IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Cockar, Muli & Akiwumi JJ A)

CIVIL APPEAL NO. 105 OF 1988

BETWEEN

MUREITHI...APPELLANT

AND

WAMBUI & 2 OTHERS..RESPONDENTS

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mr Justice Mbogholi-Msagha) dated the 5th day of April 1988

in

HCCC No 1079 of 1988)

****

JUDGMENT

On 7th September, 1984, a motor accident occurred on the Maragau/Murang'a highway which is a major road. The accident involved an Isuzu *matatu* registration No KUD 817, and a Toyota lorry registration No KPM 114. A passenger in the *matatu*, Benson Kanyare, as well as the *matatu* driver, Joseph Muraguri, were killed as a result of the accident. The lorry driver, Michael Nduru, however, survived the accident. The owners of the *matatu* and the lorry and the lorry driver were jointly and severally sued by the widow of Benson Kanyare for damages in respect of his death allegedly caused by the negligent driving of both drivers.

At the trial that followed at the High Court, the only evidence as to how the accident could have occurred, was given by a lady passenger who had been sitting in the fourth row of the *matatu*, to the effect that she saw the lorry on a minor road being driven towards the major road along which the *matatu* was travelling and that they were both some 10 yards away from where the minor road joins the highway. She then heard a bang.

The learned judge accepted the evidence but concluded, merely because the lady passenger did not say so, that the driver of the *matatu* was negligent because he did not hoot his horn or apply his brakes. The learned judge then further concluded that:

"The other driver must have joined the major road without ascertaining that it was safe to do so. He had a duty to stop and give way. He was more to blame for the collision. He did not appear in Court to answer

the allegations against him. ...... In my judgment I find that the driver of motor vehicle registration KPM 114 was 90% to blame for the collision and that of motor vehicle KUD 817 contributed to 10% thereof."

It is against this apportionment of blame that the owner of the *matatu*, has appealed to this Court on the grounds that the learned judge erred in apportioning blame the way he did, that he had misapplied the principles laid down in *Oluoch v Robinson* [1973] EA 108 and that no evidence was given to establish negligence on the part of the *matatu* driver.

It is clear to us that the accident occurred on the highway and that it was caused by the lorry being driven into the path of the *matatu*, but was there any evidence to show that the *matatu* driver had on his part, been negligent in any way? There is no evidence that he was driving at a speed or in a manner which, taking the surrounding circumstances into account, can be said to be negligent. If he was driving at a speed or in a manner which was safe in the circumstances, should he then have hooted or applied his brakes? We would say no! It has to be shown on a balance of probabilities, and this was not shown in this case, that he saw the lorry being driven in such a manner towards the junction that it was or must have been, reasonably apparent to him that danger was imminent. The evidence of the only eye witness, and who has never driven in her life, the lady passenger in the *matatu*, does not support this proposition. And indeed, the only other person who could have given evidence on this, namely the driver of the lorry who was the third defendant in the suit before the High Court, did not give evidence. The inference that can reasonably be drawn from this is that he was to blame.

The holding in the *Oluoch* case *supra* that:

"a driver on a major road is not entitled to assume that a driver on a minor road will comply with traffic signs",

which the learned judge relied upon, must be considered in the light of the *dictum* contained in the judgment of Law, JA in that case, that:

"In this case I agree that the possibility of danger emerging was reasonably apparent to the respondent; he himself says so."

He expressed himself this way when applying the following principles referred to by Lord Dunedin in *Lang v London Transport Executive* [1959] 3 All ER 609 namely, that:

"If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligent; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of

a reasonable man, then there is no negligence in not having taken extraordinary precautions."

In order to find that the *matatu* driver was negligent at all, there must be evidence which there was not, to show that it was reasonably apparent that there was a possibility of the accident occurring and that the *matatu* driver in not hooting and applying his brakes, took no extraordinary precautions and so contributed to the accident. The mere fact that he was approaching a junction is not enough. Each case must be determined on its merits. The only relevant evidence, namely that of the lady passenger, at best, can only be construed to mean that the possibility of an accident that emerges was only a mere possibility which, having regard to all the surrounding circumstances as established by the evidence adduced at the trial, would never occur to the mind of a reasonable man. And in which, it cannot be said that the *matatu* driver was negligent in not hooting or applying his brakes. For these reasons, we think that the learned judge misapplied in the matter before him, the decision in the *Oluoch* case. It also follows that on the available evidence, it cannot be said that there was before the learned judge any culpable act of negligence on the part of the *matatu* driver. The position might have been otherwise, if the lorry driver who was represented by counsel at the trial, had chosen to give evidence.

Lastly, it being undisputed that the accident occurred on the highway upon the lorry being driven along a

minor road unto the highway where the *matatu* was, and also that there was no evidence to show that the *matatu* driver should have taken precautionary steps as he approached the junction or that it must have been reasonably apparent to him that there was a possibility of an accident, the inescapable conclusion to our minds must be that, the accident was entirely due to the negligence of the lorry driver.

In the result, the appeal succeeds and the judgment of the learned judge apportioning to the appellant 10% of the blame for the accident is hereby set aside and the appellant shall not be liable to pay any part of the damages awarded by the learned judge. The appellant shall also have her costs for the appeal against the second respondent herein.

It is so ordered. The cross appeal is also hereby dismissed with costs to the appellant therein.

Dated and Delivered at Nairobi this 6th day of December 1994.

A.M.COCKAR

....

JUDGE OF APPEAL

M.G.MULI

....

JUDGE OF APPEAL

A.M.AKIWUMI

....

JUDGE OF APPEAL

I certify that this is a true copy of

the original.

<u>DEPUTY REGISTRAR</u>