



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 249 of 2005
RUSSEL JOHN HALDENAPPELLANT
Versus
REPUBLIC.....RESPONDENT
JUDGMENT

Russel John Halden, the appellant herein, was tried on a charge of two counts. In the first count, he faced a charge of careless driving contrary to section 49(1) of the Traffic Act. In count two, the appellant was accused of failing to stop after an accident contrary to section 73(1) of the Traffic Act. At the end of the trial the appellant was convicted in both counts. He was sentenced to pay a fine of Kshs. 5,000/= and Kshs. 1000/= in counts I and II respectively. Being aggrieved, the appellant preferred this appeal.

On appeal the appellant put forward the following grounds in his petition of appeal:

1. *That the learned trial magistrate erred in law in convicting the appellant of the offence of careless driving contrary to section 49 (i) of the Traffic Act, Chapter 403, Laws of Kenya, merely on the finding that a collision with complainant's car amounted to careless driving.*

2. *The learned trial magistrate erred in law in not making a finding that the complainant i.e. Driver of the Motor Vehicle KTR 946 was fault in not giving adequate warning to the appellant and this overtaking was a dangerous maneuver on his part.*

3. *That there was no evidence that the appellant had personal knowledge of the accident or collision at the point of impact and time of impact, and a conviction under section 73(i) of the Traffic Act was not conclusive.*

When the appeal came up for hearing, Mr. Mahan, learned advocate for the appellant urged this court to find that the complainant was to blame for overtaking a convoy of three trucks on a dusty and bumpy road without signaling. The learned advocate further urged this court to find that the appellant could not stop after the accident because he was not aware of its occurrence. It is argued that the appellant only came to know of the accident when the convoy stopped at Sagana for refreshments, hence the duty to stop did not arise. Mr. Makura, learned State Counsel, opposed the appeal on the ground that there was overwhelming evidence to prove the offences in the two counts. It is his further submission that the appellant refused to stop until traffic police officers mounted a road block to stop him.

I have taken into account the submissions of both learned counsels. I have also considered the recorded proceedings. This being the first appellate court, hence the appellant is entitled to a re-evaluation of the evidence. The prosecution's case was buttressed by the evidence of three witnesses. Dr. Moses Njue Gacoki (P.W.1) stated before the trial court that on 23rd August 2005 at about 11.30 a.m. he drove his motor vehicle registration No. KTR 946 along Nyeri-Nairobi road. At Kibingoti centre, P.W.1 said he overtook a convoy of three army trucks. He passed the first truck without any hitch. While overtaking the second truck, that truck suddenly swerved to P.W.1's side of the road and hit his motor vehicle thereby

flipping off the left hand side rear mirror and the mudguard mounding. P.W.1's motor vehicle was also pushed into a ditch beside the road. P.W.1 said he managed to bring back his motor vehicle onto the road after which he gave a chase to stop the truck. The driver to those trucks ignored P.W.1 and proceeded with their journey as though nothing had happened. P.W.1 said he managed to over-take the trucks near Sagana whereupon he took photographs of them. This prompted the trucks to stop. P.W.1 informed the drivers to those trucks about the accident, still they ignored him and proceeded with their journey. They even refused to report the accident to Sagana Police Station. P.W.1 said he raced ahead of them and reported to the police manning the road block at Makutano junction where the police stopped the trucks and ordered them to go back to Sagana Police Station where investigations began. Police officers and the parties visited the scene. Simon Macharia (P.W.2) a passenger in motor vehicle registration No. KTR 946 gave near similar evidence as that of P.W.1. Sergeant James Oliech (P.W.3), the investigating officer stated that he charged the appellant with the offences after considering the evidence in the statements and the sketch maps drawn about the scene.

When the appellant (D.W.1) was placed on his defence he stated that he was not aware that an accident had occurred until he was flagged down near Sagana by the complainant. D.W.1 he then stopped checked his truck and found that there were blue paint marks on his right hand side near tyre and noticed the damage on the complainant's car. He said he and his colleagues decided to drive off when the complainant became agitated and hysterical. The appellant admitted that they were turned back at the Makutano police road block. At the scene, D.W.1 said there were telephone posts leaning towards the road with cables hanging onto the road. Simon further (D.W.2), said he saw P.W.1's car overtake his truck and came in between his truck and that driven by the appellant. D.W.2 said he saw P.W.1 overtaking D.W.1's truck before he suddenly stopped. D.W.2 said he did not witness the collision hence they continued with their journey. D.W. 2 further stated that one had to drive carefully at the scene to avoid the telephone posts and the overhanging cables.

On appeal, it is the submission of Mr. Mahan that the learned trial magistrate based the appellant's conviction on the mere fact of collision. I have carefully reconsidered the evidence on record. It is not in dispute that the accident occurred at Kibingoti. The appellant is of the view that the road was dusty and bumpy hence the complainant should have been careful while overtaking a string of three trucks on a narrow road. With great respect to Mr. Mahan, I do not think the learned Resident magistrate solely based his decision to convict the appellant on the fact of collision. P.W.1 and P.W.2 gave the first hand account of what happened at the scene of the accident. P.W.3 visited the scene where he took measurements before drawing a sketch map of the scene. There was evidence that the stretch in which the complainant overtook was wide. There was also evidence that the appellant suddenly swerved thus hitting the complainant's car. The complainant's evidence appears to have been corroborated by the evidence of Simon Turner (D.W.2) who stated that at the scene one had to be careful because there were telephone posts which were leaning towards the road with cables hanging into the road. It is therefore right to infer that the appellant in an attempt to avoid hitting the posts and the cables, swerved thus hitting the complainant's car. It would appear he swerved his right hand side without first checking on his side mirror to notice the complainant's car. This inference was also made by the learned Resident Magistrate. He was entitled to do so hence he cannot be faulted. In convicting the appellant, the learned Resident Magistrate relied on both direct and circumstantial evidence. It has been submitted by the appellant that since he was not aware of the accident he was not duty bound to stop to report the same. That is a perfect submission but unfortunately that appears not to be true. It is clear from the evidence of P.W.1 that he was forced out of the road by the impact. P.W.1's evidence is corroborated by the evidence of D.W.2 who said he saw P.W.1 overtake the appellant's truck before suddenly stopping. It is not in dispute that the appellant and his colleagues only stopped near Sagana when they realized the complainant was taking photographs. The appellant checked and noticed that his truck's tyres had blue paint marks. That paint was similar to that of the complainant's car. The appellant also notice that the complainant's car was damaged.

The complainant had hinted to them to report to Sagana Police Station. The appellant said they decided to proceed on when they realized that the complainant was annoyed. Taking into account all the above circumstances I am convinced the appellant was aware of the accident but decided not to report. I think the appellant's conduct betrayed him. He had no intention to report the accident.

In the end I see no merit in the appeal, the same is ordered dismissed in its entirety.

Dated and delivered this 10th day of March 2010.

J.K. SERGON
JUDGE

In open court in the presence of Mr. Kiminda h/b Mahan for the Appellant and Mr. Makura for the State.

J.K. SERGON
JUDGE