REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO. 1131 OF 1986

FRANCIS MBURU NJOROGE ….....……..APPELLANT

VERSUS

REPUBLIC……..……..……RESPONDENT

(Appeal from the Resident Magistrate's Court at Kiambu, R M Mutitu, Esq)

JUDGMENT

The appellant, Francis Mburu Njoroge, was charged before the Resident Magistrate, Kiambu with driving a motor vehicle on a road without due care and attention contrary to section 49 (1) of the Traffic Act (cap 403) and fined Kshs 900. He has appealed to this court against the conviction.

The prosecution case is that at about 1.15 am on December 6, 1985 the complainant, Hon. Peter Kabibi Kinyanjui MP, who was on his way home was driving his vehicle, a 280 Mercedez Benz Reg No KWJ 588, along Kiambu-Kikuyu Road on the Kiambu direction. When he reached Mwimuto Road junction near Wangige Market a Bedford Lorry driven by the appellant in this case suddenly came onto the main road from the Mwimuto Road. The said lorry in turning onto the main road in Kikuyu direction took a wide turn and in doing so collided with the complainant's car. As a result of that collision the complainant sustained serious injuries and was admitted to MP Shah Memorial Hospital where he remained while undergoing treatment for 20 days before being discharged. The vehicles were also extensively damaged.

At the hearing of this appeal Mr Shah of S Shah and Parekh, Advocates appeared for the appellant while the republic was represented by Mr Muchiru the State Counsel. I have given utmost consideration to the points which were raised and urged before me by the counsels on both sides. I am most grateful to the two advocates for the able manner in which they handled the issues involved in this case. The first question that immediately arises is, did the appellant drive his lorry on the road during the fateful night without due care and attention.? In order to be able to consider the relevant evidence it is necessary first to turn to the authorities. In the case of *Republic v Wallace* [1958] EA 582 at paragraph I Law J in the case where the appellant had been charged with similar offence said:

> "A conviction for driving without due care and attention cannot be founded on a mere fact of a collision but must be based on a finding of a fact that the driver charged with the offence was guilty of some act or omission which was departure from the standard of driving expected of a reasonably prudent driver."

It is clear from this extract that a conviction can only be found when the driver has some blame and the court faced with such a case has to make a finding of such blameworthiness as a fact before convicting. It

follows therefore that every case of this nature has to be considered with reference to its peculiar or special facts and surrounding circumstances.

Turning to the instant case we find that its special facts are that the road at the scene of accident was 30 feet wide and it was divided into three lanes. The trial court made a finding about these facts after studying the sketch plans produced as exhibits together with the three sets of photographs which were also produced as exhibit and the evidence of PW 3.

However, as I have to make inferences on these facts it would be necessary for me to satisfy myself about these facts on record. Looking at Sketch Plan Ex 3A, photograph Exhibit DIE, the evidence of PW 3 and DW 3 the road at the scene of accident was near the Mwimuto Road junction. The middle lane was a box for traffic to turn right as one faces Kiambu.

The right turn is onto Mwimuto road. On the left of the middle lane is a lane reserved for traffic going to the opposite direction to Kikuyu. According to the Sketch Plan the lane for traffic going to Kiambu (P O) is 11 feet wide. While the middle lane (QO) is 10 feet wide.

From the evidence of DW 3 and the photograph Ex DIA it is clear that there was a yield sign on the Mwimuto road just before one comes to the main Kiambu Kikuyu Road. PW 3 the Police Officer investigating this case had told the court that there was a T sign (page 8 line) but his sketch plan did not show this important fact. The complainant in his evidence said there was a stop sign. With these witnesses misled the trial Court in their inaccurate statements. In view of the circumstances and the clear evidence of DW 3 and the photograph DIA, I find that the traffic sign on Mwimuto Road is not a T sign or stop sign but a Yield sign.

According to PW 4 the only eyewitness in this case the appellant did not stop when he came to the main road. This piece of evidence was corroborated by the complainant in his evidence in court. The trial court correctly found that the appellant did not stop at the Kiambu/Kikuyu junction before going onto the main road.

The issue now is was the appellant guilty of any act when he failed to stop at the junction? The trial court said he was at fault. But what is the implications of a yield sign when one faces it at any time?

The yield sign being a traffic sign is classified under class A which are regulatory signs as opposed to warning traffic lights, signals and markings. It is described under schedule to the Traffic Signs Rules made under the Traffic Act (cap 403). Against this sign which is given as R2 in the rules are the following words:

> “Give way and, if traffic is approaching from the right or left stop unless it is possible to proceed without causing danger or inconvenience to such traffic.”

