REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.483 OF 2001

(From original conviction and sentence in Traffic Case No.1533/2001 of the Senior Principal Magistrate's Court at NAIVASHA - I. K. MUTAI(R.M.)

JAMES GICHURI MUNGAI…………………..APPELLANT

VERSUS

REPUBLIC………………………………………RESPONDENT

J U D G M E N T

The Appellant was tried and convicted of a charge of Careless Driving contrary to S.49 (1) of the Traffic Act. He was aggrieved by the conviction and filed this appeal. The Petition of Appeal filed herein is more in the form of an affidavit or adducing evidence than a petition. The evidence before the trial court was that the Appellant joined the Naivasha/Mai Mahiu road from the right side where the Oasis Primary School gate is to the left lane on which the Complainant was driving. Soon thereafter, the prosecution witnesses all said that the Appellant stopped the vehicle on the road as a result of which the Complainant was unable to stop the vehicle KAE 412L and hit the Appellant's vehicle KAM 027K on the rear. The impact sent the Complainant's vehicle off the road to the right facing Naivasha direction and the Appellant's vehicle off the road to the left facing the opposite direction. The prosecution eyewitnesses were PW1, the driver, PW2 his conductor (KAE was a public service vehicle) and PW3 and PW4 both passengers in the vehicle. PW5 the Police Officer who visited the scene after the accident noted the scene as evidenced in his sketch plan Exh.1(a). He was able to identify the skid marks of Complainant's vehicle 13 meters before the Oasis School gate on left lane facing Naivasha to 50 meters after that moving from left to right lane to point it rested on right side off the road. He also identified possible point of impact which was on middle of the lane more towards the right lane evidenced by broken glass debris.

The defence called three witnesses the driver who is the Appellant, his father DW2 and Dw3 the watchman of the school. Their evidence was that the Appellant crossed the road from Oasis Primary School to the left off the road while the road was clear. It stopped to pick up two women who had waved at the driver to give them a lift. Before they could board the vehicle, the Complainant's vehicle came and hit the Appellant's vehicle on the rear.

The Appellant's contention is first that the prosecution case was full of contradictions that were ignored. He named them as contradiction of distance of vehicles before the accident. The alleged contradictions are in my view not material and have no effect on the evidence of causation of this accident. Mere fact PW3 and PW5 said vehicles were 50 meters while PW1 and PW2 said 5 meters and 5 to 7 meters apart respectively is immaterial. He complained of contradiction of where the vehicles particularly that of the Complainant was damaged whether on whole front or more on left side. Again I do not find it impacted on the evidence adduced. The material fact is that the damage to Complainant's vehicle was on the front while that on the Appellant's vehicle was on the rear and we have the photos produced by the defence to prove it. On the place the vehicle KAM stopped on joining the road, all prosecution witnesses said he stopped on the road. PW1 and PW2 said he stopped on left lane while PW3 and PW4 said on middle of the road. The fact is that according to the prosecution case the appellant stopped on the road. That gives credence to the scene visiting officers sketch plan pexh.1(a) and his evidence that the possible point of impact was on the middle of the road more towards the right lane facing Naivasha.

The Appellant has submitted that the defence evidence was not treated properly and further that the trial court gave his opinion of the accident after visiting the scene. In trial court's judgment at page 4 it is stated:-

> ***"Perusing the evidence before the court and having in mind how the scene looked like since the same was visited by the court, it was noted that from the prosecution exhibits 1(a) and (b) there were skid marks left on the road by the PW1's vehicle. This too was observed at the scene of the accident."***

I do agree that the trial court did import into the evidence adduced before it her opinion of the scene of the accident. That is irregular. The court must have visited the scene many days after this accident and the scene must have been disturbed since the accident. What was observed in the visit at the scene, like skid marks cannot be said with certainty to have been those of the Complainant's vehicle.

The issue whether a driver drove without due care and attention and therefore carelessly is a finding of fact. The evidence before the court must show that the Appellant was guilty of some act or omission, which was careless, and a departure from the standard of driving expected of a reasonably prudent driver. The court can only convict based on a finding of fact based on the evidene before it.

The evidence before the trial court was that the Appellant joined the road from the right just before the collision occurred in which the Complainant hit him from behind. That is not disputed by both sides what is disputed is where the Appellant stopped after joining the road. The prosecution case was he stopped on the middle of the road. The defence case was he stopped off the road. The court resolved that issue in favour of the prosecution and found:-

> ***"Further the court noted that if this was the case rather if the accident took place on the left lane some evidence e.g. broken glasses, debris or some disturbances e.g. damaged culvert could have been seen. The court also observed that the said marks of PW1's vehicle were not towards where the Accused vehicle is said to have been parked but rather from the left lane going to the right lane. It is clear that the point of impact was not on the left side off the road as for face Naivasha."***

The court arrived at a finding of fact that the accident was on the road towards the right lane while one faces Naivasha direction. The debris and broken glass that were found at the scene by the scenevisiting officer, together with the skid marks of PW 1's vehicle all confirmed that finding. Even though the Trial Magistrate imported certain remarks of her own opinion somewhere in the judgment. I am satisfied that her finding of fact of point of impact was based on the evidence before her both of the four eyewitnesses and the sketch plans and evidence of PW5. It is no derogation of evidence to rely on a scene visiting officer's finding of the scene of accident. It was undisturbed and both vehicles were still at the scene when PW5 visited it. That finding of evidence and the skid marks, debris and position of vehicles after the accident negated the defence evidence and strengthened the prosecution evidence that indeed the Appellant stopped on the road soon after joining it from the right side just before the collision. The debris found at the scene does, and the skid marks of PW1's vehicle found by the scene visiting officer, PW5, do not support the defence evidence that the appellant stopped off the road. The appellant was at fault and drove carelessly without due regard to other road users by stopping on the road in front of the path of PW1's vehicle which was very close. He was to blame for the accident and the trial court's finding to that effect was right.

The Learned State Counsel does not support the conviction and maintained that the evidence before the court was sufficient to support a conviction.

I have carefully considered the proceedings and judgment of the Lower court. I am satisfied that the court analysed both the prosecution and defence evidence adduced before it and came to the finding of guilt. I am satisfied that the finding was based on facts and evidence before the court and that the conviction was safe and I will therefore not disturb it. The Appellant seems to be content with the sentence imposed and made no submission in its regard. The appeal is dismissed.

Dated and Delivered at Nakuru this 27th day of February, 2003.

JESSIE LESIIT

JUDGE