**Lutwama v Uganda**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 19 October 1973

**Case Number:** 123/1973 (9/74)

**Before:** Saied J

**Sourced by:** LawAfrica

*[1] Evidence – Witness – Interested in outcome of traffic prosecution – Evidence can be accepted.*

*[2] Evidence – Witness – Policeman – Sketch plan rejected – Rest of evidence can be accepted.*

**Judgment**

**Saied J:** The appellant was convicted by a Magistrate Grade I of driving without reasonable consideration for other road users contrary to s. 126 of the Traffic and Road Safety Act, 1970. He was fined Shs. 600/- and disqualified from obtaining any driving permit for a period of four months. This prosecution arose out of an accident which occurred on 21 December 1972 at about 4.35 p.m. on Kitante Road between a seven ton tipper belonging to the City Council and being driven by the appellant, and a motor cyclist Youngson Remmy Odong who was riding a motor cycle. The complainant Odong maintained that he was riding abreast with the appellant’s truck, he on the inner lane and the appellant on the outer, when the appellant suddenly and without any warning swung to the right into his path whereby the complainant collided with the front offside mudguard of the truck and fell some 30 yards away. He suffered an injury to his left leg which had to be amputated. The fact that an accident had occurred was not denied by the appellant, nor was it denied that the front off side mudguard of the truck was damaged in the collision. The defence maintained that the appellant was on the inner lane close to the middle island. Katundisa, also an employee of the City Council and sitting next to the appellant, said that the appellant was “keeping on to his right close to the middle island.” The other witness, Ssekandi, another co-employee, who was in the rear of the truck, said that the appellant was so close to the middle island that “it was impossible for any vehicle to overtake from the right.” The appellant said that he wanted to turn right. He gave a hand signal and looked into his driving mirror. Finding no one behind him he turned right. At the same time there was a bang and he saw the complainant falling some 60 feet away. Ssekandi, who was looking behind, denied seeing the motor cyclist prior to the accident. The trial magistrate said that the decision was dependent “squarely” on facts and the credibility of witnesses. He rejected the sketch-plan which had been drawn by P.C. Manyali who visited the scene because it was very confusing and the witness himself had difficulty in interpreting it. Considering the position of the truck in relation to the middle island as described by the defence, he said: “This makes it difficult to understand how the victim was able to pass and hit the front right mudguard of the lorry. This fact has been admitted by both parties – that the victim hit the front right mudguard of the lorry.” In rejecting the defence version, he said: “To me if the lorry was as close to the right as said by the defence witnesses, the victim should have hit the rear of the lorry and fallen backwards. The accused however in his evidence said there was a space on his right and that was the space used by the motor cyclist. From this it seems that the lorry driver must have left a large space on his right which tempted the cyclist to pass through. This being so the lorry driver should have been able to see the cyclist through his driving mirror approaching from behind and should have given warning before turning right. It’s incredible that the cyclist could not be seen by the lorry driver approaching from behind, not even by the witness standing on the lorry. I don’t believe this story.” The trial magistrate was convinced beyond reasonable doubt that “the victim was riding abreast with the lorry when the lorry driver without any warning swung the lorry to the right, thus crashing into the victim”. He found him guilty as charged. For the appellant Mr. Mpanga argued the following three main points. First, he submitted that, the evidence of the policeman having been rejected, the complainant was the only witness left for the prosecution. He sought to cast doubt on the integrity and veracity of the complainant (i) because the police had not obtained any statement from him soon after the accident, and (ii) he was an interested party in so far as the conviction of the appellant would affect any subsequent insurance claim or litigation for damages. Secondly, he submitted further that the magistrate had nowhere expressly rejected the evidence adduced by the defence. The third point argued by counsel was that the magistrate had failed to direct his mind properly on law in that a conviction could not be based merely on the fact of a collision without a finding of fact that the driver charged with the offence of careless driving was negligent – *R. v. Wallace*, [1958] E.A. 582 as applied in the Kenya case of *Jesani v. Republic*, [1969] E.A. 600. For the respondent, Miss Binaisa submitted that there was ample evidence to support the conviction. She said that the trial magistrate had reached his findings after a careful consideration of the evidence before him during which he had rejected the defence version. I think that it is not quite correct to say that the evidence of P.C. Manyali had been rejected by the trial magistrate. What