REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

APPELLATE SIDE

FLORA WAMBUI MUCHAI……..……..APPELLANT

VERSUS

THE REPUBLIC……………………..….RESPONDENT

JUDGMENT

The appellant was charged with using her car on a road at a time when its condition did not comply with the requirements of the Traffic Act and had not been maintained in such condition that driving it was not likely to be a danger to persons travelling on it or to other users of the road. What was alleged was that the vehicle's footbrake, which operates by means of a hydraulic device, was defective and its brake cylinder fluid reservoir was empty.

The facts of the case, of importance to motorists, are these: the appellant, who has her car regularly serviced, was driving it along Uhuru Highway a little after 5.00 pm. one Tuesday. When she applied her footbrake, there was no reaction; she swerved to her left, hit two girls (fortunately not seriously) and her car came to rest against a tree. A vehicle examiner told the Court that as a result of the defects the car was unroadworthy before the accident and that the defects might have contributed to what took place. His evidence was not challenged. That the vehicle was not in a condition to satisfy the requirements of the Act is not in contest.

The charge was laid under section 55(1) punishable by section 58(1) of the Act which reads:

No vehicle shall be used on a road unless such vehicle and all parts and equipment thereof, including lights and tyres, comply with the requirements of this Act, and such parts and equipment shall at all times be maintained in such a condition that the driving of the vehicle is not likely to be a danger to other users of the road or to persons travelling on the vehicle.

And what we are being asked, and we are told a court is for the first time being asked to decide, is whether the language of section 55(1) provides a defence to a driver who has had his car regularly serviced, who experiences a sudden breakdown which he could not with reasonable diligence have foreseen, and so on.

The appellant's argument is that, upon the facts, she cannot be guilty of the offence charged for either, or both, of two reason: that she was unaware of the defects and could not be expected to have known of them because they manifested themselves inexplicably and with great suddenness, relying on the authority of *R v Spurge* [1961] 2 All ER 688; and that for the commission of an offence under section 55(1), which has two parts, not only has a defective vehicle been used but also it has not regularly been

maintained, relying on the wording of the provision itself, and the fact that her car had enjoyed the advantage of a regular maintenance.

She must have know of the defect before the accident happened because she began her journey at Uchumi House in the middle of Nairobi and she could not, on the day and at the time concerned, have gone as far as she did without seeking to engage her car's braking mechanism somewhere along the way. Indeed she says that she did, and with success too, but it cannot be so, for she had no fluid at all in the reservoir and there is no suggestion of a fluid leak. Her footbrake must have been ineffective before the accident. But the question of knowledge of the defects is, in any event irrelevant, and the issue of regular maintenance is immaterial, to a charge under 55(1) as we interpret it.

Spurge is irrelevant because, as Salmon J made clear in delivering the judgment of the court (see page 690 of the report), what was at issue in that case was:

a point hitherto undecided, namely, whether a mechanical defect can ever be relied on as a defence to a charge of driving in a manner dangerous to the public

…

and we are dealing, not with a case to do with the driving of a vehicle, but one as to a vehicle's condition. We can see no justification for applying what was said about an offence as to the manner of one's driving to an offence concerning itself with the user of a vehicle on a road contrary to the law's requirements nor does section 55(1), as we read it provide what

Ashworth J in *Hawkins v Holmes* [1974] RTR 436, 440, called:

specific provision for an escape route if the driver in question is able to satisfy certain requirements about the use of due diligence and so on …..

The words "be maintained" where they appear in section 55(1) are, on our construction, synonymous with be kept and are not for equating with be regularly serviced.

The facts in the *Hawkins* case were not unlike those in ours. The accused was using his vehicle on a road, and after the brakes had worked successfully, he collided with a pedestrian as his vehicle's footbrake failed to operate because of oil on the brake shoes due to an oil leak. The brake cylinder reservoir had been full six days before the accident. The provision of the law under which he was charged is worded differently from ours (it is regulation 94(1) of the Motor Vehicles (Construction and Use) Regulations 1973 made under the authority of section 40 of the Road Traffic Act 1972) but it also uses the words "be maintained." It reads:

Every part of every braking system and of the means of operation thereof fitted to a motor vehicle … shall at all times while the vehicle … is used on a road … be maintained in good and efficient working order and properly adjusted ….

It was contended on behalf of the prosecutor that the word "maintained" in the regulation was (as we have found in relation to the word in section 55(1) synonymous with the word "kept" and that, once it was established that immediately before the application of the brakes preceding the accident the braking system was defective, the defendant had to be convicted whether or not it was established that he had followed the ordinary and proper maintenance procedures. The accused, however, contended that she should not be convicted unless the prosecution satisfied the Court beyond reasonable doubt that she had failed to follow the normal and proper maintenance procedures. The defence succeeded before the justices because it was not possible to tell whether the leak was, or was not, of long standing and was more likely of recent origin and because their attention was drawn to another provision, regulation 73(1) of the Motor Vehicles (Construction and Use) Regulations 1955 (since replaced) which provided that a vehicle and all its parts and accessories must at all times be in such a condition that it should not, if we may so put it, be a danger on the road and they drew a distinction between the word "be" and the words "be maintained".

They thought that such a distinction had to exist in the light of the different wording of the two provisions. But the appellate court disagreed, holding that the accused could have no answer, no escape route, on the facts put forward by him; for the regulation provided none.

It took the view that the case was within the principles laid down by the House of Lords in *Galashiels Gas Co Ltd v O'Donnell* [1949] AC 275, a case under one of the Factories Acts in which it was held that where a hoist or lift had by law to be properly maintained, there was an absolute and continuing obligation imposed so that proof of any failure in the mechanism established a breach of the statutory duty even though it was impossible to anticipate the failure before the event or to explain it afterwards, and even though all reasonable steps had been taken to provide a suitable hoist or lift and to maintain it properly. We think those principles to be applicable to section 55(1).

As we see it, section 55(1) provides the appellant with no defence, no escape route, on the facts which she put forward. Once it was proved, as it was, that before she applied her footbrake preceding the accident, even though it was immediately before she did so, the braking system was ineffective, it cannot matter whether she knew of the defects or should have known of them or not, and it cannot matter whether she had or had not had her car regularly and properly maintained. It is true that the final words of section 55(1) say:

…. that the driving of the vehicle is not likely to be a danger to other users of the road or to persons travelling on the vehicle but they do not, as we believe, import a defence of non-foreseeability.

Upon our construction, they relate, as we think they must, to the vehicle's condition, ie that it must at all times be maintained to a standard that its driving will not be a likely danger to those concerned.

Appeal dismissed.

Dated at Nairobi this 29th Day of March 1976

E. TREVELYAN

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JUDGE

S.K. SACHDEVA

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JUDGE