This is different from what is written against stop sign which in capital letters reads “stop and do not proceed into the junction.” It would therefore appear to me that any driver who faces a yield sign before coming onto a single lane road will check to see whether there is traffic on the road in front of him. If there is none he has no obligation to stop. In a multiple lane road a driver will only check to see whether there was any traffic from his right. He gives way to those vehicles from his right as they and he uses the same lane which is the one nearest to him as he goes to his left.

In the instant case the appellant’s obligation was to stop when there were vehicles from his right ie vehicles coming from Kiambu direction and going towards Kikuyu. As to the vehicles going to Kiambu the appellant had no obligation to yield to them as they would take the other lane. As there is no evidence on record to indicate that at the time the appellant entered onto the main road there was traffic from his right ie from Kiambu going towards Kikuyu, I find that the appellant was not at fault in not stopping at the junction and the trial court was wrong to hold that because he did not stop he was at fault.

The other aspects of this case should have shown whether or not the appellant was the blameworthy in

this accident was the point of impact. According to the record, the court appears to have accepted what PW 3 and PW 5 said without making any finding itself. The authorities would appear to indicate that it is the responsibility of the court to make a finding of point of impact as a fact. Secondly to do that the court has to treat the police officers as experts by establishing their experience in dealing with accidents for a considerable period. Such police officers would only state what they see on arrival at the scene stating where every debris on the road including the position of the vehicles after the impact. The court would then make up its mind as to the point of impact after taking into account all the circumstances of the case including evidence of other witnesses. In the case of *Charles Ng'ang'a Muhia v Republic* the Court of Appeal said:

> "Opinion evidence given by police officer relating to the point of impact should never be accepted unless he can show that he has many years experience in inspecting the scenes of traffic accidents. He should give evidence only of what he saw at the scene on his arrival including every mark on or near the road and every piece of debris leaving it to the court to determine the point of impact."

In the instance case PW 3 did not indicate how many years he had spent in inspecting scenes of accidents before his evidence was accepted.. Secondly he took upon himself to tell the court where he thought or suspected the point of impact was. He said:

> "I found broken glasses in the middle lane and I suspected this to be possible point of impact."

This appears to have been accepted by the trial court and without determining itself the point of impact, the court could not be said to have been accurate in assigning the blame of the accident to the appellant.

Again this witness had earlier on said that when he arrived at the scene he saw that the lorry was on the middle of the road. However, the measurements this witness took and indicated in his sketch plan and evidence in court do not bear out as regards this remark. As a matter of fact the lorry was not on the middle of the road.

Furthermore, the competency of this witness to be treated as an expert witness does not seem to have been inquired into adequately by the trial court before his evidence was accepted. I am therefore not persuaded beyond reasonable doubt that this officer could be treated as expert witness.

From both sketch plans Ex 3A and 3B it is clear that the lorry was 7.8 feet wide while the Mercedez was 5 feet wide. If the complainant had stuck to his lane he could have occupied only 5 feet of road leaving 6 feet to his right and would have had ample room to pass safely without an accident even if the lorry projected itself 4 feet into the middle lane. As it is, he left his lane entirely and went 6 feet into the middle lane thereby occasioning this accident. The complainant had the opportunity to avoid this accident being on the main road with ample room which could enable him to have swerved to the left onto his lane.

The evidence of the PW 1 the Vehicles Inspector in connection with the impact which caused the damage was relevant in relation to inference that can be made of the speed the vehicles were travelling before the collision. Although the witness could not guess he stated that the speed was high and definitely not 50 kph to 60 kph as claimed by the complainant. As it is, it was the only complainant who would have been at high speed as the appellant had just entered the main road and in accordance with his evidence which was not challenged he had not changed the gears. The only inference that I can make is that the complainant was travelling at a high speed. This could explain why his vehicle traveled 12 feet after the impact and the fact he did avoid the collision by swerving to the left.

The trial court's holding that the complainant could travel at any speed as he was on the main road is not strictly accurate as the Traffic (speed limits) Rules made under the Traffic Act limit the highest permissible speed at 100 kph.

For the above reasons this appeal is allowed and the conviction is quashed and it is ordered that if the fine imposed has been paid it should be refunded.

Dated and Delivered at Nairobi this 22nd day of May, 1987

B.K TANUI

JUDGE