REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

CIVIL APPEAL NO 97 OF 1986

JONATHAN NJENGA……………………APPELLANT

V

HASSAN FARAJ ABOUD…………..RESPONDENT

JUDGMENT

Cases

1. *Emphantus Mwangi & Nguyo Ngatia v Duncan Mwangi Wambugu* Civil Appeal No 77 of 1982

2. *Fernandes v Noranha [*1969] EA at p 508

April 30, 1987, **Nyarangi JA** delivered the following Judgment.

The direct question in this case is whether the defendant (appellant) who on the 13th day of August, 1980 owned and drove vehicle registration mark KVF 971 when it collided with the Toyota Corolla registration mark No KJQ 224 owned and driven by the plaintiff (respondent) as a result of which the Toyota was damaged extensively causing the plaintiff to suffer loss, expense and damage committed the various acts of negligence the particulars of which are set out in paragraph 5 of the plaint.

The background facts giving rise to this appeal are important and can be stated briefly. The plaintiff owner of the motor-vehicle registration mark KJQ 224 was driving his vehicle at a speed of 15 to 20 KPH from Mwembe Tayari towards Langoni Road ahead where there is a roundabout where some seven roads end at the junction of Digo Road Half-way within the roundabout and while facing Langoni Road, the plaintiff heard a bang on his left hand near-side passenger door. In the view of the plaintiff, his car was hit by that of the defendant asked the plaintiff why he, the plaintiff, had hit his car. The plaintiff denied hitting the other car and both parties agreed to wait for police officers to arrive at the scene, but the defendant nevertheless drove away. A police officer (PW2) arrived at the scene and found three motor vehicles which had been involved in the accident. The Toyota was inside the roundabout PW 2 took the measurements of the relevant distances and prepared a sketch plan which the witness did not produce, claiming that

> "police file had been misplaced."

On the plaintiff's side, Jessee Sherwin (PW1), an engineer, gave qualified support to the plaintiff's evidence on the damage to his car and produced a report and photographs of the Toyota which he took. According to this witness the damage to the Toyota is consistent with the car having been hit infront by a

solid obstruction.

The defendant's version was that he was driving from Old Nyali bridge along Digo Road towards Likoni, in the heavy traffic cars moving slowly bumper to bumper. Before entering the roundabout the defendant looked to his right. All was clear, However, as he was proceeding in the middle lane, he was hit in the front driver's door by the plaintiff's car. Whereupon he got out of his car and spoke to the plaintiff. They were both angry, there was booing and shouting and so the plaintiff decided to drive to the central police station where he wrote a statement to PW2. The defendant blamed the plaintiff for the accident and disagreed that the plaintiff's vehicle was pushed against the roundabout or against the kerb of the roundabout.

On the basis of those facts, the trial judge found that the defendant was wholly liable for the collision. The defendant is aggrieved and he appeals to this court on the following grounds:-

1.The procession on Digo road, found as a fact by the trial judge, could not have permitted the appellant in the line of procession to have attained excessive speed, which could be and was attained by the respondent, who was not held up by any such line of traffic.

2.The respondent admitted having taken on evasive action in applying brakes to avoid colliding.

3.The findings were made not on evidence, but upon surmise and speculation.

4.Sherwin's opinion too was based on surmise, without physical evidence of impact, by means of a photograph of the actual collision or other evidence.

5.Sherwin's opinion inconsistent with the respondent's evidence as to the point of impact, not head on or frontal collision, but a colliding against a near side door.

6.There was no evidence of the respondent's car having been crushed into the kerbside hardly 4" high.

7.The damage was consistent with the respondent's car having run into the Audi broadside at speed to be damaged on both ends.

8.Demeanour or aggressive or timid character of the relatives drivers could not have helped to resolve the question "who hit whom" or to explain the nature and character of the damage.

9.The respondent had failed to prove the collision was due solely to or any negligence of the appellant and in any case an unexplained collision in the middle of the roundabout showed equal degree of negligence.

10.The judge wrongly introduced and allowed himself to be carried away by portions of the driving Manual Ministry of Transport of the United Kingdom, nor formally proved and in any case irrelevant.

11.Ignorance of Traffic Rules of Kenya is one thing, does not of itself prove their non-observance and it is impassable to discern, how the judge below concluded or could have concluded the cause causans of the collision was such non-observance.

12.The respondent's car being a write off, it is impossible in law compatibly with that to have allowed car hire charges for the first ten days after the accident, the substratum having gone, namely of waiting redelivery of the respondent's car duly repaired.

This memorandum of appeal can be criticised to some extent for non compliance with rule 84 of the rules of this court. I understand Mr Sharma for the appellant to contend that the decision of the judge is not supportable on the evidence, that the damage to the defendant's car is consistent with the defendant's evidence, that having regard to the damage to the plaintiff's car and the material photographs, the frontal impact to the Toyota was caused by the Toyota banging into the defendant's car and that if the

defendant’s car had hit the Toyota, the defendant’s car would have changed its position. Mr Sharma said the evidence of Sherwin does not assist in showing who was negligent although its is apparent from the damage to the Toyota that it was a frontal, not angular impact, and also that the plaintiff’s evidence as to how the accident occurred could not be correct if considered together with the photographs. Counsel complained that the judge did not specify in what way the defendant was negligent.

