IN THE COURT OF APPEAL

AT NAKURU

(Coram: Gachuhi, Cockar & Tunoi JJ A)

CRIMINAL APPEAL NO. 12 OF 1994

BETWEEN

MWANGI RURII…….....APPELLANT

AND

REPUBLIC…….....…RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kericho (Lady Justice R.N. Nambuye) dated 3rd September, 1993,

In

H.C.CR.C. NO. 87 OF 1993)

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JUDGMENT OF THE COURT

We concluded the hearing of this appeal on 22nd February, 1994. Because of the numerous authorities cited to us we reserved judgment to 25th February, 1994. On 25th February, 1994, we delivered our decision under the provision of rule 32(5) of the Rules of this Court dismissing the appeal and reserved our reasons to be delivered later which we now proceed to give.

The appellant was charged and convicted by the Senior Principal Magistrate at Nakuru on a charge of causing death by dangerous driving contrary to section 46 of the Traffic Act cap 403 of the Laws of Kenya. He was sentenced to a term of imprisonment of two years. His appeal to the High Court (Nambuye, J) was dismissed. He now appeals to this Court against both the conviction and sentence on five grounds, namely:

That the learned judge erred in law and in fact:

1. In holding that the act of swerving to his right and overtaking without applying brakes timeously amounted to an act of recklessness and dangerous driving despite the totality of evidence on record;

2. In finding that the accident was the substantial cause of the deceased death ignoring the fact that at the time of the accident, the deceased was being taken to hospital;

3. In failing to take into consideration the presence on the road of a trailer without tail lights or reflectors and holding the appellant solely negligent for the said accident;

4. In upholding the appellant's conviction and sentence;

5. In holding that the prosecution has proved its case beyond reasonable doubt.

The facts of the case are that the appellant on 4th September, 1992, at about 10.30 pm was driving to Kisumu a Peugeot station wagon registration No GK E 933 along Nakuru-Kericho Road. On reaching Kapkatungor Tea Estate in Kericho he suddenly came to a slow moving trailer. According to him he saw the trailer when it was very close to him and in order to avoid hitting it he applied emergency brakes and swerved to the right when he met an oncoming vehicle from the opposite direction, a Peugeot saloon registration No KAA 699 U (GK L716) and thereby a head-on collision occurred. The deceased who was in the front passenger's seat in KAA 699 U(GK L716) died instantly.

The driver of KAA 699 U(GK L716) stated that he was at the material time on his return journey to Nakuru along Kericho-Nakuru Road with three passengers in his vehicle including the deceased whom he had gone to collect at Bomet to take her to a hospital in Nakuru. The weather was dry and clear. On reaching Kapkaturgor Tea Estate he saw a trailer from the opposite direction moving slowly. As he was about to pass it and having passed the front part, a car suddenly emerged from its rear and came into his lane. As he was trying to swerve to the left, a head on collision occurred. He became unconscious and gained his consciousness at St Leornards Hospital, Kericho. Two of his passengers were also admitted at that hospital but the patient whom he had gone to collect died on the spot of the accident.

A motor vehicle examiner inspected both vehicles and produced his reports as exhibits. From the reports it was revealed that both vehicles were damaged in front. Both foot and hand brakes of both vehicles were effective.

The photographs that were taken of the scene of the accident and produced in Court showed that the accident occurred on a tarmacked straight patch of the road on the left side of Kericho-Nakuru Road facing Nakuru. The photographs indicate that the impact was on front left side of both vehicles. The impact was severe indeed.

The evidence of two witnesses who were passengers in KAA 699U(GK L716), corroborated the evidence of the drivers in every respect. The only witness in GK E 933 said that she was dozing and was awakened by the impact. After waking up she saw a trailer ahead of them. She said that she saw the trailer while it was one and a half meters away. She further said that the driver applied emergency brakes to avoid hitting it and swerved to the right when their vehicle collided with the oncoming vehicle. This witness's evidence cannot be true because after the impact which awoke her, their vehicle was in front of the other vehicle which collided with

hers and not the trailer, which was then at her left side.

There is evidence that when the appellant's vehicle swerved to the right, it left a skid mark from the centre of the road to the point of impact of 27.5 meters. The impact was 1.8 meters from the centre of the road in the left lane of the road Kericho to Nakuru. The appellant denied that he was or was trying to overtake the trailer when the accident occurred.

The vehicle KAA 699U (GK L716) was correctly on its lane when the driver saw a vehicle emerge from the rear of the trailer and suddenly came into his lane. He said that he thought the vehicle was turning to its right lane or was in the process of overtaking the trailer.

Though the appellant denied that he was not overtaking the trailer he did not give any reason for swerving to the right. He only said that he applied emergency brakes and the car swerved. This raises a question whether the driver was driving negligently so as to be unable to see the trailer ahead of him in time, or whether he was driving too fast and in so doing came into the rear of the trailer suddenly, or that his

headlights were defective that he could not see a good distance ahead. There is no evidence to show the accident was attributable to any of these factors. There must be a cause for the vehicle to have swerved to its right, if not then the appellant was negligent.

