REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 1703 OF 1983

(From Original conviction and sentence in Traffic Case No 4378 of 1983 of the Resident Magistrate's Court at Thika H R Aggarwal Esq)

SEBASTIAN NYACHING ALUM …….. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

CORAM; SHACHDEVA J

PORTER J

J W M Njore for Appellant

C W Gatonye (State Counsel) for Respondent

JUDGMENT

The appellant was charged in the court below with causing death by dangerous driving contrary to section 46 of the Traffic Act (cap 403). He was convicted of the offence and sentenced to pay a fine of Kshs 3,000, in default 6 months imprisonment. His driving license was ordered to be endorsed.

There was only one eyewitness to the accident, and that was the female passenger with the appellant. She said that they were going along the Thika-Garissa road in the Garissa direction. As they approached the Gatitu junction on their left, there was a queue of cars waiting to turn into the Garissa road. About 40 feet away from the junction she noticed another car passing all these cars, and then turn left into the Garissa road straight in front of them. The appellant swerved to the left to avoid the car and managed to do so. In doing so he left the road and went into a field on the left hand side of the road. The witness shut her eyes, perhaps understandably. The car came to rest and the appellant got out and said that a lady had died. The witness got out and saw the deceased lying behind their vehicle, dead. It was raining at the time hence difficult visibility. Garissa road is straight wide and even at that point. In cross examination the witness said that the appellant could not have swerved to the right as two vehicles were coming in the opposite direction quite close to them, and they would have had a head on collision. The assumption has to be made that the deceased was standing on the verge of the Garissa road.

A plan was drawn of the scene, confirming most of what the witness had said. According to the calculations of the learned Resident Magistrate the car had traveled in all 100 metres from the point where

he had first seen the car turning out in front of him. From the start of the skid mark to the place where the car stopped was in the region of 50 metres and the car had crossed a shallow ditch and gone across the muddy field, although it is not clear whether it was braking all the way.

There were tyre marks starting 13.1 metres from the mouth of the junction. In his judgment the learned Resident Magistrate doubted the account of the accident given by the witness. He doubted that there was another car at all. We have looked carefully at the evidence and are of the view that, besides the fact that it would be very difficult to account for this accident happening at all in any other way, there was the direct evidence of a prosecution witness as to what happened. While it is true that the learned Resident Magistrate is entitled to look at that evidence and give it whatever weight he thinks fit, he is not entitled to ignore the surrounding facts in coming to his own summation of what happened. If he did not, as he said, accept the account of the prosecution witness then he would be in, to misuse a phrase, a res ipsa loquitur situation, and would have to look at all the surrounding facts to see how the accident happened. Far more preferable then to look at the evidence of any witness and see if the evidence of, for example, the sketchplan bears them out. And in this case it does. There is no doubt that the marks of the tyres of the appellant's vehicle on the verge start 13 metres after the www.kenyalawreports.or.ke 3 mouth of the junction out of which both the witness and the appellant say that a car turned out just in front of them. Now the learned Resident Magistrate went into a long analysis of the evidence of the witness and the appellant to come to the conclusion that their account was not true. He ends this analysis by saying that "inconsistencies between the evidence of both the accused and PW3 does raise a doubt and the court wonders if the car really existed." On the evidence, as we have above set out, the car did exist.

If the learned Resident Magistrate entertained any doubt about that then it should have been resolved in favour of the appellant. It is not quite clear from the judgment whether the rest of the resolution of the facts accepts that there was a car or not.

Assuming for the moment that he did accept for the purposes of his judgment, as we think he should have done, that a car did turn out very close in front of the appellant it is trive law that in the agony of the moment the much cannot be expected of the appellant. The learned Resident Magistrate points out that the appellant could have turned to his right and that he said nothing about the two cars said to have been approaching by the witness. It cannot be again said however that an approaching vehicle would explain why he could not turn to the right. Perhaps in the agony of the moment he did not think of doing so: he cannot be blamed for that, nor if that is what happened should his credit be impugned if his story differs from his passenger's. The learned Resident Magistrate further criticizes the appellant for not turning along the verge of the road when he got to it. We feel that that is expecting too much of him.

Then the learned Resident Magistrate turns to an analysis of the plan to extract the conclusion that the appellant was driving at a very fast speed. He says the appellant having seen the car overtaking should have been warned of the danger and slowed down. But the whole point is that neither he nor indeed his passenger saw that car until very late, too late to do much about it. Certainly as he was on the major road he would not be expecting a car to turn out in front of him.

The learned Resident Magistrate draws the conclusion from the absence of dirt of the body of the deceased that it was thrown through the air, and not dragged along the ground. He says that that in itself is an indication of speed since the distance involved was, on his calculation and …… of impact, in the region of 25 metres. He does not seem to have considered whether the deceased was carried on top of the car for the distance. There is a bad dent in the offside front of the vehicle.

Finally there was perhaps no need for such calculations. The prosecution witness gave evidence and said nothing about excessive speed, nor apparently from the record was she asked to do so. The learned Resident Magistrate criticized the appellant and his advocate for not putting to the officer who gave evidence, that the appellant had reported the car which pulled out to the police, but he did not deal with this lacuna. This was a matter for the prosecution to prove by the best evidence available.

The only matter, which might have given rise to concern about the speed of the appellant, is the distance he appears to have traveled to the place where his vehicle finally stopped. However there is no evidence

to show whether once having put his brakes on, the appellant kept them on nor how the rain and mud affected the position. We are of the view that there was a doubt in this case as charged, and it should be resolved in favour of the appellant on our own assessment of the file. We so resolve it, by quashing the conviction of the appellant in respect of causing death by dangerous driving and setting aside the sentence, and endorsement.

However we are of the view that there was some evidence that in the particular circumstances of bad weather and bad visibility that the appellant was driving too fast for the circumstance, and we are satisfied to the required standard that he was driving without due care and attention, for which offence we substitute a conviction, and impose a sentence of Kshs 500, in default 3 months.

Dated and delivered by Sachdeva J this 27th day of September, 1984.

S K SACHDEVA

JUDGE

D C PORTER

JUDGE