



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO 75 OF 1993**

**PIUS KABUNGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged in the lower court with the offence of causing an accident by obstruction c/s 53 (3) of the Traffic Act Cap 403 laws of Kenya. The appellant was tried and found guilty convicted and sentenced to a fine of 1, 000/- I/D 30 days imprisonment. Being aggrieved with that decision he has appealed to this court citing 7 grounds of appeal namely that the Resident Magistrate erred in interpretation of the facts of this case, failed to appreciate that the complainant was driving too fast and too near and failed to take late account the traffic rules and in particular the highway code which shows the distance to be kept by the following vehicle, failed to give weight to the eye witnesses produced by the defendant, did not consider the whole case on its merits and did not give the appellant, the benefit of the doubt, failed to apply the law and appeal should be allowed.

In his submissions to court counsel for the appellant submitted as follows:

1. That the offence charged is not maintainable as the appellant was in the process of driving the said vehicle. The offence is committed when a person leaves the vehicle on the highway in such a manner that it interferes with the flow of traffic.
2. It is the matatu driver who was in the wrong as he ran into the back of the appellant's vehicle, he failed to keep distance as required by the highway code and he was also driving too fast and did not brake in time.
3. That the learned trial magistrate observed that there was a conflicting evidence which created doubt in the prosecutions case and that doubt should have been resolved in favour of the appellant.

The respondent on the other hand supported the conviction as the ground that

1. The undisputed facts are that the complainant wanted to overtake the appellants vehicle when another vehicle from the front flashed and appellant took it that he was receiving a greeting from a vehicle from the same company.
2. The distance between the two vehicles was less than 50 metres and then the appellant slowed down without giving warning causing the complainant's vehicle to ram into his.
3. The appellant stopped suddenly without giving the due regard to either road users and such as be obstructed but did not drive carelessly. Having the heard submissions of both counsels and perused the lower courts record the duty of this court is to decide whether the conclusions reached by the lower court are to be upheld or not see the same of Peter V. Sunday Post (1958) E.A 424.

I have re-evaluated the evidence adduced before the lower court on my own and I find that there is no dispute that the appellant's vehicle was going ahead of that of the complainant in the lower court, that the distance between the two vehicles was very short, the complainant's vehicle seemed to be going at a speed and apparently wanted to overtake but when an opposite vehicle flashed he pulled back. It is alleged that the appellant suddenly slowed down and the then complainant rammed into the back of the appellant's vehicle. The appellant was then charged with the offence of causing an accident through obstruction. It is apparent that there is no dispute that an accident occurred on the material day. The only dispute is whether the same was caused through obstruction or through careless driving. The appellants counsel has submitted that the offence disclosed was not one of obstruction as the vehicle was in motion. The state on the other hand supports the finding of the lower court that there was obstruction. The appellants counsel relies on the section under which the appellant was charged. Section 53 (3) which reads;

“Any person who leave a vehicle on a road in such a position or manner or in such a condition as to cause or be likely to cause any danger to any passers shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding eighteen month.”

As submitted by the appellants counsel the framing of the section depicts a situation where a vehicle has been abandoned on the road and not a vehicle in motion.

Another factor to be considered is the fact that there was not enough distance kept between the two vehicles. The person behind was supposed to keep safe distance between him and the vehicle immediately ahead of him. Had this been the case no accident would have occurred as the complainant in the lower court could have braked in time to avoid the accident. He is also to blame as he contributed to the cause of the accident. The appellant was also to blame as he slowed down without giving a warning. However, appellants conduct does not amount to obstruction but careless driving. He was charged with a wrong offence. The offence of careless driving is not a lesser offence to one of causing obstruction and as such cannot be substituted for the offence charged.

For the reasons given the appeal is allowed. Conviction quashed and sentence set aside. If fine is paid the same to be refunded to the appellant.

**Dated and delivered at Eldoret this 9<sup>th</sup> day of August, 1995**

**R.N NAMBUYE**

**JUDGE**