was rejected, and quite properly in my view, was the sketch plan prepared by him. It could have had no evidential value if the maker of it was unable to interpret it. But his visual evidence of the damage to both vehicles does not seem to have been rejected. The magistrate felt no need to consider the rest of his evidence for the simple reason that the damage to the tipper, which was of obvious importance to the case, was not in dispute. The damage was to the front off side mudguard and it must follow that that must have been the point of impact. Regarding Mr. Mpanga’s comment on the absence of any statement taken from the complainant, it must be pointed out that what P.C. Manyali said was that it was not his duty to record a statement from the complainant whom he saw in hospital. Nowhere is there any suggestion that the complainant did not in fact make any statement to any other police officer. It is of interest to note that counsel who represented the appellant in the lower court did not ask him about it, nor was a request for his police statement made to contradict him. In the circumstances I think it is futile now to raise this matter and ask this court to draw an adverse inference against the complainant when there is no basis or foundation for doing so. I do however agree that the complainant is the only main witness for the prosecution. It cannot be denied also that he is an interested party in so far as the issue of damages and insurance claim is concerned. Mr. Mpanga’s submission is that his testimony should have been rejected in favour of the three defence witnesses. I am sure that this cannot be true. The testimony of such a witness is not on the same footing as that of a co-accused or an accomplice who has a purpose of his own to serve, where prudence demands that a warning in similar terms, which as a rule were proper to be employed by recalling the evidence of accomplices, be given – *Russell v. R*. (1968), 52 Cr. App. R. 147. As the trial magistrate rightly said, the decision depended on facts and the credibility of witnesses. In *Angile v. Uganda* (1971), H.C.B. 67 where the appellant was convicted of some traffic offences it was submitted on appeal that as there were two witnesses for the defence the trial magistrate had erred in believing the uncorroborated evidence of the only prosecution witness, Sir Dermot Sheridan, C.J., held after referring to s. 132 of the Evidence Act that there was no substance in this submission. Phadke, J., considered the proposition of whether the testimony of an interested party should be rejected in *Ali Masembe v. Uganda* (1972), H.C.B. 54 where he held: “The proposition that a witness who was an interested party should not be relied upon was unacceptable. Such a proposition would mean that in every case a complainant’s evidence had inevitably to be treated as open to doubt. The credibility of a witness’s evidence, be he an interested person or an independent witness, had to be judged by the court according to the opinion it formed about the veracity of that witness.” I respectfully agree. The magistrate considered both versions and gave reasons for rejecting the defence. The submission that nowhere did he expressly reject the evidence of the defence witness is not correct. [*The judge considered the magistrate’s judgment and continued.*] It follows that what the prosecution had succeeded in proving was that when the complainant was riding abreast with the tipper which was in the outer lane the appellant suddenly and without warning swung to his offside in the path of the motor cyclist. This leads me to the final submission of Mr. Mpanga in that the trial magistrate failed to direct himself on the lines set out in the case of *Wallace* (*supra*). That case has been applied in Uganda in *Tejani v. Uganda* (1968), H.C.B. 5. In *Wallace’s* case it was held that: “a conviction for driving without due care and attention cannot be founded on the mere fact of a collision, but must be based on a finding of fact that the driver charged was guilty of some act or omission which was negligent, and which was a departure from the standard of driving expected of a reasonably prudent driver.” The same must apply to driving without due consideration and in particular in instances where such a charge arises out of a collision. Notwithstanding that the magistrate had not specifically directed himself on whether the act of the appellant in swinging to his offside was such that no prudent driver would drive in that manner he was satisfied beyond doubt that the collision was caused “when the lorry driver without any warning swung to the right thus crashing into the victim.” This was the only logical conclusion at which he could have arrived and this final finding of fact made by the magistrate indicates without any shadow of doubt that the appellant was guilty of negligence not expected of a prudent driver in changing lanes and turning right in front of the motor cyclist of whose existence, almost parallel to him, he must have been aware. Upon a re-appraisal of the entire evidence I am satisfied that the conviction of the appellant was well founded and amply supported by evidence which the trial magistrate accepted. The appeal is dismissed.

*Order accordingly.*

For the appellant:

*F Mpanga*

For the respondent:

*Miss C Binaisa* (State Attorney)