



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELATE SIDE

CRIMINAL APPEAL NO. 135 OF 1982

(From original conviction and sentence in Traffic case No. 6 of 1981 of the Resident Magistrate's court at Murang'a)

ALBERT WACHIRA NDIRANGU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CORAM: SACHDEVA, J.COCKAR, J.

P. Mwuite for Appellant S. Channa (Senior State Counsel) for Respondent.

JUDGMENT

The appellant was charged and convicted on each of the six counts of causing death by dangerous driving contrary to section 46 of Traffic Act (Cap 403). He was sentenced on each count to two years imprisonment to run concurrently. In addition he was disqualified from driving for a period of three years from the date of sentence.

It is not disputed that on the material date between 7.30 am and 8.00 am in the morning the appellant was driving a Bedford lorry Reg No KNL 326 along Thika Muranga road towards Muranga direction when it collided with a bus Reg KNH 879 coming from the opposite direction and a result of this collision the six deceased named in the six counts died. The prosecution evidence is that the bus was travelling on its left side of the tarmac road and a Nissan Canter Matatu was coming from the opposite direction when the two vehicles were about 60 feet apart the appellant's lorry which was following the canter started overtaking at the beginning of a bend (PW 3 & PW 10). The bus driver (PW 3) moved the bus more to his rear side so that its rear side wheels were off the tarmac, were near the edge. Despite the buss driver's maneuver the lorry came and hit the bus at its mirror and at a point which was two seats behind the driver's. Both the vehicles ended up off the road on the side the bus was travelling which was the off side of lorry.

The appellant's version of the accident was that the bus had come at a very high speed and had gone so much on its wrong side that it was covering $\frac{3}{4}$ of its off side half of the road. Thus only $\frac{1}{4}$ of the lorry's half of the road was left for the lorry. The appellant swerved toward the grass and then the bus came into contact with the lorry. The lorry was as a result thrown across the road on to that side of the road in which the bus was travelling and there it ended up in a trench.

Mr Muite for the appellant argued that the evidence of the bus driver must be treated with caution because he, being the other driver involved in the accident, would naturally be an interested party. He further

pointed out to the fact that the prosecution had called a passenger (PW 5) from the Nissan matatu which had been following the lorry prior to and at the time of the accident but had not deemed it fit to call the driver of the Nissan who would have been in a much better position to have witnessed the accident. This criticism has no merit. Inspector Jeremiah (PW 8) who took over the investigation explained why the driver of the Nissan was not called. He had been a temporary employee only as a driver and the Inspector had tried to find him but the said driver had left and could not be traced. This witness confirmed in cross-examination that the Nissan was fitted with glass all round. PW 5 John Maina Mwangi in cross-examination explained that he had a clear view of the lorry in front and the way it was being driven. We are satisfied that PW 5 was in a position to see clearly what was happening on the road in front.

Finally Mr Muite contended that Lidio Mwangi Jaramba (PW 4) the driver of the canter which the prosecution claimed was being over-taken. Mr Muite urged that this was the crucial evidence. We do not consider so. It is true that this witness said that he did not see the lorry until after the accident and that if a vehicle had attempted to over-take his canter he would have seen that vehicle. But keeping in mind the fact that a bus was approaching his vehicle from the opposite direction only 60 feet away, it is hardly likely for him then to have noticed whether he was being over-taken from behind. At that particular stage his attention would be concentrated more on the on-coming bus only 60 feet away than on what was taking place behind him. We are satisfied that his evidence does not in any way constitute any meaningful contradiction to the evidence of other prosecution witnesses who had testified immediately prior to the accident the lorry had started over-taking the canter.

Coming back to Mr Muite's point taken in respect of the evidence of the bus driver, PW 3, that he was an interested party – which incidentally was not a ground of appeal, the prosecution called two independent witnesses to the accident – PW 5 John Maina Mwangi who was a passenger in the Nissan following the lorry & PW 10 police constable Bennet a passenger in the bus sitting in the fourth seat behind the bus and who said that he could see clearly in the front. Both corroborated the evidence of the bus driver. In addition there was the evidence of Chief Inspector William Kolel (PW 11) who took the photographs at the scene and Inspector Edward Muchiri (PW 12) who drew the sketch plan. Inspector Muchiri in addition to confirming PW 3's evidence that there was a yellow line in the middle of the road, said that the point of impact was 1.8 metres from the edge of the road on the side the two vehicles were lying that is on the side of which the bus would have properly been travelling. In cross-examination he had put it. The width of the road was 6 metres. Even PW 4 the driver of the canter whose evidence Mr Muite wanted to be treated as crucial ended his cross-examination with the words: "I did not fear as the bus came in a good manner."

The learned trial magistrate appears to have considered all the evidence before him carefully. He accepted the evidence of the prosecution witnesses and we do not see any reason to differ from him and from his findings as to the cause of the accident. Mr Muite argued that the mere occurrence of a collision could not be taken by itself as enough evidence to constitute dangerous driving. That was not the position in this case. What has been found as proved was not that the appellant driving his lorry loaded with stones started over-taking another vehicle at the beginning of a curve at a time when a bus was coming from the opposite direction and was only about 60 feet away. A yellow line in the middle divided the road. Yet the appellant continued in his attempt to overtake and in so doing his lorry not only crossed the middle yellow line but went so far across the road as to hit the on-coming bus travelling on its correct side at a point only 1.8 metres from the edge of the road on the other side. The learned magistrate was satisfied, and so are we, that the appellant had driven the lorry in a dangerous manner.

There is no substance in this appeal. The sentence in the circumstances is not excessive.

Appeal against convictions and sentence is dismissed. The sentence is confirmed.

SK SACHDEVA

JUDGE

AM COCKER

JUDGE

23.9.1982