Mr Jiwaji for the plaintiff founded his reply in the main on the findings of the trial judge. Counsel said the police officers found the plaintiff’s car outside the roundabout and argued that as both cars were not entering the roundabout at the same time, the presumption is that the plaintiff was leaving the roundabout when his car was hit and that the Toyota was in the roundabout when the defendant’s vehicle arrived and therefore the defendant’s car had to give way to the Toyota. The court was urged to uphold the conclusions and decisions of the trial judge.

I pass, then, to a consideration of the evidence. I proceed on the basis that this is a first (and only) appeal so I am obliged to reconsider the evidence, assess it and make my own conclusions about the evidence, not forgetting that I Have not seen or heard the witness: *Ephantus Mwangi & Nguyo Ngatia v Duncan Mwangi Wambugu,* Civil Appeal No 77 of 1982, *Fernandes v Noranha*, [1969] EA at page 508. After seeing and hearing the defendant, the judge formed the impression he was an aggressive person, unmindful of others and impatient. The judge has given nor reasons for these impressions. Be that as it may impression alone does not justify the finding that the defendant therefore disregarded the rules and courtesies for safe driving.

There has to be reliable evidence of actual carelessness in his manner of driving on the part of the defendant to support such a finding. Here, there was no independent eye-witness because the police officer who arrived at the scene observed and drew a sketch plan gave oral evidence on the damage to the Toyota and its position at the scene and no more. The witness did not produce the sketch plan. The resulting factual position before the judge in my judgment was an irreconcilable conflict between the parties upon which the judge could not reasonably infer that the defendant’s car hit the Toyota or that the defendant was driving carelessly. PW2 should have produced the sketch plan. No reasonable explanation was offered for the failure to produce the plan. Without the plan the judge could not have anything like a fair picture of what happened or might have happened.

The plaintiff made much play with the defendant’s departure from the scene to report and make a statement at the central police station. The judge held that on that score the defendant contravened the spirit of the Traffic Act and prevented police officers from observing the scene as to what happened. But, the only police officer (PW2) who testified said the defendant was charged with careless driving but that he did not know what happened to the case. PW2 did not tell the judge that the defendant’s conduct made it difficult for him or the police to observe and prepare a sketch plan and therefore in my view there was no justification for the judge’s observation which was prejudicial to the defendant’s case.

The evidence of Sherwin, the assessor and surveyor of motor accident, showed that there was severe frontal damage to the Toyota and another vehicle. That evidence even put and considered together with the photographs and the plaintiff’s evidence did not enhance the plaintiff’s case and does not sufficiently portray the material scene.

The absence of concrete evidence on which to make findings of fact and so settle the conflicting versions did I fear caused the judge to decide crucial factors on the demeanour of the parties to the action. The judge overlooked the evidence that a sketch plan was actually prepared but not produced. That was an error which prompted excessive reliance on demeanour.

The remaining question is as to Rule 78A of the Traffic Rule, and the Kenya Highway Code. On my view of the state of evidence before the judge, the Rules and the code were of no consequence to the determination of the issues, there being no cogent evidence adduced to show the position of the cars when the accident occurred. A copy of the street map of Mombasa is admissible evidence. The map would have to be explained by witnesses and then related to the actual scene. I could not at this stage of litigation utilize the map to fill in essential gaps in the evidence in an attempt to understand what might have

happened. I take judicial notice of the map. I could not, properly apply the contents of the map to describe the scene because the evidence about the scene as I have stated is in irreconciliable conflict. In my opinion the reference to the map does no more than induce a benevolent scrutiny of the evidence which at the end of the day does not resolve the problem. I can neither form nor express any sort of opinion about the evidence by looking at the map.

With that I have reached the end of the remaining question. I would like to finish where I began by saying that the inescapable point is whether on the evidence the plaintiff proved his claim of negligence against the defendant.

For reasons I have attempted to explain, the conclusion contended for on behalf of the appellants is the right one. The upshot is that I would allow the appeal with costs, dismiss the suit below with costs with interests at 12% p.a from the date of filing suit until payment, and disallow hire charges of Kshs 2,539.60 with costs with interest at 12% and as Gachuhi, J A agrees it is so ordered.

Platt J A The plaintiff, Hassan Faraji Aboud sued the defendant, Jonathan Njenga for damages due to his motor vehicle, as a result of an accident between the parties which occurred on August 13, 1980. The learned judge assessed the total loss sustained by the plaintiff at Kshs 22,234.60 and entered judgment for the plaintiff in that sum with costs and interest. The defendant has appealed to this court against that judgement, and after stating that the defendant is the present appellant and the plaintiff the present respondent, I shall continue to refer to the parties as they were at the trial.

There is no dispute that at 5.30 pm on August 13, 1980 there was an accident involving the plaintiff’s car (registered number KJQ 224), a Toyota Corolla and the defendant’s car (registered number KVF 971), an Audi. The accident occurred in the course of these two vehicles negotiating a roundabout on the Digo Road near the Mackinon market. As there was no sketch map of this area, probably because it was very well-known to the parties and their counsel, it is necessary to be clear how the vehicles were negotiating the round-about.

The evidence of the plaintiff was that he was coming from Mwembe Tayari and going towards Langoni Road which leads to the Old Town of Mombasa. Coming from Mwembe Tayari and approaching the roundabout he would be traveling on Jomo Kenyatta Avenue which is a double carriage way and intersects Digo Road going towards Nyali, also a double carriage way. Having crossed the roundabout, he would turn into the single road called Langoni Road. When the plaintiff said that “seven” roads ended at the round-about, he meant to say that Digo road was double carriage way on either side of the round-about, so that on the one side, Digo road went towards Likoni and on the other side of the round-about this road went towards Nyali. Equally Jomo Kenyatta Avenue is a double carriage way and it would cross Digo road at right angles while facing towards Langoni road on the other side of the round-about. So the plaintiff counted six roads for 3 double carriage ways and one road for Langoni road. But the important point of the round-about is that Digo road is crossed at right angles by Jomo Kenyatta Avenue and Langoni Road. The defendant confirmed this impression. He said that he was traveling from Old Nyali Bridge and going along Digo Road towards Likoni. He approached the round-about at the junction between Digo Road and Jomo Kenyatta Avenue. The defendant’s intention was to go straight on the opposite road beyond the round-about at the right angles. The only question that remains to be clarified is whether the plaintiff was approaching the round-about from the defendant’s right or left. That question seems to be answered by the defendant who gave this description-

> “Accident happened at a designated round-about. There are 3 lanes each way in Digo Road, left lane is filter for Langoni road whilst middle and right are for proceedings onwards or to turn right. My intention was to go straight on.”

The defendant had earlier accepted that he was traveling in the middle lane going through the round-about. If that is so, then on the defendant’s left was the lane which turned left into Langoni Road, from which it follows that Jomo Kenyatta Avenue was on the defendant’s right. In consequence the plaintiff came up Jomo Kenyatta Avenue, came across the roundabout towards the second side of Digo Road which has 3 lanes, in the central lane of which the defendant was travelling, and the plaintiff would wish

to continue in front of the defendant into the filter lane on the left of the defendant to go into Langoni Road. On the other hand, whilst the plaintiff had come from Jomo Kenyatta Avenue and was going to negotiate the round-about, the defendant might wish to go in front of the plaintiff, go through the round-about and continue on the other side towards Likoni. Unfortunately, instead of one or other of the parties passing safely in front of the other, there was a collision as they negotiated the roundabout.

The next general point is to describe the manner in which these parties would negotiate the round-about in accordance with Traffic Rule 78A. A driver like the plaintiff travelling from Jomo Kenyatta Avenue, on approaching the round-about. Would leave vehicles on his right coming from the side of Likoni on Digo Road, to go through to Nyali, and thus take a path in the opposite direction to that of the defendant. Having let those vehicles pass, the driver like the plaintiff would advance to the point where vehicles travelling like the defendant would be about to enter the round-about. The driver like the plaintiff would thus have already completed half the round-about before he met a driver like the defendant.It will then be the turn of the driver like the defendant to allow a driver like the plaintiff to pass, so that the latter might either turn into Langoni Road on the defendant's left, or, go on in the round-about in priority to the defendant and vehicles on the defendants's side of Digo Road. On the other hand, it might be that even if the plaintiff would normally hope to have the right of the way, he might be so far behind on entering the roundabout, that a driver like the defendant would find it safe to go ahead. In that event it would be the duty of the plaintiff to allow the defendant to proceed in front of him.

There are two matters on which I take judicial notice. The first is that it is notorious that the round-about is a device for allowing vehicles to filter in a stream around the round-about, where there are no traffic lights. There was no evidence in this case that there were such lights.

Secondly, although evidence can be pieced together without the necessity of a sketch plan, nevertheless useful to set any remaining queries at rest, by referring to a copy of the street map of Mombasa published by the Survey of Kenya Series SK 54 of 1977. The map speaks for itself, but on it I have placed a red line showing the path chosen by the defendant. It is clear that if the plaintiff had safely negotiated the round-about up to half way across Digo Road, at that stage, the defendant would normally give way to the plaintiff. A right of way is not, of course, an absolute right, and it remains to be seen how the accident in fact took place. I refer to this map under the authority of section 39 of the Evidence Act (Cap 80) which provides as follows and is entirely relevant:-

> "39 statements and representations of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of any Government in the Commonwealth, as to matters usually stated or represented in such maps, charts or plans are themselves admissible."

Having described the scene generally, I turn now to the evidence, bearing in mind that on this first appeal, it is the duty of the court to re-hear the case and to reconsider the material before the learned judge, and make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. I have to bear in mind that I have not seen nor heard the witnesses, and that should make due allowance in this respect, so that I must be guided by the impression of the judge who saw the witnesses. But here may be other circumstances, quite apart from manner and demeanor, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge even on a question of fact, turning on the credibility of witnesses whom the court has not seen. (see Dinkerrai Ramkrishan Pandya v R, [1957] EA 336.

The plaintiff's evidence was that he was half-way the round –about and was facing Langoni Road when he heard a bang on the left hand front side of his car near the passengers' door. The bang was caused by his car being hit by an Audi 100, blue in colour, coming from Nyali. He was traveling at 15 to 20 kph. His car was pushed against the kerb of the round-about, as a result of which the right hand side of his car was also damaged. No one was hurt and he got out of his car and went towards the Audi which had stopped some 50 feet further on along Digo Road. He then spoke to the defendant. The parties had an argument and although they agreed to wait for the Police, nevertheless the defendant drove off.

The plaintiff could not move his car because it was not mobile. The plaintiff confirmed under cross-examination that it was the defendant's car which came into collision with his car. He was not driving too fast nor failing to keep a proper look out; the brakes were in good order at the time of the accident but he did not use brakes before the collision. He was moving slowly at that point and he did not try to swerve. He had started signalling just before he was going to enter Langoni Road. He had put on his left indicator and he had negotiated the round-about in the left lane. On the other hand, the defendant testified that he was driving from Old Nyali Bridge and going along Digo Road towards Likoni. There was heavy traffic at the time. Cars were moving very slowly, bumper to bumper owing to a procession on Digo Road. Before entering the round-about he had looked to his right and seen no one. He was proceeding in the middle lane.

His car was hit at a place on the front door of the driver by the plaintiff's car. His car was almost at a stand-still and he stopped beyond the roundabout some 4 to 5 yards. The defendant did not agree that as a result of the collision the plaintiff's vehicle was pushed against the round-about on the blind side of the vehicle in the lane to his right. It was the plaintiff's fault who had come from nowhere because he had driven too fast; and it was not true that he hit the plaintiff's motor-vehicle when the latter was in the round-about and in the process of entering Langoni Road.

That was the evidence of the main witnesses. There were no eye-witnesses of the event, but there is the evidence of Police Contable Jackson Maingi Ngui (PW2), who came to the scene after the accident. He found the plaintiff's Toyota Corolla inside the round-about at the junction of Digo, Jomo Kenyatta and Abdul Nasser Roads outside the entrance to Langoni Road. He found that the Toyota could not move, so he took measurements and had the Toyota moved to Central Police Station traffic yard. He made a sketch plan; unfortunately the police file had been misplaced. The damage to the Toyota was extensive while the damage to the defendant's car was minor. The Constable accepted the photographs of the damage to the plaintiff's car which were produced to him.

It is sometimes useful to ask a witness if he would be able to draw another sketch of what he saw. As the Constable could remember the scene he may have been able to draw another sketch. Of court it would be subject to attack as not having been contemporaneous. But no impropriety can be attributed to the Constable for the non-production of the original plan after there had been criminal proceedings. It would not be left in his proper custody. All this would have been avoided if Counsel had prepared an agreed plan for use during the trial. Even the Mombasa street map would have served the purpose. The witnesses could then have indicated where they were.

The learned judge referred to the evidence of the plaintiff and the defendant but did not specifically refer to the evidence of the Police Constable.

Judging from the record, I would be of the view that the Constable's evidence was important and confirmed that the plaintiff's vehicle was inside the round-about and facing the entrance to Langoni Road. In those circumstances the only inference that can be drawn is that the plaintiff was right that he had crossed the round-about, and was preparing to leave it, in order to enter Langoni Road.

There was then the evidence of Mr Sherwin. He examined the Toyota Corolla-KJQ 224 and he took photographs which were exhibited in court.

The photographs include the registration number plate of this car. In his opinion the damage to the Toyota was due to a severe frontal impact, and it could not be driven. He thought that the damage was consistent with the car having been hit in the front by a solid obstruction. The car was constructed in such a way that on impact the front of the car would absorb the impact, so that it would tend to preserve the driver and front seat passenger. It appears to have been Mr Sherwin's opinion that it was an angular collision because the impact pushed the metal front of the car sideways and hence there was damage to both wings. That was further confirmed by the fact that the inner panels are welded to two front chassis members. That had the result that although the collision was not a serious one, the glancing blow would be enough to move the whole metal front sideways. The Audi was a heavier car and its speed and weight were relevant to the damage caused if it were an angular impact. A full head-on impact appears to have been

discounted because of the sideways movement of the metal front.

The learned judge held that Mr Sherwin had explained that both front inner wings were welded to the chassis members with the result that a hit on one side would cause the whole front of the motor car to appear crushed and distorted. That in the opinion of the learned judge was exactly what the photographs showed. The conclusion was that it was a frontal impact from one side. Looking at the photographs, that conclusion can be easily understood. The front left hand corner of the car is pushed in towards the right, damage which travels across the bonnet and bumper to the right ending up in distorting front right wing.

