



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Nyarangi JJA & Chesoni Ag JA

CIVIL APPEAL NO 42 OF 1983

Between

HERBERT HAHNAPPELLANT

AND

AMRIK SINGH.....RESPONDENT

(Appeal from the High Court at Nairobi, Brar J)

JUDGMENT

February 27, 1985, **Kneller JA** delivered the following Judgment.

During 1980 Herbert Hahn, the appellant, a German resident in Zambia, managed a company there called the Car Clinic Limited and visited Kenya sometimes for periods ranging from a fortnight to six months.

He purchased a new metallic painted Mercedes-Benz 280 SE in Germany for DM 50,000 (the equivalent of Kshs 225,000) towards the end of 1979, used it there for two months and then shipped it out to Mombasa where he collected it in early March 1979. The Customs Department valued it at Kshs 547,145. He did not pay duty on it but, instead, signed a bond that he would take it out of Kenya within a year because he was going to drive it back to Zambia.

On March 13, 1980 he halted it in the innermost lane in obedience to the (red) traffic lights at the roundabout where the Uhuru Highway and Kenyatta Avenue meet in Nairobi. Valrian Pinto, a Goan employed by Amrik Singh, the respondent, a Sikh transporter in Nairobi drove the respondent's Suzuki into the rear of the Mercedes. This was seen by a mechanic, Antony Kerangu, and constable Samuel Gichaha. Pinto signed a document written there by the constable by which he agreed to meet the cost of the repairs to the appellant's car. This was after Pinto had denied he was at fault and the constable had told him he would take him to the police station.

The appellant left the Mercedes at Kenatco and went by aircraft to the Far East on business. He was back in Nairobi the same month and when DT Dobie & Co, the agent, refused to repair it, he chose Joginder's garage to do the job having accepted its estimate of Kshs 11,316 for the work. He left it at the garage and returned to Zambia but when he was there he received a letter from the garage owner saying metallic paint was unobtainable here. He came back to Kenya and found this was true so he flew to Frankfurt where he spent a few days in a hotel which cost him the equivalent of Kshs 4,723, collected 4 tins of paint and brought it back to the garage which completed the repair job and then he paid the bill. The Automobile Association valued the Mercedes at Kshs 524,000 on July 8, 1980 so the appellant claimed it

had depreciated by 4.5% as a result of the accident.

He paid Shs 70 for the Association's report, Kshs 20 to the Registrar of Motor Vehicles to trace the Suzuki's owner, remained in Nairobi for a month while the Mercedes repairs were completed for which his hotel bill was Kshs 6,600 and his taxi fares another Kshs 5,600 and he lost Kshs 26,641.88 because he was away from work. His flights between Lusaka and Nairobi cost Kshs 6,651.45 and Nairobi and Frankfurt Kshs 7,790 and airport taxes amount to Kshs 400. The total for all that is Kshs 93,043.13.

His licence to import the Mercedes into Zambia expired in mid 1980 so in the end he drove it to Tanzania and then to Uganda where he sold it. He had difficulty in finding the respondent and Pinto, though he had the latter's postal address on the constable's document. He found the telephone number of the respondent and asked him to pay for the repairs but he was told to go to hell. His advocates sent a letter of demand which was ignored so the appellant sued the respondent and Pinto jointly for that Kshs 93,043.13, costs and interest because they arose out of their negligence at the roundabout.

They filed a joint written statement of defence denying their negligence and claiming that the collision was solely caused by or substantially contributed to by the appellant's negligence. They therefore denied they were liable for any loss the appellant suffered. Alternatively, they pleaded, it was agreed between the appellant and Pinto that he would be liable for the repairs to the car upto only Kshs 600 and it was on this basis that Pinto signed that paper.

The issues in the trial were agreed to be:

1. Did the appellant prove Pinto's negligence caused the collision?
2. If so, did Pinto prove the appellant's negligence contributed to it?
3. If so, in what proportion?
4. Quantum of damages, if any?

The learned judge recorded evidence from the appellant, Antony Kerangu, Constable Gichaha and Pinto. He refused a second adjournment to the appellant's advocate who did not warn a witness from the Automobile Association and Joginder Motors to attend court for the third of the trial because he did not think the learned judge would continue it beyond the first two days though he had been warned by the judge the trial would go on from day to day until it was finished, as, indeed, it should. (Order XVI rule 1 The Civil Procedure Rules). It is not clear but it seems that the judge believed the appellant and Kerangu on the cause of the collision and Kerangu and Pinto on the consequence of it and how the document came to be signed by him.

He found that the sole cause of it was the negligent driving of Pinto and that the respondent and Pinto were jointly and severally liable for:-

- Kshs 600 for the car's repair charges
- Kshs 20 for the search fee paid to the Registrar of Motor vehicles
- Ksh 500 for loss of user of the car for five days
- Which comes to Kshs 1,120 (and not Kshs 1,620 as the learned judge made it).

He awarded interest on the total at the rate of twelve per cent a year and costs on the subordinate court scale. The decree, which was presumably approved by the parties' advocates, and checked by the learned Deputy Registrar of the High Court, has repeated the arithmetical error. The appellant's trial advocate filed the memorandum of appeal but it was urged by the appellant's second one. The appellant wants this court to set aside the judgment and substitute one for his prayers in his plaint together with the costs in this court. The respondent opposes all this and asks for the appeal to be dismissed with costs.

The appellant's first grievance is that the judge "erred in holding that the agreed damages were limited to Kshs 600 only without carefully considering all the evidence before him." What he did was to set out in full what Pinto signed which reveals he "agreed to meet the costs of the repair" of this vehicle. There is no 'limit' there. Kerangu and the constable did not mention any limit in their evidence and the appellant

denied there was one. The judge noted that in the appellant's letter of demand of November 10, 1980, the cost of repairing it came to Kshs 11,316.80 and the appellant spent another Kshs 100,537.80 because and while it was being repaired and that those sums add up to Kshs 11,854.60 but in the appellant's plaint of January 15, 1981 the total sinks to Shs 93,043.13. Then he turned to the actual damage to the Mercedes which he found to be minor for it was to the off-side and lock of its boot and the off-side tail light. It was still possible to open and shut the boot by manoeuvring the catch with a finger or two. He appeared to think it would not have cost Kshs 11,316.80 to repair and Kshs 600 might be sufficient.

The judge added to these matters two more. First, it was because the appellant and Pinto agreed to the limit the appellant did not tell the respondent or Pinto about the estimate of Joginder Motors. And, secondly, this is why Pinto did not tell the respondent's insurance company or its agents about this collision. The appellant's second ground of appeal is that the judge should not have rejected the appellant's claim for depreciation of the value of the car.

The judge did so because no witness from the Customs or the Automobile Association testified about the figures they were said to have supplied so what its value was in Kenya while it was here, he held, was never proved. And, the learned judge pointed out, there was no evidence, even from the appellant, as to what he sold it for in Uganda so it may not have depreciated in value at all. He disallowed the claim for Kshs 70 for the Automobile Association's report presumably because it was not proved but this was not complained of in the appellant's memorandum of appeal. The last and final complaint of the appellant is that the claims for the hotel bills in Nairobi and Frankfurt, the air tickets and airport taxes between Nairobi and Lusaka and Frankfurt and loss of pay while he was absent were found not to have been proved. So was the claim for the transport for twenty eight days at Kshs 200 a day but this was not covered in any ground in the memorandum of appeal.

These claims were not allowed because Mr Justice Brar could find no evidence that the appellant could not drive it on to Zambia and have it repaired there thus avoiding the expenses of hotels bills here, the shuttling to and from Lusaka and Frankfurt and being away from his work. He had failed to mitigate his loss. The paint, he continued, could have been ordered by telephone instead of being collected at a cost of Kshs 36,190.70. So much, then, for the grounds of the appellant's grievance and the learned judge's findings and reasons for them.

On appeal, of course, before coming to a different conclusion on the typed evidence this court should be satisfied that the advantages enjoyed by the trial judge of seeing and hearing the witnesses is not sufficient to explain or justify his conclusion: Lord Thankerton in *Watt or Thomas v Thomas*, [1947] AC 484; especially if it is based on a straight conflict of primary fact between witnesses, where credibility is crucial, for then an appeal court can hardly ever interfere. Lord Bridge in *Whitehouse v Jordan*, [1981] 1 WLR 246, 269.

Whether or not Pinto signed the constable's written statement of liability for the repairs to the Mercedes on the understanding it was limited to Kshs 600 is a primary fact where credibility is crucial and in the straight conflict between the appellant and Pinto on this the judge believed Pinto and I am satisfied that the advantage he had in seeing and hearing them, together with Kerangu and Constable Macharia, are sufficient to explain or justify his conclusion though I am in some doubt that Kshs 600 would have been sufficient to cover the cost of the repairs to the damage in 1980.

There was no objection taken at the trial to the learned judge's acceptance of oral evidence about this document but, in any event, it is not caught by the provisions of Part VI of the Evidence Act (cap 80) which were briefly brought into the submissions of the advocates in this appeal. So, it seems to me, the learned judge considered all the evidence before him and made no error when he found the agreed damages were limited to Kshs 600. The first ground of appeal fails.

Now the next two grounds of the memorandum concern special damages which must be not only claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. This has been adumbrated

by Bowen LJ in *Ratcliffe v Evans* (1892), 2 QB 524, 532, 533, Lord Macnaghten in *Stroms Bruks Aktic Bolag v John & Peter Hutchinson*, [1905] AC 515, 525, 526, Lutta JA in *Kampala City Council v Nakaye*, [1972] EA 446, 447 and Chesoni J, in *Ouma v Nairobi City Council*, [1976] KLR 297, 304.

And so the second ground fails for, in my respectful view, the judge was right when he said the claim for depreciation in the value of the car had not been proved since the appellant did not reveal what he sold it for in Uganda. So must the third fail because the judge could not do anything else but find that the appellant did not take reasonable steps to mitigate the loss which he sustained consequent upon the negligence of the respondent and Pinto so the appellant could not claim for the airport charges, aircraft charges, aircraft flights, hotel bills and loss of pay which he ought reasonably to have avoided by driving it into Zambia and having it repaired there once the tail light had been replaced and covered with appropriate coloured plastic or glass. The respondent and Pinto said this was what he ought to have done so they had to prove it. Whether or not they did was a question of fact and not of law depending on the circumstances of the case before Mr Justice Brar. One test of reasonableness is whether a prudent man would have acted in the way the appellant did if the damage had been the result of his own negligent driving? The answer in this case would be that the prudent man would have driven it home to Zambia and ordered the metallic paint by telephone if it were not available there. The judge set out the relevant law in this from Halsbury's Law of England 4th edition (1982), pages 477 and 478 which is the law here and applied it to the circumstances of the case before him correctly.

Pinto was not cited as a respondent in this court as he should have been. The result of this appeal will not affect him. It may be that the appellant's advocate deliberately dropped him because it was thought he was a man of straw and could not meet the sums awarded to the appellant against the respondent and Pinto by the High Court and the costs of this appeal and the respondent could and would. At the end of the day, then, for the foregoing reasons, I am of the view that the figures in the decree of the High Court must be adjusted to what they ought to be and the appeal must be dismissed with costs. Nyarangi JA and Chesoni Ag JA, agree so those are now the orders of the court.

Nyarangi JA. I have read the judgment prepared by Kneller JA, which sets out the facts and I do not propose to repeat them except where it is absolutely necessary.

The first point that arises from the appeal is whether there was an agreement between the parties that the damages would be limited to Kshs 600. A police officer, Police Constable Samuel Gichaha (PW 3) was on duty at the material round about and at the request of the appellant went to the scene of the accident involving the two vehicles registration marks KRD 351 and 268 Z 2402. The two drivers were present and, according to Police Constable Samuel Gichaha:

“the driver of KRD 351 agreed that he would meet the costs of the damage to the mercedes”

whereupon the police officer wrote out Exhibit 1 after the two drivers had agreed to its substance. The evidence of the police officer had a token of genuineness and the trial judge was right to hold that there was mutual agreement that the liability for the repairs to the Mercedes would not exceed Kshs 600.

The damage to the Mercedes was, “not a major damage nor was it a minor damage” according to the evidence of Antony Kerangu, the mechanic, who witnessed the Suzuki bang the stationary Mercedes. After the accident the appellant could only open the boot by pulling it (the boot) with his fingers. The defect to the vehicle was caused by what the appellant described as “the dents on the boot”,

I doubt if the ordinary motorist in the city of Nairobi would think that the damage to the Mercedes as explained by the appellant had the hallmark of considerable damage. The sum of Kshs 600 was, in the facts given by the appellant not wholly erroneous: *Ilanga v Manyoka* [1961] EA 705. The trial judge did not err in his estimate of the credibility of the respondent's witnesses. As against that there are two circumstances which showed the unreliability of the appellant's witnesses: that is, the appellant did not tell the respondent about the estimate of Joginder Motors and, secondly Pinto did not report the incident to the insurance company of the respondent. The trial judge was entitled to fortify his finding on the Kshs

600 by taking into account the two circumstances: *R G Patel v Lalji Makanji* [1957] EA 314.

The appellant did not adduce any evidence to prove his claim that his car had depreciated in value as a result of the accident. In the circumstances, I have a feeling the appellant sold his car at a profit in Uganda. The trial judge had no material on when he could have moderated the appellant's unsupported claim for damages for depreciation. The obvious and just decision was to leave out that claim. The appellant should have driven to Zambia, and, while there, arranged for the repair to his car.

The damage to the boot did not in the remotest adversely affect the mechanical condition of the Mercedes. The expenses of the continued stay in Nairobi, the City of the Sun, were incurred by reason of the appellant's wrong: *Kampala City Council v Nakaye* [1972] EA 446 at page 449, letter H. The appellant did not take reasonable steps to mitigate the damages: *Lukenya Ranching v Kaboloto* [1970] EA 414 at page 420, letter A – B. The trial judge had all that as a live issue which he correctly decided as a matter of fact, having sufficiently borne in mind that any loss to the appellant as owner of the Mercedes while out of use due to damage to the car through the negligence of the respondent would form a head of damage in the suit: *Khanna v Samuel* [1973] EA 225 at page 227 letter H. I too would dismiss this appeal. I agree with Kneller, JA, that the figures in the decree in the High Court must be adjusted as he suggests and I agree with the order proposed on costs.

Chesoni Ag JA. On March 13, 1980 a motor accident occurred along the Kenyatta Avenue and Uhuru Highway round-about. The respondents Suzuki registration 268-2402. The appellant's motor vehicle sustained damage to the boot star, rubber, handle, lock and catch and the lid got buckled up. The right rear tail light was, too, broken in the accident. The driver of the Suzuki, Mr V Pinto admitted liability in writing and undertook to pay for the repairs of the Mercedes Benz. The appellant took his car to Messrs Joginder Garage in Nairobi for estimate of the repair charges which were set at Kshs 11,316.80 according to estimate No 172 of April 21, 1980. There was no evidence that the estimate or copy of it was sent to the man who had undertaken to pay for the repairs so as to give him a chance to comment on or dispute them before the repair was authorized. Be that as it may, Mr Herbert Hahn, the appellant, told the late Mr Justice Brar who tried the case that the Mercedes Benz was repaired and he paid Kshs 11,316.80. He said some spare parts were not available in Kenya and he had to fly to West Germany to purchase them. He named paint as the spare part that took him to West Germany. The paint cost DM 150 or about Kshs 600 and the air fare for round trip to and from West Germany cost Kshs 7,790 whereas hotel charges at Hotel Union in Frankfurt were KShs 4,723.

On January 15, 1981, Mr Hahn filed a suit by way of plaint against the respondent Amrik Singh and his driver Pinto and claimed Kshs 93,043.13 as the loss he had incurred as a result of the accident of March 13, 1980, which he said was caused solely by Pinto's negligence. Amrik Singh was sued as the owner of the Suzuki. The defendants filed their joint defence on February 9, 1981 and denied liability. Mr Justice Brar, however, found that Pinto caused the accident and Hahn did not contribute to it. Besides the repair charges the appellant had claimed depreciation of his car at 4.5% (Kshs 23,580); cost of valuation report (Kshs 70); fee to the Registrar of Motor Vehicles (Kshs 20); alternative transport for 28 days at Kshs 200 per day (Kshs 5,600); hotel charges at Hotel Fairview in Nairobi (Kshs 6,600); loss of income from duty for 10 days (Kshs 26,641.88); air ticket Lusaka to Nairobi (Kshs 2,303.45); air ticket to Frankfurt return (Kshs 7,790); air ticket Nairobi to Lusaka (Kshs 4,348); airport tax for 5 exits (Kshs 400) and hotel charges in Frankfurt (Kshs 4,723). The learned judge disallowed all the claims except the repairs, search fee at the Registrar of Motor Vehicles and loss of user of the car for five days for which he awarded Kshs 600, 20 and 500 respectively. So in the result the appellant was entitled to Kshs 1,120 in all.

The respondent's driver agreed in writing (Exhibit 1) to meet the repairs of the appellant's motor vehicle. No limit was set in Exhibit 1, but at the trial no objection was taken to the defence adducing oral evidence to explain Exhibit 1, and the judge found that the repairs were limited to Kshs 600. Pinto said he agreed to meet the repair charges because he could pay from his pocket the sum of Kshs 600. I would be slow in reversing that finding which was based on credibility of the witnesses, and as I have no reason for interfering with this finding of the primary fact I would accept the Kshs 600 limit.

The rest of the claim of the appellant except loss of use of the motor vehicle and the search fee were

unnecessarily created by the appellant who was under an obligation to mitigate his loss. The appellant was, nevertheless, entitled to the depreciation in the value of his vehicle resulting from the accident. That depreciation is calculated by deducting the post accident estimated market value from the estimated pre-accident market value of the motor vehicle and getting the difference, if any, which represents the loss the plaintiff will suffer at the time of resale of his vehicle and which is recoverable. But this loss has to be proved by evidence and is not automatic. The appellant did not in my opinion establish that loss. The Customs Department's valuation was irrelevant for proving the loss under this head.

I agree with Kneller JA that apart from mathematical adjustment of the sum awarded by Brar J and on the reasons given in his and this judgment this appeal should be dismissed with costs, and that as Pinto was not cited as respondent in this appeal he is not affected by its result.

Dated and delivered at Nairobi this 27th day of February, 1985.

A.A KNELLER

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

Z.R CHESONI

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR