars of the offence were that the appellant *on the 26.11.2008 at about 7.30 p.m. along Kakamega-Webuye Road in Kakamega North District of Western Province at Luyeshi area drove a motor vehicle KAL 579 J Isuzu canter in a careless manner and hit a motor vehicle KBA 627 W Toyota matatu from behind and made it loose control and ram into a hotel thereby causing injuries to several passengers.* The appellant was found guilty and fined KShs.3,000/= in default three (3) months imprisonment.

The grounds of appeal are that ingredients of the offence were not proved, the description of the motor vehicle was not established, the drive of the other vehicle was the one to blame, there was no evidence that the accident was caused by human error and that the burden of proof was shifted. Counsel for the appellant filed written submissions. Two grounds expounded in those submissions, namely whether the ingredients of careless driving were established, and whether the accident was solely caused by human error. Counsel reiterated that the registration number of the two vehicles were mixed up. That the investigating officer was not an expert in accident matters and that the two vehicles were not inspected yet the court found that the accident motor vehicle was not properly maintained. The state submitted that the appellant hit another vehicle from behind and the case was proved.

The evidence on record shows that the accident occurred on 26.11.2008. **PW1, BENSON SINGANILWE MULUTI and PW2 AYUB MUSIKUMI** were inside a hotel that day at about 7.30 p.m. A matatu registration number KBA 627 W entered into the hotel halfway while they were taking their food. They were both injured and taken to hospital. They did not know what had happened. **PW3, ANJELINA BAYANGA IMBIAHA** was working in the hotel when the vehicle hit it and she was also injured. She found herself at Malava hospital. She did not know what caused the vehicle to enter the hotel.

BENSON MAKORI WAS PW4. He was a conductor in the matatu vehicle. On the material day they were driving slowly with few passengers coming from the Webuye side heading towards Kakamega. They were hit by a lorry from behind and the matatu lost control and entered into the hotel that was on the side of the road. He saw the lorry driver whom he knew by the name WIKI and he turned the lorry and drove back towards Webuye. The matatu was damaged from the rear to the front of the driver's side. He knew the lorry driver as they used to meet always along the Kakamega – Webuye road. Nobody was alighting when the accident occurred. **PW5, JOHN MWAURA** was the driver of the matatu. He testified that on the 26.11.2008 while driving along the Kakamega – Webuye road his vehicle was hit from behind by a canter. The matatu he was driving entered into a hotel. He could not come out of the driver's door and he used the conductor's door to come out. The lorry turned and drove back towards Webuye. He knew the lorry driver as the appellant. According to him the matatu was hit on its boot. The lorry was chased by people it drove off.

PW6, STANOL SHILAVIKA SHIKAWI was a passenger in the matatu. His evidence was that on the material day they overtook a lorry and when they reached Luyeshe they were hit from behind and the matatu left the road and hit a hotel. They were rescued and taken to hospital. The moment the matatu was hit from behind it left the road. It is the lorry which they had overtaken which hit them. **PC JULIUS BURUNGA** was PW7. He investigated the case and went to the scene. They found the matatu's body partly inside the hotel. Both vehicles were coming from the Webuye direction and they were told the lorry driver drove off after the accident. He drew a sketch plan of the scene and produced it. The appellant went himself to the police station that night. According to PW7 the appellant was to blame.

The appellant was put on his defence. In his sworn evidence he stated that on the 26.11.2008 he was driving along the Webuye – Kakamega road coming from Eldoret. The matatu passed him using the side of the road and when he reached near it the vehicle suddenly moved back to the road and it was hit. He saw the matatu hit the hotel. He hooted loudly but the matatu did not hear. The matatu did not indicate that it was entering the road. He denied that he was careless. He was about 10 meters behind the matatu. He went to report the accident to the police station at 1.00 a.m. He drove off as people were chasing him.

The main issue for determination is whether the appellant drove the accident vehicle carelessly on the material day. Counsel for the appellant submitted that there was confusion as to the description of the accident motor vehicle. Some witnesses described the vehicle as KAA 597 J while others described it as **KAA 579 J**. The proceedings show that the charge sheet was amended after four witnesses had testified. In the initial charged sheet read **KAA 597 J** while the amendment gave the registration as **KAA 579 J**. I do find that that anomaly did not cause any injustice. The bottom line is there was a collision between a matatu registration number **KBA 637 W** and a canter driven by the appellant. The prosecution evidence does establish that there was a collision between the two vehicles. Whereas the prosecution evidence is that the appellant hit the matatu from behind, the appellant's evidence was that the matatu overtook him from the side and suddenly moved back to the road without indicating. From the evidence on record I do find that the trial court reached the correct decision. The evidence of **PW6, STANOL SHILAVIKA SHIKAWI**, was that they overtook the lorry at IPA Church and move ahead. When they reached near the shops at Luyeshe he heard a bang from behind. It is the lorry which they had overtaken that banged the matatu. PW4 and PW5 who were in the matatu heard it being hit from behind. The prosecution evidence does prove that the matatu was hit from behind and it lost control and went to hit the hotel. It was not a case of the matatu overtaking and suddenly entering the road thereby blocking the appellant's way. PW4, PW5 the Matatu driver and PW6 were consistent that the accident occurred because the matatu was hit from behind. It is unfortunate that the damage to the two vehicles was not established either through inspection or photographs. However, I am satisfied that the appellant caused the accident. The matatu overtook him and after some time hit it from behind.

In the end I do find that the appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 27th day of February 2013

SAID J. CHITEMBWE
J U D G E