The learned judge gave his impression of the witnesses which was that the plaintiff appeared to be a milder, more polite type of man than the defendant, whom the learned judge thought was impatient. I note the estimate of demeanor, but there was other evidence upon which to determine the question whether the plaintiff or defendant was relible in his account of what happened. It was the position of the car which had crossed at least half the round-about and was not facing Langoni Road when the collision occurred. That is the most important support for the plaintiff's case. The second is Mr Sherwin's opinion which appeared to the learned judge to be borne out by the nature of the damage as shown in the photographs. The learned judge also set out the relevant traffic rule which is Rule 78A of the Traffic Rules. The sub-sules provide as follows:-

> "1.The driver of a vehicle which is about to enter the round-about shall give way to any other vehicle is already in the round-about and shall, if necessary, stop before entering the round-about in order to allow for such vehicle to proceed.
>
> 2.No person shall drive any vehicle into a round-about unless at the time of entry of a vehicle in to the round-about is reasonable to suppose that the vehicle will not be forced to stop in the round-about by reason of traffic already therein."

……………… Sub-rule (4) describes the situation when a vehicle is deemed to have entered into a round-about, which concerns the vehicle crossing the perimeter of the round-about. There is no doubt that in this case the plaintiff's vehicle was clearly inside the round-about when the collision occurred, and perhaps it may be that due to the traffic on the defendant's right or the Idd procession, if there was any, that the defendant did not appear to notice the plaintiff approaching him.

The learned judge then went on to deal with the Highway Code of Kenya, and the Highway Code of the United Kingdom. They are all to the same effect as Rule 78A of the Traffic Rules except that the various aspects of that rule are specifically explained. The important aspect to remember is that, as Rule 78A explains, the driver of a vehicle which is about to enter a round-about shall give way to other vehicles and if necessary shall stop.That in practical terms means that drivers give way to traffic on their right. As the learned judge pointed out, the defendant knew that he had to give way to traffic on their right. As the learned judge pointed out, the defendant knew that he had to give way to traffic already in the roundabout, but that he did not seem to have been fully prepared to accept the practical result that one gives way to traffic on the right.

Having thus examined the evidence, I turn now to the memorandum of appeal. As Mr Jiwaji for the respondent pointed out, the memorandum of appeals is in a very loose form, but it may be dealt with by selecting the following topics. The first argument is that the defendant could not have been driving at excessive speed because of the procession going through the round-about. On the other hand, it is argued that the plaintiff must have been traveling at excessive speed.

I find this argument difficult to relate to the situation at this round-about.

For a collision to take place at all, it had to be between the plaintiff in his left lane and the defendant in the middle lane on the defendant's side of Digo Road. If the defendant was almost stationery because of other traffic and the procession, how could the plaintiff had been travelling at his speed, because he too would be stopped by the procession and other traffic. In other words what would have been holding up the defendant must also have been holding up the plaintiff, when the plaintiff reached the middle lane in

which the defendant was driving. Whilst there may have been a procession as the learned judge found, it is very difficult to see how either side could be driving at a very high speed. The movement of the procession must have been such as to allow the plaintiff to cross in preparation to turn into Langoni Road and for the defendant to move forward in his lane. In my view, the learned judge was right to discount the defence that the defendant was almost stationary. That seems to be so because if the plaintiff was merely charging forward he must have hit the vehicle and traffic which the defendants says was on his right in the right hand lane.This accident could only have happened if the defendant came into a space in which the two vehicles could collide. As Mr Sherwin explained, it would only be necessary to have a light impact to cause this damage, because of the collapsible nature of the construction of the Toyota and the greater weight of the Audi. It was not a matter of high speed on either side, but both vehicles were moving.

The next main heading which I would single out would be the nature of Mr Sherwin's evidence. The learned judges was accused of making findings not upon evidence but upon surmise. Mr Sherwin's evidence was laso based on srmise, because there was no physical evidence of the impact by means of photographs of the actual collision or other evidence.It was pointed out that Mr Sherwin's opinion was inconsistent with the plaintiff's evidence. The difference was whether the point of impact had been on the near side front door or a frontal collision.

I would agree that the nature of the judgment did point towards a decision based on the demeanor of the two parties, and that the learned judge did not elucidate some of the facts in the evidence before him. It has already been pointed out that the Police Constable's evidence was not referred to, which, in my opinion, proved that the accident occurred in the roundabout towards Langoni Road. But that evidence is very clear and it was not disputed by the defendant. Indeed the plaintiff's vehicle was rendered immobile so it could not have been moved by the plaintiff. Secondly, I would agree that there would appear to be some inconsistency between the plaintiff's evidence as to the point of impact and the description by Mr Sherwin of the nature of the force applied to the plaintiff's vehicle. It is fair to say that it is not altogether easy to understand the terms used by Mr Sherwin, when he talked about a frontal impact and an angular collision.

Despite the terms in which the learned judge described the reliability of Mr Sherwin, which may be true enough, a reading of the record of his evidence does not lead the casual observer to understand such an emphatically excellent impression perceived by the learned judge. It was not quite relevant for the learned judge to indicate Mr Sherwin's past performance. What was required was that Mr Sherwin's alleged great experience was brought to bear in cogent terms upon the facts of the present case. It is always necessary with opinion evidence to tie it down as carefully as possible to the facts before the court.

It is true that the plaintiff said that he heard a bang on the left hand front side of his car "near the side passenger door." All that is left as an independent record of this accident is the Constable's evidence and the photographs produced by Mr Sherwin. It seems to be suggested that these photographs were not entirely valuable. For my part I cannot see any thing objectionable to these photographs. The examination of the car by Mr Sherwin was carried out on October 22, 1980, that is to say, two months and nine days after the accident. The photographs were taken in the course of the examination. There is no doubt that they refer to the plaintiff's vehicle. It had been detained at the Central Police Station directly after the accident. The examination took place there. Consequently the vehicle must have been in the same condition on October 22, 1980 as it was on August 13, 1980. Therefore the photographs recorded the condition of the vehicle after the accident. Upon that basis one can clearly see that the point of impact involved the left front wing and corner of the Toyota. But the photographs on page 4 of the supplementary record appeal, show that the damage involved the top of the wing reaching back to the root or hinges of the front near-side door of the Toyota. One can see from the photographs on page 5 of the supplementary record, that his door opens by a catch in the center of the body and is hinged where the front wing meets the body of the vehicle. It follows that the plaintiff's description is not entirely accurate but is not very far out.

On Mr Sherwin's description of what he saw, there can be no doubt that this was an angular force applied to the front corner of the Toyota pushing the front left wing towards the right, and so involving the front

left wing (as already described), and across the front past the radiator to the front rightwing. The photographs make this very clear, and the learned judge quite reasonably related the evidence to the photographs.

On the other hand, it was argued that the damage was consistent with the defendant's car having been hit by the plaintiff's car, the latter having been driven at high speed. One of the difficulties in this case which the learned judge faced, was that the damage to the Audi was very slight and no report was made of it. I appreciate the logical approach that an angular impact can be achieved both by the defendant's car hitting the plaintiff's car and vice-versa. But Mr Sherwin's evidence emphasizes that the impact pushed the metal side-ways, which must surely support force applied from the side rather than force applied from a frontal more or less head-on impact. Mr Sharma for the defendant / appellant pointed out that one of Mr Sherwin's statements was that the damage observed by him was severe frontal damage, which seems to have been further explained in crossexamination by the statement that the damage was consistent with the car having been hit in front by a sold obstruction. That is true, but the crux of the matter is that the Toyota car was hit in the frontal area, namely the front left corner of the car and the metal was pushed sideways as the photographs show. Looking at Mr Sherwin's opinion together with photographs, I would draw the conclusion that Mr Shewin supported the plaintiff's case rather than that of the defendant.

Next are considerations concerning the attitude of the learned judge to the traffic rules of Kenya and the Driving Manual published by the Ministry of Transport in the United Kingdom. The Kenya Highway Code which derives from the Highway Code of the United Kingdom, and the Driving Manual in the United Kingdom all emphasise the practical meaning of Rule 78A of the Traffic Rules of Kenya. There is no difference in approach and even if the Highway Codes and the Driving Manuals are excluded, Traffic Rule 78A makes it quite clear, that in practice a driver must give way to vehicles negotiating a round-about from that driver's right. For my part I do not think that the learned judge was wrong in ascertaining whether the defendant was or was not clear about the traffic rules in question. It is a relevant consideration, and while I agree that knowledge of the rules does not necessarily explain a particular basis of driving, nevertheless if the driver is not clear about the rules, it is unlikely that he would drive correctly. If he did drive correctly in those circumstances, it must be by accident. Looking at the answers given by the defendant, it is not clear that he would be prepared to give way to the driver of the right.He said that if two cars reach the round-about at the same time neither has the right of the way. That is misleading. If the entry points were diametrically opposite in a large round-about, no doubt both cars could enter if there was no other traffic. Here the entry points were close. The defendant did not demonstrate that he was prepared to drive with Traffic Rule 78A. If the plaintiff was already in the round-abouts as he must have been, the defendant did not show that he would stop his vehicle so as to allow the plaintiff's vehicle to pass without having to stop for the defendant.

Finally it was said that the plaintiff took no remedial action. The plaintiff alleged that he had put on his indicator, indicating that he would turn into Langoni Road. Having crossed into the round-about, and having prepared to leave it, he would expect other vehicles to his left to allow him pass within the terms of Traffic Rule 78A (2). Accordingly the plaintiff would normally continue to drive around the round-about. Round-abouts are created to provide a system where traffic. Which would otherwise have to stop and start because the vehicles would meet at right-angles. Naturally as the plaintiff was in the stream of traffic going through the round-about, there would not be very much that he could do unless there was a very clear obstruction infront of him. If the defendant emerged suddenly in his path from the middle lane, the plaintiff might not be able to do very much.

The evidence is explicit as to what actually happened. According to the plaintiff his vehicle was suddenly hit from the left by the defendant's vehicle. That was the situation accepted by the trial judge and if that were so, then there is nothing to indicate that the plaintiff would have any time in which to take avoiding action.

The defendant's case is that an accident of this nature showed at least an equal liability on the part of these two drivers. If the defendant was accompanied by other vehicles on each side of him and suddenly came forward and hit the plaintiff, it is difficult to see how the plaintiff could be equally responsible with the defendant. There is nothing to indicate that he should have appreciated that the defendant would

certainly come forward. The difficulty which faced the defendant was that if his account of the accident was not accepted, and he did not see the plaintiff he would not then be very well able to suggest what situation the plaintiff faced which he should have avoided. Nothing emerged from the record to show that the plaintiff should have anticipated that the defendant might try to go infront of him instead of waiting, or that the plaintiff could have avoided this difficulty.

In the result, it is my opinion that the learned judge came to the right conclusion. From the position of the plaintiff’s vehicle found after the accident by the police constable and from the nature of the damage, it was justifiable to find that the plaintiff’s car had been hit by the defendant’s car from the left, as the plaintiff described the incident. The learned judge was within his rights to disbelieve the defence version of the accident. On this basis, the defendant ought to have given way to the plaintiff in accordance with Rule 78A. He did not do so, and as he emerged without warning or notice to the plaintiff, causing a collision with the plaintiff’s car, there was no contributory negligence on the part of the plaintiff and the defendant was entirely at fault.

On the question of damages, there in no dispute that the pre-accident value of the car less the scrap value would amount to Kshs 19,000. Nor is there any dispute that the police abstract report, Mr Sherwin’s fees and towing charges would amount to Kshs 695. What is in dispute is the sum of Kshs 2,539.60 connected with the hire charges of a car for the fist ten days after the accident. Considering that the examination of the vehicle took place over two months after the accident, before it was deemed to be a total write-off, it does not seem improper for the plaintiff to have hired a vehicle for the first ten days after the accident. I would accept that the damages found by the learned judge were reasonable, I would therefore find that judgment was properly given for the plaintiff in the sum of Kshs 22,234.60 with costs and interest as awarded. I would therefore dismiss the appeal with costs.

Gachuhi J A The plaintiff was awarded damages of Kshs 22,234.60 with costs interest at 12% by the High court for damage to his car resulting from a road accident. The accident is said to have occurred on August 13, 1980 at about 5.30 pm at the round about which is at the junction of Digo Road with Kenyatta Avenue. There is also another road Langoni road which joins Digo Road near the junction.

The plaintiff’s version of the accident states that he came from Kenyatta Avenue and entered the round about. He was ½ way round the roundabout and was facing Langoni Road when he heard a bang on his left hand front side near the nearside passenger’s door. The bang on his car being hit by an Audi 100 car travelling from Nyali. His car was pushed against the kerb of the roundabout causing damage to the right side of the car as well.

He was at the time driving at the speed of 15 to 20 Kph. After the accident the Audi stopped 50ft away on Digo Road. The accident was reported to the police station. It was later assessed by Messrs Sherwin Associates who recommended that the damage was beyond economical repairs. He assessed its preaccident value to be Kshs 22,000 and that the salvage value to be Kshs 3,000.

PW2 PC Jackson Maingi Ngui who received the report of the accident from the defendant came to the scene of the accident in the vehicle that was involved in the accident. He found that the three vehicles were involved in the said Accident. The plaintif’s vehicle was inside the roundabout facing Langoni Road. He said that at the time there was a lot of traffic at the roundabout. He did not see the procession which was said to be there at the time of the accident. He took measurements and made a sketch plan. The plaintiffs car was moved to the police station. The third car was slightly damaged so the driver did not wait for police to arrive. In the policeman’s evidence he referred to the extend of damage. He could not remember minor details of the accident because the police file possibly where he could have refreshed his memory was misplaced. No sketch plan of any sort was produced.

The defendant has his own version in which he stated that at about 5.00 to 5.30 pm he was involved in a road accident at the junction of Digo Road and Kenyatta Avenue. He was coming from old Nyali bridge along Digo Road. At the time, there was heavy traffic and the cars were moving slowly bumper to bumper owing to procession in Digo Road at the time. Before he entered the roundabout, he looked to his right but saw no one. As he was proceeding in the middle lane, he was hit in the front driver’s door by the

plaintiff's car. His car was almost at a standstill at the time. He stopped passed the roundabout 4 to 5 yards. The damage to his car was slight.

It is an undisputed fact that on the material day it was Idd-ul-Fitr. It is not disputed that there was a procession at the time which caused the flow of traffic to be slow. Another staggering point is the absence of a sketch plan to show where the cars collided. If PW2 could not find the sketch plan which he drew because the police file was misplaced and because he could remember the accident, he could have drawn a rough sketch to supplement his evidence.

The parties could have accepted or rejected the position of the accident as at the time and if accepted the rough sketch could have been put in by consent to assist the court. The fact that the official map of the Island which is a public document could be looked into, only indicates that there is a roundabout or an island at the junction of Digo Road and Kenyatta Avenue. A minor road which leads to old Mombasa town does not start from the roundabout but branches off the extreme left lane on Digo Road.

These lanes and the position of the cars are not shown on the official map.

PW2 does not tell the damage to the Audi 100 which he must have seen.

He does not give the particulars of the third car or the particulars of the damage to Audi or which part the damage could have been howeer little it could be. The fact is that PW2 stated that he found the Toyota inside the roundabout or was it in the middle lane of Digo Road as claimed by the defendant / appellant? There is no evidence to indicate whether after the accident the Toyota was pushed back into the roundabout or if it remained in its actual place of the accident. According to the appellant's version, that he was hit by the respondent's vehicle must have been well out of the roundabout. If it had to be removed from the road, then there should have been evidence to that effect and by whom it was removed also showing where it remained. The respondent's position is that he had driven halfway the roundabout when the accident occurred and it was pushed near the kerb on its right. PW2 gives a different position of the respondent's car when he came to the scene.

The evidence given by the plaintiff and PW2 confirms that there was heavy traffic at the time at the roundabout. The defendant / appellant states the same and that vehicles were moving bumper to bumper. The plaintiff / respondent also confirms that traffic was heavy at the time.

With his evidence of heavy traffic on the road, what would have prevented the plaintiff from pushing his car into the middle lane cutting and crossing the lanes on the face of oncoming vehicle in order to enter Langoni Road.

If this is what happened it would explain how he hit the Audi car by his nearside. If both cars would have been in a high speed, it would be a glancing damage and the plaintiff's vehicle would have been pushed to its offside. If the accident happened in the middle, I do not see how the plaintiff's car could have been pushed into the kerb and or the roundabout.

It is also unbelievable how there could be an accident involving the plaintiff's front left side without seeing that he was driving to another vehicle unless he was not keeping a proper lookout or that he was facing himself forward claiming his right as per section 78A of the Traffic Act.

If that is what he did, he has to show that the road he was intending to go to started from the roundabout which would make a four directions roads leading to the roundabout. There is no evidence at all whether there were traffic light or other traffic signs.

On the other hand, if the defendant / appellant entered the area parallel to the road from the roundabout and did not see the plaintiff emerging from the roundabout and because of the slow movement of the traffic bumper to bumper and he is run into by the plaintiff, could it be said that the plaintiff was guilty of not complying with section 78A of the Traffic Act Cap 403? Certainly not. In the absence of the sketch plan or clear explanation of the scene of the accident I am unable to say that the defendant / appellant was

guilty of any degree of negligence.

On the damage of the vehicles, the respondents state that he was hit on the let side. The appellant’s car was hit on the drivers front door. If both vehicles were moving, the appellant’s car was ahead of the respondent’s Toyota so as to have a point of impact of Toyota in its front and on the side of Audi. It is an angular impact. The damage to the Toyota under those circumstances would be heavily in the front left side. What appears in the photographs exhibited in the supplementary record is that the damage is heavily in the front right side.

The damage on the left appears to be consistent with the car hitting or being hit at an angle. But the plaintiff avoids to state any damage of the car he collided with. He cannot be so ignorant of the fact that as a result of the accident he must one day be expected to give evidence and will have to relate the damage to both cars. Here he states that he did not see any damage to the defendant’s car. Could there be such an accident that does not leave even a dent to the other vehicle or even a mark or paint scratch?

The plaintiff expects us to believe that in this accident there was no visible mark left. PW2 states that the damage to Mercedes was minor. PW2 could not differentiate a Mercedes from Audi. But the fact remain that the damage was minor. Similarly he avoids to state the damaged part of the Audi that received the impact. In the absence of this evidence it is difficult to state accurately which vehicle hit the other. So the position of the impact is verge.

The evidence of PW1 Jessee Sherwin, an engineer is on the assessment of damage to the plaintiff’s car, for the purpose of possible repairs. I am not able to dispute his reconstruction of the accident in order to arrive at the conclusion. But I accept his observation that the damage is consistent with car having been hit in front by a solid obstruction. In fact this ties up with the defendant version that at the time of the accident, vehicles were moving slowly – bumper to bumper. In that process, the plaintiff must have tried to push into the lane of Audi and in that process hit Audi which was in the middle lane of Digo Road. In that respect, section 78A does not apply in this case.

In my view, the plaintiff failed to prove any degree of negligence against the defendant. I would allow this appeal with costs.

I would set aside judgment of the High Court and substitute thereof a dismissal of the suit with costs.

April 30, 1987

NYARANGI, PLATT & GACHUHI, JJ A