IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Hancox, Nyarangi JJA & Gachuhi Ag JA)

CIVIL APPEAL NO. 35 OF 1985

MWANASOKONI ....APPELLANT

AND

KENYA BUS SERVICES LTD & 3 OTHERS ....RESPONDENT

(Appeal from the High Court at Mombasa, Bhandari J)

JUDGMENT

July 26, 1985, **Hancox JA** delivered the following Judgment.

The appellant sued in the High Court in Mombasa for damages for negligence arising out of an accident which occurred on March 24, 1978 at about 2.30 pm between an omnibus No KJV 719, belonging to the first respondents and that which was described as a country bus No KJT 047, belonging to the second respondents. She said she suffered an injury to her right eye as a result of flying glass, leading to the eventual loss of vision in that eye.

The two buses were driven at the material time by the third and fourth respondents respectively. There were four agreed issues of fact for decision by the learned judge, to which he added a fifth during the course of his judgment. He found that there was collision, in the sense of contact, between the two buses and that the rear view of the mirror bus, which presumably projected beyond the main body of Kenya bus, was damaged and its glass broken as a result.

The judge also found that the Kenya Bus, No KJV 719, was travelling on its wrong side of the road coming towards the other bus, and that the driver was guilty of negligence. He found that the driver of the country bus was not guilty of any negligence and that he had taken avoiding action. From these findings it would follow that the first respondent would be vicariously liable for the accident which occurred due to the negligence of their driver acting within the scope of, and in the course of, his employment, since, although denied on the pleadings it was not, as I understand it, disputed by the respondents at the trial.

The learned judge found that the appellant was a passenger in the country bus, but in response to the additional issue which he framed in his judgment, namely was she injured as a result of the accident, he found that it was not proved satisfactorily to the standard required that she had suffered any injury as a result of the collision. He rejected her evidence that she was injured by flying glass from one of the windows of the bus which was broken as a result of the collision.

Consequently, he dismissed the suit. The reason which the learned judge gave for rejecting the appellant's evidence on this issue, despite the supporting evidence of the other passenger, Mwijaa Badi, who was

sitting beside her at the time, were that the country bus driver, the fourth respondent, testified that no window glass was broken in the accident, that the only damage to the bus was the rear view mirror, and that there was no medical evidence to support her, including the conspicuous absence of the medical cards which she said she had given to her advocate, a matter emphasized by Mr Satchu on behalf of the first and third respondents in this appeal. Moreover, the police officer who was called to the scene asked if anyone was injured and no one responded to his inquiry, hence the entry in the police abstract that no one was injured in the accident. Surely, the judge asked:

> "If a woman gets hit in her eye, she faints and falls in the bus people help her out and send her away in a vehicle, is it possible to imagine that all this accident will go unnoticed by all the passengers and the driver of the bus?"

Despite his dismissal of the suit the judge went on, correctly, to assess the damages he would have awarded, in the event of liability being established. The appellant has appealed to this court on the grounds first, that the learned judge was wrong in framing the fifth issue, secondly that he erred in deciding it against the appellant, by holding that she was not injured in the accident, and thirdly that the notional damages he assessed were manifestly too low.

I have no hesitation in stating that in my opinion the judge was perfectly right in framing the additional issue as to whether it had been proved that the plaintiff was injured in the accident. Indeed this course is expressly envisaged by Order 14 rule 5 of the Civil Procedure Rules, which provides:

> "(1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed."

Notwithstanding the existence of this provision the judge would in any event have been obliged to answer this question in order to arrive at a just and fair decision on the case. I would accordingly dismiss ground 1 of the appeal. I therefore come to ground 2. Although this Court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in *Sotiros Shipping v Sauviet Sohold*, The Times, March 16, 1983:

> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said."

Again, in *Peters v Sunday Post Ltd* (1958) EA 424, as decision of the Court of Appeal for Eastern Africa, Sir Kenneth O'Connor, P said at p 429:-

> "It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.

But the jurisdiction "(to review the evidence) should be exercised with caution: It is not enough that the appellate Court might itself have come to a different conclusion."

Accordingly only when the finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did, will this Court interfere with it – see–*Ephantus Mwangi & Another v Wambugu*, (1983/84) 2 KCA 100 at page 118. I therefore agree with Mr Satchu's proposition that if the judgment of the trial court was one at which it could reasonably have arrived on the evidence then it should not be upset on appeal. In the instant case the learned judge took into account that the police

officer who arrived at the scene and who failed to elicit any response to his inquiry as to whether anyone was injured did so after the appellant had been taken to Msambweni Hospital. However, he was in my respectful opinion wrong when he in effect rejected the evidence of the other passenger, Mwijaa Badi, who corroborated the appellant. This witness said:-

> "The accident broke glass window. This lady (PW 2) was injured who was sitting near the window, and I was sitting beside her. I saw her holding her eyes and she was bleeding. We all alighted. I assisted her. She fainted due to dizziness. A vehicle carried the plaintiff."

Shortly afterwards he said:-

> "It was about a month later that I accompanied my friend to the hospital where he was going to see his mother. This is when I recognized her as the lady who was injured in that accident."

That is reasonably strong and unchallenged evidence from an independent source from a witness who was not acquainted with the appellant personally at the time of the accident, though her son Said Abdalla was his friend. The only point on which he was challenged was as to whether the glass in the windows, as opposed to that in the rear view mirror, was broken and he firmly maintained that they were. Neither of the respondents' advocates put it to Badi that the appellant was not injured in the accident, as he said, instead they concentrated, as they did in cross-examining the appellant, on endeavouring to establish which of the two buses was to blame for the collision. Equally, there was no such suggestion to the appellant's son Said Abdalla, who had her transferred from Msambweni to Coast General Hospital. In addition to the foregoing there was the evidence of Dr Mehta, the eye specialist, who did not, admittedly, see the appellant until June 1978, after which he completed his report of July 5th. In that report, made on the strength of the hospital cards (which, of course, were not produced in evidence) Dr Mehta said that the appellant was injured in bus accident on March 24, 1978. In court he said under crossexamination by counsel for the first and third respondents:-

> "Looking at the eye I could not have said how she got the injury; she told me."

That is a clear reference to an injury rather than a condition, and it is supported, as Mr Jiwaji on behalf of the appellant reminded us in his reply, by the P3 medical examination form which was let in without objection from the defence at the trial, and which said that there was a wound on the right eyebrow and that the eye was inflamed "due to trauma", meaning an impact or a blow. None of this was challenged by the respondents' advocates at the hearing before Bhandari J.

Finally, I consider that the learned judge gave undue weight to the fact that when the police officer arrived no one said that the appellant had been injured. This does not, in my view, necessarily lead to the conclusion that she was not injured, or that, if she was, it went unnoticed by the others present. There could be a variety of reasons why bystanders or potential witnesses would not speak up, for example, a desire not to get involved, with the consequence of going to the police station to make statements and so on. Moreover, though there was no indication of how many passengers there were in either bus, it is probable that the injury to the appellant would only have been noticed by those in close proximity to her, such as the witness Mwijaa Badi, who was sitting next to her.

The passage which we have cited earlier from the learned judge's judgment involves three false propositions, namely that the appellant was not injured in the accident because first, if she was no one noticed it, which, as I said, does not necessarily follow, and secondly that those present did not say they noticed it, from which, again, it does not follow that she was not injured, and thirdly that by the time the police arrived, which was after 15 to 20 minutes, all those present had necessarily been passengers in the bus, or had witnessed the collision, which, equally, does not follow.

In these circumstances I take the view that if the learned judge had taken the other passenger's evidence into account, instead of rejecting it in favour of that of the country bus driver, and if he had correctly appreciated the effect of the unchallenged medical evidence, and had not given undue weight to the lack

of response when the police arrived, he must have decided this issue, which he had himself framed, in favour of the appellant. I would therefore take the unusual course of reversing the learned judge's finding of fact on this issue, and hold that the appellant had established on the balance of probabilities that she sustained the injury to her eye as a result of the collision between the two buses, in the second of which, as the learned judge found, she was lawfully travelling as a passenger.

There was no appeal (or cross-appeal) on any of the other issues of fact which were for the learned judge's decision, and so, in the result I would hold that the third respondent was wholly liable for the collision and that it was his negligence which caused the injury to the appellant. It follows that the first respondent is vicariously liable for it. I would therefore allow the second ground of the memorandum of appeal, in as much as it was an error on the facts which led to the judge's equally erroneous conclusion on the law that the first and third respondents were not liable in damages to the appellant.

This brings me to the issue of the quantum of damages raised in the third ground of appeal. I have had the advantage of reading in draft the judgment of Nyarangi JA, on this question. I find myself in complete agreement with his reasoning and conclusions, and that the correct figure to be awarded to the appellant is Kshs 100,000, making Kshs 101,000 inclusive of the agreed special damages, plus interest on the special damages as Nyarangi JA, proposes. I would also award the costs of this appeal and of the proceedings in the High Court to the appellant, but the issue of how those costs are to be recovered and paid has been reserved to enable counsel to address us thereon. Reverting to the main appeal, as Gachuhi Ag JA, also agrees in the result, the appeal will be allowed and for the judge's finding there will be substituted a finding that the first and third respondents are jointly and severally liable to the appellant in the sum of Kshs 101,000.

Nyarangi JA. I have had the opportunity of reading the judgment of Hancox JA, in this matter and I agree with his reasoning and with the conclusion at which he has arrived. The learned judge misapprehended the evidence of the appellant and that of her witnesses and so he could not be held to have taken due advantage of the witnesses whom he saw and heard. The matter is therefore at large for the court to decide: *Watt v Thomas* (1947) 1 ALL ER 582.

The appeal on damages for the loss of the sight of the appellant's eye is as stated in the third ground of appeal. Mr Jiwaji referred to his submissions before the judge the record of which demonstrates that the decision in *Mohamed Juma v Kenya Glass Works Ltd*, Civil Appeal No 1 of 1980, where an award of Kshs 70,000, was made for loss of left eye due to an injury to the eye, was cited to the judge and that it was there urged that an allowance of 20% for inflation should be made. Mr Jiwaji complained that the judge overlooked the decision in *Kenya Glassworks Ltd* which was binding on the judge and instead preferred the award of Kshs 50,000 which was made in the original suit ie Mombasa High Court Civil Case 598 of 197.

In reply, Mr Satchu for the first and third respondents, decided not to refer to earlier decisions after the court drew his attention to the judgment on appeal of *Kemfro Africa Ltd t/a Meru Express Services (1976) v A M Lubia and Olive Lubia* Civil Appeal No 21 of 1984 but argued, not without glee, that the award of KShs 30,000 in *Bundi Marube v Nyamuro,* Civil Appeal No 8 of 1983 compared with the award of KShs 150,000, in the *Lubia* case meant that within a period of 23 months there had been an increase of 400% for loss of sight due to an injury to an eye. Mr Satchu sought support for his view that which he regarded as astronomical increase in the fact that the award in *Lubia* was determined with the full knowledge of the decision in *Bundi*. He then invited the court to notice and accept the conflict between the two decisions, to overlook *Lubia* and to vary award the subject matter of this appeal on the base of the award in *Bundi*.

In *Bundi* the appeal was against liability; in *Lubia* it was against quantum. The appellant in *Bundi* was a male youth aged about 14 whose injury did not leave him a deformity which would interfere much with his earning capability or degrade his prospects of marriage. Olive Lubia has to live with an artificial glass eye which is smaller than the left, uncontrollable, uncomfortable, has affected her pretty appearance and therefore her prospects of marriage reduced her chances in employment market and one time hindered her progress at school. The two decisions were held to be distinguishable both on the substances of the appeals and on the facts. The decision in *Bundi* was therefore specifically considered and there was

unanimity of view that even an award of Kshs 60,000 which was proposed by Kneller JA, would have been on the low side. It is therefore erroneous, with due respect to Mr Satchu, to argue and submit that there is a conflict between *Bundi* and *Lubia*. There is therefore no question of this court being faced with two conflicting decisions and being entitled and bound to decide which to follow: *Kiriri Cotton Co Ltd v Ranch Hoddas Keshvji Dewani* (1958) EA 239 and *Young v British Aeroplane Co* (1974) 2 ALL ER 293. The decision in *Lubia* was not given *per incuriam*:

> "not given in ignorance or forgetfulness of .. some authority binding on the court ..."

Morrel Ltd v Wakeling (1955) 1 ALL ER 708, and we are bound by it and we proceed to apply the decision to this appeal.

The appellant was aged about 40 years at the time her eye was injured. She is married to a fisherman and had three children, the eldest of whom was aged 16 years in June 1984. She had more or less had the greater part of her life. There was no evidence that she had occasioned loss of earning capacity or employment. Her circumstances were very different from those concerning *Lubia* at the time the latter lost her eye. The judge was therefore right to seek guidance in the decision in *Mohamed Juma v Kenya Glassworks Ltd*. Mohamed Juma was aged about 41 years on the date of his injury. Unfortunately, the judge erred in overlooking the increased award made by this court in *Mohamed Juma v Kenya Glassworks Ltd*, Civil Appeal No 1 of 1980. The judge intended to assess the general damages at Shs 70,000 and he would have adjusted for inflation by adding 20%, making a total of Kshs 34,000 and should have included the agreed quantum of special damages of Kshs 1,100.

Notwithstanding that the loss of sight in one eye carries with it increased vulnerability to blindness if the other eye should be injured, in the circumstances and bearing in mind recent decisions in similar cases I would award Shs 100,000 general damages and therefore give judgment for Shs 101,000 to include the agreed special damages plus interest on special damages at court rates from the date of filing of the suit until payment.

Gachuhi Ag JA. I have had the opportunity of reading the judgment of Hancox and Nyarangi JJA, in the matter and I agree with them. I would, however, add that the trial judge did answer the four issues framed by the parties correctly on the facts based on the evidence.

On the other issues framed by the trial judge and being the basis of the first ground of appeal before this court, the same was correctly framed as provided by Order 14 Rule 5 of the Civil Procedure Rules. But the trial judge relied on the evidence of the driver of the country bus in holding that the appellant was not injured. In that he discounted the evidence of the passenger in the bus who was sitting beside the appellant. Even if the driver's evidence that there were no window glasses broken was accepted, this could not necessarily mean that there could never be flying broken glass from the rear mirror reflector that injured the appellant. Immediately the accident occurred, the driver went out to argue with the other driver. It is doubtful if he knew what went on inside the bus, unless he made enquiries.

The person who could have known this was the bus conductor who is required to be carried under Traffic Rules. He should have been responsible even for collecting fares and, furthermore, checking that any passenger who left did not get away with the fares if one had not paid before. In the course of doing that he could have noticed the appellant's injury. The bus conductor was not called as a witness even for the defence. The evidence of the driver that he did not check whether there was anybody injured was correct in that respect. The police officer, who came to the scene, was unable to find out of the appellant's injury. He was in a hurry and did not wish his time being wasted. The driver would be more suited for enquiries if a person was injured by the vehicle within his view. The conductor is the eye witness for what happens inside the bus.

There was no evidence that all those who were present at the scene had been passengers. In case of accident, or for any peculiar happening, for various reasons, persons other than those directly affected, gather around the place partly for anxieties and partly for curiosity. If those who were there were not passengers, and if the conductor and those around did not wish to involve themselves in going to the

police station for statements, they would not volunteer any information. As the facts turned out later, a police P 3 was introduced in the evidence by consent. It was signed by the medical officer on May 12, 1978. It could not have been prepared if there was no accident. This P 3 and the medical report having not been challenged, must stand as clear evidence that the appellant sustained injury as a result of the accident. There was a medical report compiled from the hospital cards produced by the appellant. The doctor gave evidence in court. Mr Satchu argued that these cards were not produced and that there was no evidence from the hospital.

The trial judge similarly relied on this submission his judgment. But he overlooked P 3 which was good evidence by the hospital. Looking at the P 3, the doctor's report and the evidence of PW 3 Mwijaa Badi, all those were sufficient evidence to hold that the appellant was injured in the bus, even without relying on the hospital card having regard that it was never disputed that the appellant was a passenger in the bus at the material time. If the trial judge had considered these aspects of the evidence, he would in my view have reached a different finding.

On the question of damages, Mr Satchu argued that there has been a conflict of two decisions of the court in *Kemfro Africa Ltd t/a Meru Express Services (1976) v AM Lubia and Olive Lubia*, Civil Appeal 21 of 1984 (unreported) and *Bundi Murube v Nyambo,* Civil Appeal No 8 of 1980 (unreported) both delivered within a period of 23 months. In fact there are no conflicts. Both judgments are based on the losses of the injured parties. For instance, a young person may have a longer period in which losses are viewed on various circumstances while an older person has nothing much to lose except, for pain and suffering, having the benefit of earlier period of life.

In the case of *Bundi* an award of Kshs 30,000 was made. He was a boy aged 14 years in the country side. The award was arrived at after taking into account several factors. In the case of *Lubia*, she was a girl of 8 years at the time of the accident. Girls are more affected by anything that affect their appearance. Knowing that she will be married and responsibility to carry she was confronted with this stigma, of losing an eye which has been replaced with a noticeable glass one. These matters have to be taken into account whether the award will be higher than the other, it cannot be said that there is conflict. Circumstances dictate how cases can be distinguished in any particular case, but certainly, there is no conflict particularly where the judgment is unanimous as in the case of *Lubia* as opposed to a majority judgment as with the case of *Bundi*.

Coming now to the damages assessed, the trial judge, did not consider the appeal decision in *Mohamed Juma v Kenya Glassworks Ltd*, Civil Appeal No 1 of 1980 but, relied on the previous decision of the High Court which amount of damages had been substituted by the Court of Appeal. This judgment for assessment should have been adjusted upwards by 20% which he called inflation adjustment. This would have resulted to a figure of Kshs 84,000 in general damages to which would be added the agreed special damages of Kshs 1,100. Total damages should then be Shs 85,100. Notwithstanding that the loss of sight in one eye carries many risks, to a total blindness if the other eye is affected by injury or other acts bearing in mind with other awards that have already been awarded in similar cases, this award should be increased to Kshs 100,000 in general damages plus special damages of Kshs 1,100 making in all Kshs 101,100. Having said that, I would allow this appeal on ground 2 and 3 and dismiss ground one. I would set aside the order of the High Court and substitute judgment for the plaintiff the sum of Kshs 101,100 plus costs and interest as prayed in the plaint.

I would allow the cost of the appeal.

Dated and delivered at Mombasa this 26th day of July, 1985.

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

J.M GACHUHI

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR