REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

CIVIL APPEAL 67 OF 1983

BETWEEN

ABBAY ABUBAKAR HAJI

PATUMA ALI ABDULLA…….APPELLANT

AND

MARAIR FREIGHT AGENCIES LTD…….RESPONDENTS

(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Aragon, Ag. J)

in

Civil Case 149 of 1983

JUDGMENT

ABBAY ABUBAKAR HAJI and FATUMA ALI ABDULLA, the appellants, are the widows o the late AHMED MAOW FARAH. MARAIR FREIGHT AGENCIES LTD., the respondent, is a limited liability company.

The appellants' claim for judgment against the respondent for special and general damages, costs and interest on all those sums was dismissed with costs on June 13 1983 by the High Court (Aragon, Ag. J.) in Mombasa.

Their claim was brought under the Fatal Accidents Act on behalf of themselves, their mother-in-law and their eleven children because they were all dependants of AHMED MAOW FARAH.

He and his passenger were killed outright at about 1.10 am on march 29 1981 as he was driving his Datsun Pick-up (the Datsun) KSV 598 near Taru about 50 kms from Mriakani on the main Nairobi Mombasa road towards Mombasa.

So were Ramzani Ismael Esmu and Naushad (Y. Hasmuk?) one of whom was driving a Daihatsu saloon (the Daihatsu) KVY 672 belonging to the respondent at the same point on that road but in the opposite direction or towards Nairobi.

The appellants alleged these vehicles collided and the cause of the collision was the negligence of the respondent's driver. The respondent denied the vehicles collided and also pleaded that the late

AHMED MAOW RARAH collided with a cow or some cows or, in the alternative, if the vehicle collided, then it was due solely to the negligence of the deceased AHMED MAOW FARAH in his Datsun or his negligence contributed to the collision. The appellants joined issue with the respondent on those defences. There was no counterclaim by the respondent against the appellants. The parties agreed to settle the issue of quantum and go to trial on the issue of liability.

I.P. Ombalo and C.I.P. of Mariakani Police Station who reached the scene on March 20 at 4 a.m. and 8.30 a m respectively were called by the appellants and Manjit Sing Dhadialla who owns "Protectors", a private investigation firm, and reached the scene on March 30 between 2 p.m. and 4 p.m. testified for the respondent. The vehicles had been towed to Mariakani Police Station by the time Mr Dhadialla reached the scene.

The learned judge would not allow any of them to suggest how the accident happened because none of them was a qualified motor vehicle engineer and, therefore, had no special knowledge of what motor vehicles do in various circumstances. He found Mr Dhadialla's evidence of what he called the primary facts much more helpful than those of IP Omabalo (whom he criticized for not, among other things, having the rectal temperatures of the 4 people who were killed in the accident 3 hours before he reached them taken by a doctor and 3 dying or dead cows at the scene examined by a vet) and he did not comment one way or another on the evidence of C.I.P) waigwa which is not surprising since he was not permitted to say anything more than that he arrived at the scene at 7.30 a.m. and it was raining. It would have been in order for these three witnesses to indicate what his training, experience and observation of the scene suggested to him how the vehicles came to be where they were and in that condition, and the learned judge would then give appropriate weight to their testimony.

He admitted, however, Mr. Dhadialla's report, 39 photographs and IP. Ombalo's rough and fair sketch plans with alegend and details of measurements. He then reviewed such facts as were before him together witht eh relevant law and concluded that the appellants had not proved the respondent liable because there was

> "… no evidence whatsoever of any actual collision having occurred between the Datsun and Daihatsu and no (evidence) of any negligence on www.kenyalawreports.or.ke 3 the part of either of the two cars, or of any fact or facts from negligence could be inferred…."

The appellants in their memorandum aver that it was an error of law to dismiss the claim on the evidence that was led and not to find the vehicles collided, each driver was to blame and equally at fault. It was also an error of law to disregard the evidence of IP Ombalo and refuse to allow C I P Waigwa to declare where the point of impact was.

The appellants ask this court to allow the appeal with costs, set aside the judgment of the trial court and substitute one for them against the respondent or, alternatively, apportion the blame – worthiness of the drivers and give judgment accordingly. The respondent opposes this and asks us to dismiss the appeal with costs. The advocates for both parties asked the court not to remit the matter to the High Court for any purpose.

The trial judge rightly applied to the facts before him the relevant law enunciated by Spry, V P in **Lakhamshi v Attorney General,** (1971) E A 118, 120 for such cases which -

> "It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take

> evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.

The facts before the High Court were these. This road was tarmac one, 21’ 10’ wide. The nearside part of the road heading to Mombasa is 11’ wide and then there is a verge 13’ wide. The near side portion leading to Nairobi is 10’ 10’ and the verge 5’ wide. The weather was dry when the accident occurred. The center of the road was marked. There was no lighting there and no traffic signs. The road was straight for miles, uphill towards Mombasa and downhill towards Nairobi, and in good condition. There were no brake or gauge marks to be seen on it.

On the near side verge of the road facing towards Nairobi, which is the direction in which the Daihatsu was heading, there were the carcasses of two cows separated by 30’. Close to the center line but to the left of it facing Nairobi was a large whitish stain, more or less 17’ from the stain across to the off side verge traveling towards Nairobi was part of the roof of the Daihatsu was and third dead cow and in between scratches and pieces of broken glass on the road.

The Datsun came to a halt across the middle of the road facing the near side verge of that part of the road leading to Nairobi. It will be remembered that it had been going towards Mombasa. The Daihatsu was across the off side verge of the same part of the road. They were, therefore, both on the wrong side of the road. They had not traveled far after hitting whatever they did hit, probably because they were too damaged to mobe further.

The Daihatsu was a nearly new one. Both vehicles were too damaged to permit Dhadialla to say either had any mechanical defects before the accident which might have been the cause of it. The Datsun’s battery was broken and its acid was probably what stained the road white. If this were so, then the Datsun was at some time over the center line and in that part of this road on which the Daihatsu was traveling. The front of the Daihatsu and its off-side from wing was undamaged but its nearside one was crumpled but not from a direct impact. The dashboard was undamaged. It hit something underneath the center pillar which tore the passenger seat and pushed it upwards.

The Datsun appeared to have run into something head-on because the headlamps, bumper bar, grille and front off side and near-side wings were damaged. The off-side front wing was crushed and the near-side one detached and crumpled. Its steering was depressed slightly twisted but not pushed backwards. There was cow dung on its front off-side.

On all this it was suggested by Mr Dhadialla that perhaps the Daihatsu struck a cow lying on or knocked down on the tarmac road, went up it, as if up a ramp, and bounced on the bonnet and roof of the Datsun, killed its driver and passenger, slewed it round clockwise and halted it and then regain the road and traveled along it another 17’ or so. Or, the Datsun may have had to avoid another cow on the road and do so crossed the center line into the path of the Daihatsu an dso been bounced on by the Daihatsu.

The learned judge also ventured to reconstruct what happened. Both vehicle were being driven very fast in their correct part of the road. These cows suddenly began to walk across the road ahead of the Datsun which hit one and threw it up onto the roof of the Daihatsu and the Datsun was deflected from its course collided with a second cow which was flung up onto its cabin crushing its roof in and, finally, the Datsun hits and kills the third cow which is found under the Datsun.

It was conceded by the appellant’s advocate at the trial that how each vehicle was damaged and those four people were killed could not be determined on the evidence before the High Court. At the hearing of the appeal we were asked by another advocate for them to infer it using the same meager evidence and the respondents submitted it was impossible to do so.

No one survived the event, it seems, the policemen and assessors were prevented from trying to reconstruct it and neither the trial judge nor the appellants' advocate that the driver of each vehicle was negligent because he (or she) approached an obstruction at considerable speed and at such a speed that they were unable to avoid it so their blameworthiness was equal. He withdraw this at the cutest of the appeal and later underlined the plethora of uncertainties in the case. Thus, he said, there was no evidence of the time of each vehicles accident, speed, the direction in which it was traveling, how many cows were struck by what vehicle and whether or not the driver of each vehicle was blameless because the cattle suddenly cavorted across the road into each vehicle.

The direction each pleaded and not traversed. The Dutsun towards Mombasa and the Daihatsu towards Nairobi. The evidence supports a finding that the Datsun struck one of the three beasts. Nothing else is clear about this tragedy.

In these circumstances the cause of the accident is so speculative that no reasonable and probably inference can be drawn, in my view, that no reasonable and probable inference can be drawn, in my view, that either driver was at fault, of Romer, L J in BAKER v MARKET HARBOROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LTD: WALLACE v RICHARDS (LEICESTER) LTD (1953) 1 All E R 1472, 1478, 1479 (CA). There is in fact no direct evidence that either was negligent and nor can it be inferred from the circumstances of the accident set before the learned judge or this court.

For these reasons, therefore, I would dismiss the appeal with costs, and as Hancox, J A and Nyarangi, Ag J A agree it is so ordered.

Delivered at Mombasa this 31st day of January 1984.

A A KNELLER

JUDGE OF APPEAL

JUDGMENT OF HANCOX, J A

During the early hours of 29th March 1981 an accident occurred on the main Mombasa/Nairobi road near Taru in which the occupants respectively of a Datsun pick-up, KSV 598 and of a Daihatsu saloon, KVY 672, were killed and the two vehicles almost totally destroyed. There had been driver and one passenger in each vehicle. In addition three cattle were killed, one of which was under Datsun and two were lying off the roadway.

I use the word "accident" in the singular, but, as Mr Geogiadis emphasized in his submissions on behalf of the respondents to this appeal, there was really nothing to show that the deaths of all these unfortunate people had been caused simultaneously in one accident. It could not for instance, be ruled out that one of the vehicles had initially hit an animal and that the other came upon the accident and collided with that which was already there. Indeed the suggestion in the report of the expert witness, Mr Dhadialla, that one of the dead cows had formed a ramp enabling the DAIHATSU to mount the cab of the DATSUN, leaving tyre marks on the roof, of which IP Ombalo gave evidence, (though he did not march them to the tyres of the Daihatsu) might well be consistent with that possibility.

The trial judge, Aragon, J. refused to follow the line of authorities cited to him, in which there was scant evidence, if any, of that which had taken place, and the tenor of which was that, in such circumstances, if it was clear that both drivers were to blame for the accident, I emphasise those words, and it was impossible to distinguish between them, then liability should be cast equally on each. He refused to do so because in all those cases it was evident that that there had in fact been a collision, in the sense of an impact, at or near the center of the road, between the two vehicles involved. Thus, even if one had strayed marginally over the middle line and was thus negligent, it could also be said that the other had been negligent in failing to take any avoiding action.

The leading case appears to be BAKER v MARKET HARDBOROUGH INDUSTRIAL CO-

PERATIVE SOCIETY in (1953) 1 WLR, 1472, in which the widow of each deceased driver sued the other's employers and the respective appeals were heard together. That was the case in which DENNING L J , AS HE THEN WAS, ENUNCIATED THE PRINCIPLE TO WHICH I HAVE JUST REFERRED. Similar results occurred in the east African cases of WELCH v STANDARD BANK CO. (1970) E A 115 (MADAN, J, as he thenw as,) and LAKHAMSHI v ATTORNEY GENERAL (1971) E A 118, (Court of Appeal for East Africa). Accordingly Mr Satchu, on behalf of the appellants and former plaintiffs, whow ere the widows of the driver of the DATSUN, submits that this court should follow those decisions, reverse ARGON J's decision that hey had failed to prove negligence, and apportion liability for this tragedy equally between the parties. He says that it was manifest from all the evidence, as depicted in the sketch plan, and the presence of the tyre marks on the roof of the cab of the DATSUN, that there had, in fact been a collosion between the two vehicles. Moreover the learned Judge should not have excluded, as he did, the evidence of the second police officer, C/I WAIGWA, who attempted to give his opinion as to what had happened based on his 22 years' experience as a police officer (see Ground 3 of the Memorandum of Appeal).

There can be no doubt that it is the clear duty of a court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible. The court cannot, as Denning LJ. Wash its hands of the case and shrink from arriving at a conclusion simply because the evidence is deficient in some respects. This is clearly recognized by SPRY V-P in the LAKHMSHI case (supra) where, at p. 120, he accepted that in relation to most traffic accidents it is possible to conclude on a balance of probability that one or other, or both, of the parties were guilty of negligence. But he expressly said that it was not settled law that where the evidence is insufficient to establish the negligence of any party, the court must find both equally to blame, and he left open the situation where, as in my opinion is the case here, athere is a lack of evidence as opposed to a conflict thereof. He said, at p.121:

> "I am inclined to think that the position is different. I personally find it difficult to see how a party can be found guilty of negligence if there is not evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident. This problem does not arise on the present appeal and it is unnecessary for us to decide it."

It is apparent, then, that SPRY V-P's remarks were obiter, but that passage is in my judgment apposite to the present case. Even in the Market Harborough case, ROMER L J was prepared to envisage that circumstances could exist where the evidence was so meager that any explanation would be purely speculative, and thus that the plaintiff's case could not be said to have been proved.

That isin my judgment the situation in the instant case. In the vast majority of traffic accidents it will be possible to reconstruct the events so as to lead to an inference on the balance of probabilities that one or other, or both, parties were negligent. Here that is not possible. I have advanced one theory. Aragon J advanced another. There are many hypotheses and permutations which can be put forward, as Mr Georgiadis demonstrated.

In those circumstances I find myself in complete agreement with Kneller J A whose judgment I have had the advantage of reading in draft. Despite the trial judge's rather cavalier treatment of C/I WAIGWA's evidence, I nevertheless agree with him as to his conclusion. I would therefore dismiss the appeal with costs to the respondent.

Dated at Mombasa this 31st day of January, 1983.

A R W HANCOX

JUDGE OF APPEAL

JUDGMENT OF NYARANGI, AG. J.A.

The appellants being aggrieved by the judgment and decree of the High Court of Kenya at Mombasa (Aragon, J) dated the 13th day of June 1983 in Civil Case NO 149 of 1982, appeal to this on the grounds that

> 1. The learned trial judge erred in law in dismissing the appellants claim in its entirety in face of the nature of the evidence or the lack thereof as the case may be which was before him.
>
> 2. The learned trial judge should have drawn the inference that in the circumstances of the case and upon the evidence as was before him, each driver was to blame for the collision and in the absence of other evidence, being unable to decide the issue, he should have found that both drivers were to blame and that they were equally to blame.
>
> 3. The learned trial judge erred in law in disregarding the evidence of Jared Ombala P W 1 and further in disallowing the questioning of Nathaniel Waigwa P W 2 on the possible location of impact between the two vehicles on the road.

This court is asked that this appeal against the judgment of the trial judge be allowed and in place of the judgment of the court below this court give judgment for the appellants on the issue of liability or alternatively apportion the degree of blameworthiness between the drivers of the two vehicles and that the costs of this appeal be provided for. Broadly the facts of the matter are that on or about the 29th March, 1981 at about 12.30 a.m. the deceased husband of the appellant was driving a Datsun pick-up registration mark number KSV 598 on the Nairobi/Mombasa road towards Mombasa. There was a passenger in the pick-up. On the same night a Daihatsu saloon car registration mark KBY 672 was being driven along by an employee of the defendant on the same road but towards Nairobi. There was a passenger in the saloon. At or near Taru the two cars were involved in an accident as a result of which the two vehicles were extensively damaged and all the four persons died. Three cows died within the spot of the accident. There was no eye witness to the accident. I.P. Jared Ombalo who went to the scene after receiving a report found that the saloon's front rear side wheel was on the road. There was much broken glass on the road and there were two dead male bodies on the road. The pick-up was on its wheels and its from was at an angle point to Mombasa. The witness saw the tyre marks on the roof of the cabin of the pick-up. The width of the road was 22 feet. The two dead cattle off the road had been injured and the third cow was under the pick-up with its intestines out. Under cross-examinations, the witness replied inter alia that he did not know which vehicle was going in which direction after seeing the scene and that there was ample room for vehicles to pass the wreck of the pick-up on either side. Also that there was no traffic sign on either side or speed restriction. The defence witness visited the scene between 2 and 3 p m. The witness found no pre-accident mechanical defects in either of the vehicles, no brake marks on the tarmac, noticed that the vehicles had recently been registered, that there was no evidence on the collision but that photographs number 15 showed that the pick-up had sustained 100% head collision, both its head lights and side-lights were broken. The witness did not think that the two vehicles collided head-on. The saloon split into two at near side center pillar but that the damage at the near side center pillar showed the saloon had received.

> "strong application of force from beneath motor-vehicle thus coning rear section of the saloon…"

The witness could not determine any point of impact. The witness prepared a report which he produced to the court.

The two witnesses described as well as they could what they observed at the scene. The defence witness prepared a report which was of assistance to the trial judge. The evidence before the court did not constitute a conflict. Rather, the result of both sets of the evidence was that it was not possible for the trial court to establish the cause of the accident. The sole issue to be tried was that of liability. The determination of that issue depended entirely on a finding of negligence against one or both parties. However, on the sketchy evidence adduced, the trial judge observed,

> "No evidence was led conclusively to prove that there was a collision between the two cars.

Mr Dhadialla did not say that he found any traces of paint from the Datsun or Daihatsu or vice versa,"

The judge is here stating that here was no evidence to prove on the balance of probabilities that there was a collision.

Where it is proved by evidence that both parties to motor accident are to blame and there is no means of making a reasonable distribution, the blame can be apportioned equally on each: BAKER v MARKET HABOUR INDUSTRIAL CO-OPERATIVE SOCIETY LTD (1953) W.L.R. page 1472.

The position must however be different where there is no evidence to establish that any party was negligent. That would be the case where the evidence adduced points one way and there is no conflicting evidence. In that case it cannot be right to apportion blame there being no evidence on which apportionment could be based. As was stated in LAKHAMSHI v ATTORNEY GENERAL (1971) E A page 118 at page 121 by Spry – V P. It is difficult to appreciate how a party can be held to have been negligent if there is no evidence that he was in fact negligent.

The trial judge recognized that and so held. He was right on the facts and in law.

I would dismiss the appeal.

Delivered at Mombasa and dated the 31st day of January, 1984.

J O NYARANGI

AG. JUDGE OF APPEAL