On behalf of the appellant it was submitted that the trial court and the first appellate court failed to consider blameworthiness of the driver whether there was misjudgment and if there was whether it was intentional or wreckless. It was further submitted that the appellant was an experienced driver and that the speed of 70 to 90 Kph which he was travelling at the time was safe. At that speed the appellant was not disregarding other users of the road and that he was not at fault because he could not avoid the accident. On those grounds it was submitted that the prosecution did not prove the charge.

The State submitted that the appellant was negligent in that he drove the vehicle at high speed and came too close to the trailer and as a result he was unable to control the vehicle or take avoidable action. Neither did he ascertain whether the lane on his right was safe before he swerved into it.

From the evidence on record and in the absence of an explanation as to why the appellant swerved to his right so suddenly, it can be inferred that such movement had been caused by the driver driving recklessly

and coming too close to the trailer without realizing that the trailer was moving slowly on the road either without rear lights or reflectors, or the lights were dim, or that he was intending to overtake the trailer without first ascertaining that the lane to his right was clear to enable him overtake the trailer safely. The impact on both vehicles being on the left or near side, of both vehicles the appellant's vehicle must have cut across the path of the other car completely off the tarmac.

Counsel for the appellant submitted that fault was not established and for that matter the appellant could not have been convicted. She relied in her submission on the case of *R v Gosney* [1971] 3 All ER 220. In that case Megaw LJ while reading the judgment of the Court of Appeal said at page 224:

"Fault does not necessarily involve deliberate misconduct or recklessness or an intention to drive in a manner inconsistent with proper standards of driving nor does it necessarily involve moral blame. Fault involves failure, ie falling below the standard of care or skill of a competent and experienced driver. Thus there is fault where an incompetent or inexperienced driver although striving to do his best, falls below that standard. Fault in this sense, even though it is slight, or is a momentary lapse, will be sufficient. If looked at sensibly, it is a cause of the dangerous situation, although not necessary the sole cause. Such fault will often be sufficiently proved by inference from the facts of the situation but as accused is not precluded from avoiding that inference by proving some special fact relevant to the question of fault."

The irresistible inference that can be drawn from all the evidence that was put before the Court is that the appellant had driven at a speed which was dangerous having regard to the state of traffic on the road, and had swerved to his wrong side of the road in the face of oncoming traffic.

Regarding the cause of death of the deceased it is shown that the deceased was in front passenger's seat and it was on that part that the impact of the collision was. Counsel for the appellant submitted that the deceased who was being taken to hospital was suffering from an undisclosed disease. Death might have been caused by that undisclosed disease and not necessarily by injuries received in the accident. The postmortem report that was put in evidence contained injuries the deceased sustained which were described as fracture of left femoral, fracture of right humerus, deep

cut wound on the mid shaft of tibia fibula, fracture of 1st and 2nd cervical spine, and compression on the spine cord. The doctor who performed the post-mortem formed the opinion that the cause of death was due to cardio-pulmonary arrest and fracture of cervical spine and cord compression due to road accident. The doctor was not cross-examined by the defence to elucidate the other ailment. The finding of the doctor as recorded in the post mortem report was accepted that the cause of death was due to injuries sustained in a road accident. The appellant was responsible for that accident.

The appellant failed to show what action he took to avoid the accident. Although he claimed that there

was a trailer moving on the road, the presence of the trailer was not the cause of accident.

Both counsel referred us to several authorities in support of their submissions but authorities relating to causing death by dangerous driving are many. In *Patel v R* [1968] EA 97 Sir Charles Newbold P in delivering judgment of the Court referred to two English decisions at page 100 letter 1 and stated:

"In those cases the Courts held that the test to determine whether or not any driving was dangerous was an objective test; indeed in one of the cases the Court went to the extent of saying that even if the driver was "blameless" nevertheless, if, in fact the driving was dangerous an offence had been committed."

The Court was dealing with an appeal in which the driver, (Patel) was convicted of dangerous driving on a road which was wet. The car was being driven in a normal way at a reasonable speed; and then it suddenly skidded or swerved across the road in front of an oncoming vehicle and the collision occurred. Sir Charles Newbold P stated at page 101 letter 'C'

"It is well-known that cars, even on a wet road, do not skid or swerve without reason. It is also well-known that for no reason at all cars do not turn into an oncoming vehicle. Unless an explanation is given which shows that for all practical purposes the driver of the car was not, for reasons beyond his control, in control of it, turning immediately in front of an oncoming vehicle is, on the face of it, a patently dangerous manoeuvre."

There is concurrent finding by the trial court and the first appellate court that the appellant drove his vehicle dangerously in the manner which caused head-on collision as a result of which the passenger in the other car

died on the spot. We are of the same view. His appeal against conviction, fails and it is dismissed.

Regarding the sentence, the maximum sentence is imprisonment for 5 years. The appellant was imprisoned for two years. The sentence is lawful and is not excessive. In any case this Court has no jurisdiction to interfere with a lawful sentence. His appeal against the sentence also fails. The upshot is that the appeal fails and is dismissed. That is the order of the Court.

Dated and delivered at Nakuru this 29th day of July 1994.

J.M. GACHUHI

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JUDGE OF APPEAL

A.M. COCKAR

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR