



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 241 OF 1998 'A'

(From Original Conviction and Sentence in Traffic Case No. 33 of 1998 of the Resident Magistrate’s Court at Yatta: P.T. Nditika Esq. on 4.11.98)

DONALD MWASHIGANDI ::: APPELLANT

VERSUS

REPUBLIC ::: RESPONDENT

Coram: J. W. Mwera J.
Appellant in person
Mr. Orinda State Counsel for Respondent
C.C. Muli

J U D G E M E N T

The appellant was charged under S.46 Traffic Act (Cap 403) in that on 24.5 97 at 20 about 7.30 p.m. at Kavindini area along THIKA-GARISSA road being a driver of GK 876 P he parked that motor vehicle in the road causing obstruction as a consequence of which another motor vehicle KAD 338 W rammed into it and one Julius Mwamuti died. After eight prosecution witnesses, the appellant who was represented was heard with one witness. The trial closed and the Learned Trial Magistrate delivered his judgement on 4.11.98. The appellant was found guilty and sent to prison for 9 months. About a week after that an application for bail pending appeal was heard and determined in the appellant’s favour.

On 10.11.98 a petition of five points was filed. That the appellant ought to have been fined rather than sentenced to prison which was described as excessive in the 10 circumstances. That conviction was against the weight of the evidence and that the prosecution evidence was contradictory. Lastly that the Learned Trial Magistrate disregarded an inspection report. The appellant somehow did not show up in the offices of his lawyers M/s Wambua Kilonzo and Company Advocates when hearing dates were fixed. Orders for execution of warrant of arrest issued. On 22.10.2001 the appellant showed up and later he decided to represent himself. He was given a copy of his petition. He prepared and argued his appeal in person closely going by the five points that the petition bore.

The Learned State Counsel went over the lower court proceedings and judgement 20 and could not agree that conviction was not on proper and weighty evidence. He observed that the sentence was lenient but left the rest to the court.

This court then went over the same record.

Iregi Mulumbi (P.W.1) was the driver of motor vehicle KAD 338 W. He was driving at a speed of 50 KPM on a road from Matuu to a place called Kanyonyoo. Near Kavindi a motor vehicle came from the opposite direction P.W.1 dimmed his light in order for the 2 motor vehicles to pass each other. But then as he proceeded along suddenly the appellant's motor vehicle was on the road, stationary. This was some 4 M ahead and a collision took place. The driver of this stationary motor vehicle had not placed leaves, life savers on the road to warn other motorists that his motor vehicle was in the road. This was at about 8.30 p.m. People were injured, one died later but not 10 because P.W.1 hit him.

Peter Kathoka (P.W.2) testified next. He had been to the city mortuary to collect somebody for burial. They used a landrover driven by the appellant. On the way back it got a puncture. While P.W.2 had gone to fetch a branches from the bush, seemingly to place on the road, their land rover was hit. People were injured. According to P.W.2 the motor vehicle had stopped "outside the road" (meaning off the road?). That the motor vehicle that hit their landrover came at a high speed and its driver lost control – hence the collision. 20

Mwikya Ingathu (P.W.3) who was travelling with P.W.2 and was injured also said that their land rover was "outside" (off) the road, and P.W.1's lorry hit the deceased who was apparently looking at what had caused the puncture. Waweru Njoroge (P.W.5) inspected the appellant's land rover and found damage on its rear tail gate which was ripped off plus other parts damaged e.g. broken indicators. He also noted, inter alia a burst tyre before the accident. He inspected P.W.1's lorry and found among others, frontal damage e.g. cabin offside mudguard and some pre-accident mechanical defects, In his observation, the landrover was mainly damaged to its left and he put the blame to the lorry driver (P.W.1).

P.C. Ngigi (P.w.7) visited the scene and found the 2 motor vehicles there. The land rover was in the right lane as one faced Garissa from Thika, while the lorry was in 10 the left one. There were skid marks by the lorry in the left lane and there were no signs warnings on the road. P.W.7 drew and produced a sketch plan. To him the land rover driver was in the wrong. That the land rover had been hit on its rear left side.

The last witness Wambua Musyoki (P.W.8) who was with P.W.1 in the lorry gave more or less the same evidence as P.W.1. They passed this on-coming motor vehicle with lights on and then there was this land rover on the road with a burst tyre and people willing around. P.W.1 braked and attempted to swerve to the left but still hit the motor vehicle in the road. There had been no signs/warnings of a broken down motor vehicle in the road. 20 The appellant testified on oath. On the evening in question while driving the said land rover towards Mwingi carrying a dead body, a rear tyre burst. He slowed down and parked the motor vehicle off the road. But then this lorry coming from behind hit his land rover on the left side. That he had parking lights on and one of his passengers had gone to fetch branches to place on the road. The road was straight and the lorry came along very fast. Its driver lost control thereof – hence the accident. That the appellant's party had not placed (SAVE LIFE) triangles on the road or any other warning. There was another defence witness before the hearing closed with submissions followed with a judgment.

The Learned Trial Magistrate after reviewing the evidence in rather extremely an economic way, found that a death occurred when there was this collision at the time and 10 on the road earlier stated. The point of determination was whether the appellant was to blame. To get to that point the Learned Trial Magistrate recited the contents of S.46 Traffic Act in its vital form and substance. He also referred to S.53 of the same Act about the duty on any driver whose motor vehicle is likely to obstruct on a road to place appropriate signs and signals to warn other road users accordingly. The Learned Trial Magistrate then concluded that the appellants land rover was not completely off the road. This court concurs and adds, that had that been true, it is quite unlikely that it would have been hit mainly on its left side which would in that case be off the road. It would be closer to the bush than the tarmac where other motorists 20 would have had space to pass. It is on this tarmac that P.W.1's lorry's brake marks were found. This court also agrees that the appellant had not placed triangles or other warnings on the road. Other than saying so himself his passenger P.W.2 told the Learned Trial Magistrate that when they suffered a puncture he went into the bush to collect branches quite likely to place on the road as warnings. That the appellant did not do anything of the sort, his landrover constituted obstruction as elaborately set out in S.46, and as a result one of his party of mourners was fatally hit.

If the appellant meant to say that the inspection report was disregarded, probably it is because, its maker P.W.5 held the view that the lorry of P.W.1 was to blame. The Learned Trial Magistrate disagreed and added that he was not bound by P.W.5's report. Indeed his report was on the condition of the motor vehicles. So his attempt at giving an opinion as to who to blame between the 2 drivers was entirely unfounded and irrelevant. 10

In conclusion the Learned Trial Magistrate was right in convicting the appellant under S.46 of the Traffic Act.

On sentence, the appellant can count himself lucky. The maximum under S.46 is ten years. There is no option of fine. So he could not ask for it . Indeed the Learned Trial Magistrate forgot to cancel the driving licence as per S.46.

The Learned Trial Magistrate gave 9 months and then granted bond, for among other reasons, this court may add that probably because this was a funeral party and a 20 puncture occurred on the road at night.

In its own impression from all here involved and while affirming that the prison term was lawful if not lenient, the lower court sentence of imprisonment is set aside and substituted with one of a fine of Sh.30,000/= in default nine (9) months imprisonment. The appellant's driving licence shall be cancelled with effect from this day 19.2.2001 when his conclusion is confirmed.

Judgement accordingly.

Delivered on 19.2.2001.

J. W. MWERA

10 JUDGE