IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: Kneller, Hancox JJA & Nyarangi AG JA)

CIVIL APPEAL NO. 67 OF 1983

BETWEEN

1. ABBAY ABUBAKAR HAJI

2. FATUMA ALI ABDULLA……..…..……. APPELLANTS

AND

MARAIR FREIGHT AGENCIES LTD……..…..…….…… RESPONDENTS

(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Aragon, Ag, J.) dated June 13 1983 in Civil Case 149 of 1983)

JUDGMENT

Kneller JA Abbay Abubakar Haji and Fatuma Ali Abdulla, the appellants, are the widows of the late Ahmed Maow Farah. Marair Freight Agencies Limited, the respondent, is a limited liability company. The appellants' claim for judgment against the respondent for special and general damages, costs and interest on all those sums was dismissed with costs on June 13, 1983 by the High Court (Aragon Ag J) in Mombasa. Their claim was brought under the Fatal Accidents Act (cap 32) on behalf of themselves, their mother-in-law and their eleven children because they were all dependants of Ahmed Maow Farah.

He and his passenger were killed outright at about 1.10 am on March 29, 1981 as he was driving his Datsun pickup (the Datsun) KSV 598 near Taru about 50 kms from Mariakani on the main Nairobi-Mombasa road towards Mombasa. So were Ramzani Ismael Esmu and Namshad (Y Hasmuk?) one of whom was driving a Daihatsu saloon (the Daihatsu) KVY 672 belonging to the respondent at the same point on that road but in the opposite direction or towards Nairobi.

The appellants alleged these vehicles collided and the cause of the collision was the negligence of the respondent's driver. The respondent denied the vehicles collided and also pleaded that the late Ahmed Maow Farah collided with a cow or some cows or, in the alternative, if the vehicle collided, then it was due solely to the negligence of the deceased Ahmed Maow Farah in his Datsun or his negligence contributed to the collision.

The appellants joined issue with the respondent on those defences. There was no counterclaim by the respondent against the appellants. The parties agreed to settle the issue of quantum and go to trial on the issue of liability.

IP Ombalo and CIP Waigwa of Mariakani Police Station who reached the scene on March 29 at 4.00 am and 8.30 am respectively were called by the appellants and Manjit Singh Dhadialla who owns "Protectors", a private investigations firm, and reached the scene on March 30 between 2.00 pm and 4.00 pm testified for the respondent. The vehicles had been towed to Mariakani Police Station by the time Mr Dhadialla reached the scene.

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

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

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

The appellants in their memorandum aver that it was an error of law to dismiss the claim on the evidence that was led and not to find the vehicles collided, each driver was to blame and equally at fault. It was also an error of law to disregard the evidence of IP Ombalo and refuse to allow CIP Waigwa to declare where the point of impact was. The appellants ask this court to allow the appeal with costs, set aside the judgment of the trial court and substitute one for them against the respondent or, alternatively, apportion the blameworthiness of the drivers and give judgment accordingly. The respondent opposes this and asks us to dismiss the appeal with costs. The advocates for both parties asked the court not to remit the matter to the High Court for any purpose.

The trial judge rightly applied to the facts before him the relevant law enunciated by Spry VP in *Lakhamshi v Attorney General* [1971] EA 118, 120 for such cases which is:

"I accept that a judge is under a duty when confronted by conflicting evidence to reach a decision on it. I accept that in relation to most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty or that both parties were guilty of negligence. I accept that in many cases, as for example where vehicles collide near the middle of a wide, straight road in conditions of good visibility with no obstruction or other traffic affecting their courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. I think that it is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, but I accept that where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence as opposed to a conflict of evidence, I am inclined to think that the position is different. I personally find it difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot be properly inferred from the circumstances of the accident."

The facts before the High Court were these: This road was a tarmac one, 21' 10' wide. The nearside part of the road heading to Mombasa is 11' wide and then there is a verge 13' wide. The near side portion

leading to Nairobi is 10’ 10’ and the verge 5’ wide. The weather was dry when the accident occurred. The centre of the road was marked. There was no lighting there and no traffic signs. The road was straight for miles, uphill towards Mombasa and downhill towards Nairobi, and in good condition. There were no brake or gauge marks to be seen on it.

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

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

The Daihatsu was nearly a new one. Both vehicles were too damaged to permit Dhadialla to say either had any mechanical defects before the accident which might have been the cause of it. The Datsun’s battery was broken and its acid was probably what stained the road white. If this were so, then the Datsun was at some time over the centreline and in that part of this road on which the Daihatsu was travelling.

The front of the Daihatsu and its offside front wing was undamaged but its nearside one was crumpled but not from a direct impact. The dashboard was undamaged. It hit something underneath the centre pillar, which tore the passenger seat and pushed it upwards.

The Datsun appeared to have run into something head-on because the headlamps, bumper bar, grille and front offside and nearside wings were damaged. The offside front wing was crushed and the nearside one detached and crumpled. Its steering was depressed slightly downwards but not into the driver’s seat. Its front wheels were twisted but not pushed backwards. There was cow dung on its front offside.

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

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

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

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

road into each vehicle.

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

In these circumstances the cause of the accident is so speculative that no reasonable and probable inference can be drawn, in my view, that either driver was at fault, of Romer LJ in *Baker v Market Harborough Industrial Co-operative Society Limited; Walace v Richards (Leicester) Limited* [1953] 1 All ER 1472, 1478, 1479 (CA). There is in fact no direct evidence that either was negligent and nor can it be inferred from the circumstances of the accident set before the learned judge or this court. For these reasons, therefore, I would dismiss the appeal with costs, and as Hancox JA and Nyarangi Ag JA agree it is so ordered.

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

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

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

The leading case appears to be *Baker v Market Hardborough Industrial Co-operative Society Limited* [1953] 1 WLR 1472, in which the widow of each deceased driver sued the other’s employers and the respective appeals were heard together. That was the case in which Denning LJ, as he then was, enunciated the principle to which I have just referred. Similar results occurred in the East African cases of *Welch v Standard Bank Co* [1970] EA 115 (Madan J, as he then was) and *Lakhamshi v Attorney General* [1971] EA 118, (Court of Appeal for East Africa). Accordingly, Mr Satchu, on behalf of the appellants and former plaintiffs, who were the widows of the driver of the Datsun, submits that this court should follow those decisions, reverse Aragon J’s decision that they had failed to prove negligence, and apportion liability for this tragedy equally between the parties. He says that it was manifest from all the evidence, as depicted in the sketch plan, and the presence of the tyre marks on the roof of the cab of the Datsun, that there had, in fact been a collision between the two vehicles. Moreover the learned judge should not have excluded, as he did, the evidence of the second Police Officer C/I Waigwa, who attempted to give his opinion as to what had happened based on his twenty two years’ experience as a police officer (see ground 3 of the memorandum of appeal).

There can be no doubt that it is the clear duty of a court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible. The court cannot, as Denning LJ said, wash its hands of the case and shrink from arriving at a conclusion simply because the evidence is deficient in

some respects. This is clearly recognized by Spry VP in the *Lakhamshi* case (*supra*) where, at p 120, he accepted that in relation to most traffic accidents it is possible to conclude on a balance of probability that one or other, or both of the parties were guilty of negligence. But he expressly said that it was not settled law that where the evidence is insufficient to establish the negligence of any party, the court must find both equally to blame, and he left open the situation where, as in my opinion is the case here, there is a lack of evidence as opposed to a conflict thereof. He said at p 121:

"I am inclined to think that the position is different. I personally find it difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident. This problem does not arise on the present appeal and it is unnecessary for us to decide it."

It is apparent, then, that Spry VP's remarks were *obiter*, but that passage is in my judgment opposite to the present case. Even in the *Market Hardborough* case, Romer LJ was prepared to envisage the circumstances could exist where the evidence was so meagre that any explanation would be purely speculative and thus that the plaintiff's case could not be said to have been proved.

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

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

Nyarangi Ag JA. The appellants being aggrieved by the judgment and decree of the High Court of Kenya at Mombasa (Aragon J) dated June 13, 1982 in Civil Case No 149 of 1982, appeal to this on the grounds that:

1. The learned trial judge erred in law in dismissing the appellant's claim in its entirety in fact of the nature of the evidence or the lack thereof as the case may be which was before him.

2. The learned trial judge should have drawn the inference that in the circumstances of the case and upon the evidence as was before him, each driver was to blame for the collision and in the absence of other evidence, being unable to decide the issue, he should have found that both drivers were to blame and that they were equally to blame.

3. The learned trial judge erred in law in disregarding the evidence of Jared Ombalo (PW 1) and further in disallowing the questioning of Nathaniel Waigwa (PW 2) on the possible location of impact between the two vehicles on the road.

This court is asked that this appeal against the judgment of the trial judge be allowed and in place of the judgment of the court below, this court give judgment for the appellants on the issue of liability or alternatively apportion the degree of blameworthiness between the drivers of the two vehicles and that the costs of this appeal be provided for. Broadly, the facts of the matter are that on or about March 29, 1981 at about 12.30 am the deceased husband of the appellant was driving a Datsun pickup registration mark number KSV 598 on the Nairobi-Mombasa Road towards Mombasa. There was a passenger in the pickup. On the same night a Daihatsu Saloon car registration mark KVY 672 was being driven along by an employee of the defendant on the same road but towards Nairobi. There was a passenger in the saloon. At or near Taru the two cars were involved in an accident as a result of which the two vehicles were extensively damaged and all the four persons died. Three cows died within the spot of the accident. IP Jared Ombalo who went to the scene after receiving a report found that the saloon's front rear side wheel was on the road. There was much broken glass on the road and there were two dead male bodies on the

road. The pickup was on its wheels and its front was at an angle point to Mombasa. The witness saw the tyre marks on the roof of the cabin of the pickup. The width of the road was 22 feet. The two dead cattle off the road had been injured and the third cow was under the pickup with its intestines out.

Under cross-examination, the witness replied *inter alia* that he did not know which vehicle was going in which direction after seeing the scene and that there was ample room for vehicles to pass the wreck of the pickup on either side. Also that there was no traffic sign on either side or speed restriction. The defence witness visited the scene between 2 and 3 pm. The witness found no pre-accident mechanical defects in either of the vehicles, no brake marks on the tarmac, noticed that the vehicles had recently been registered, that there was no evidence on the collision but that photographs number 15 showed that the pickup had sustained 100% head collision, both its head lights and side lights were broken. The witness did not think that the two vehicles collided head-on. The saloon split into two at near side centre pillar but that the damage at the near side centre pillar showed the saloon had received,

"strong application of force from beneath motor-vehicle this coning rear section of the saloon"

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

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

"No evidence was led conclusively to prove that there was a collision between the two cars. Mr Dhadialla did not say that he found any traces of paint from the Datsun or Daihatsu or vice versa."

The judge is here stating that there was no evidence to prove on the balance of probabilities that there was a collision. Where it is proved by evidence that both parties to a motor accident are to blame and there is no means of making a reasonable distribution, the blame can be apportioned equally on each. *Baker v Market Hardborough Industrial Co-operative Society Limited* [1953] WLR p 1472.

The position must however be different where there is no evidence to establish that any party was negligent. That would be the case where the evidence adduced points one way and there is no conflicting evidence. In that case it cannot be right to apportion blame there being no evidence on which apportionment could be based. As was stated in *Lakhamshi v Attorney General* [1971] EA Page 118 at page 121 by Spry VP, it is difficult to appreciate how a party can be held to have been negligent if there is no evidence that he was in fact negligent.

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

I would dismiss the appeal.

Dated and Delivered at Mombasa this 31st day of January, 1984

A.A. KNELLER

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JUDGE OF APPEAL

A.R.W. HANCOX

…….

JUDGE OF APPEAL

J.O. NYARANGI

……..…

AG. JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR