IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Potter, Kneller & Hancox, JJA)

CIVIL APPEAL NO 77 OF 1982

BETWEEN

EPHANTUS MWANGI

GEOFFREY NGUYO NGATIA ……..…….. APPELLANTS

AND

DUNCAN MWANGI WAMBUGU ……...……RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Chesoni, J) dated 29th June, 1982 In

High Court Civil Case No 1046 of 1981) _____

JUDGMENT OF KNELLER, JA

On June 29, 1982, the High Court (Chesoni, J) gave judgment for the respondent Duncan Mwangi Wambugu (Wambugu) against the first appellant, Ephantus Mwangi (Mwangi) and the second appellant, Geoffrey Nguya Ngatia (Ngatia), jointly and severally for Shs 91,252/50 special damages and Shs 110,000 general damages, costs and interest. Wambugu was the plaintiff before the High Court and Mwangi and Ngatia the first and second defendants respectively.

Wambugu, by his plaint filed on April 15, 1981, asked for judgment against Mwangi and Ngatia jointly and severally for special damages and general damages because he sustained severe injuries and pain and his vehicle was a write-off, as the consequence of an accident for which, he alleged Ngatia's negligence was responsible, and Mwangi was also responsible, because Ngatia was his agent or servant at the time. Mwangi and Ngatia, in their defences of May 21, 1981, admitted Ngatia was the servant of Mwangi but denied the second was negligent and claimed that, if he were found to be so, then Wambugu was too, and his negligence contributed to the cause of the accident. Thus the issues were:-

1. Did Wambugu prove on the balance of probabilities that Ngatia was negligent?

2. If so, did Mwangi and Ngatia, prove by the same standard that Wambugu was also negligent?

3. If so, in what proportion was their negligence the cause of the accident?

4. Special damages

5. General damages

The judge answered the first two issues in this way:-

1. Wambugu proved on the balance of probabilities that Ngatia was negligent.

2. Mwangi and Ngatia did not prove by the same standards that Wambugu was negligent.

So, now Mwangi and Ngatia, have appealed to this court against the judge's finding that Ngatia was negligent and Wambugu was not negligent and against the quantum of his awards for special and general damages. Wambugu has not cross-appealed. We heard the submissions of their advocates on liability and deferred the issues relating to damages.

Mwangi and Ngatia's advocate urged this court to reverse the High Court on the answers to the first two issues so that they would then be:-

1. Wambugu did not prove Ngatia was negligent

2. Mwangi and Ngatia proved Wambugu was Or to modify them so that they were, in effect, Wambugu and Ngatia were both negligent.

.and then fix, in what proportion Wambugu's negligence contributed to the cause of the accident.

The trial judge recorded the testimony of; Wambugu, the owner/driver of a 1975 Peugeot 504 station wagon KQR 197 (the matatu), Wekesa, his motor vehicle assessor, and Kihara, the driver of a Toyota Saloon, KPJ 912 (the Toyota) and Wambugu's advocate, then closed his case; Ngatia, the driver of a large Leyland omnibus KPD 354 (the bus), Mwangi, the owner of the bus, D'Souza, their assessor, Constable Muiruri of Maragua Police Station who produced the police traffic accident investigation file, I.P. Muli, who went to the scene of the accident within 40 minutes of its happening and so began the investigation and Dhadialla, Mwangi and Ngatia's private investigator. Besides all that, the High Court had two police abstracts of May 9 and November 7, 1980, the reports of the three assessors or investigators, six photographs of, either the vehicles and/or the road and the Maragua Police Station investigation file, to assist it in finding the answers to the first two issues.

This is a first (and only) appeal so this court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering we have not seen or heard the witnesses and making due allowance for this. Sele & anr v Associated Motor Boat Company Ltd & ors, [1968] EA 123, 126(CA-Z- and Williamson Diamonds Ltd v Brown, [1970] EA 1, 12 16 (CA-T).

Wambugu was driving the matatu down the hill at Sabasaba between Muranga and Thika on April 22, 1980, at 3 p.m. when Ngatia was driving Mwangi's bus up the hill, from Thika to Muranga. There were eight passengers and Wambugu in the matatu, thirty and Ngatia in the bus, which was licensed to carry sixty-seven. The matatu was overloaded and the bus was half-empty.

The road, they were on, was a tarmac one and in good condition. It's width was 20' and on each side, there was a grass verge of 10'. The road was marked down the middle with a continuous yellow line and, if each vehicle were driven in its correct half, they could have passed one another without difficulty or, in time of trouble, each could have travelled for a reasonable time on its near side verge. Yet, they collided at 3 p.m., when the weather was fine and visibility good.

Who was to blame? Each driver claimed he was driving his vehicle at a reasonable speed on his near side, when the other vehicle, without warning and at speed, travelled over the yellow line into its wrong half of the road, to overtake a vehicle in front of it, and so a collision was inevitable. Let me put in the details for these drivers. It was claimed, for Wambugu, the matatu driver, that Ngatia, in the bus, came over to his off-side so much so that, it made Wambugu take the near side of the matatu off the tarmac and he could take it no further, because where the tarmac ended, there was a steep slope. The bus was then travelling at

a “great speed” because it had just come down into the small depression and then rushed up the other side, in order to get up the hill. It came out from its near-side, far over to to its off-side, to overtake Kihara in the Toyota. The matatu was in good condition with steering, brakes and tyres in faultless working order. He was driving the matatu at 65 kph, which was within the limit for that hill in that rural area.

Ngatia, the bus driver, swore that there was no Toyota ahead of him and he did not overtake any vehicle. Instead, the matatu zoomed down this hill on its nearside, came out to its off-side across the yellow line, at great speed and without warning, in order to pass the Volkswagen pick-up moving slowly ahead of it, in the same direction but he could not avoid the matatu, although he was moving at only 30 kph because the bus was trundling up the hill, and on its near-side there was an embankment. He did not rush down into and out of the depression, because it was a small one and far away from the point of impact. The bus was in good working order and no faults were found on it, which could have contributed to this accident.

These two different accounts of the event mean that, Wambugu, in the matatu, claims that the collision was a head-on one on his off-side, but in his part of the road, and Ngatia, in the bus, says it happened over the yellow line in his half of the road doing up hill and the off-side of each vehicle was involved. Kihara, in the Toyota, supported the account given by Wambugu in the matatu and I shall come back to him later in this judgment. Wekesa, the assessor, saw the matatu on September 11, which is five months after the event, and he said the matatu was in good condition before the accident. D’Souza went to the scene on May 22, or a month after the collision, and he also saw the matatu and said, the front of it was damaged

“completely”. Dhaliala, described each side of the road as being “motorable” for a considerable distance for each vehicle and formed the opinion that one was moving at high speed but he did not say which one and he could not discover the point of impact. I P Muli, is a vital witness in this case. He says, he was at the scene by 3.30 p.m and he found the matatu, which had been righted, and the bus in certain positions on the road. He took measurements of the road, the vehicles and their tyres from a fixed point of one another and put them all on a rough sketch plan which he did not follow up with a fair plan and/or a legend. He, too, formed the opinion that, one vehicle had been travelling fast, too fast, before the accident and that, it was the matatu . He marked the point of impact as being in the half of the road which the bus was supposed to travel in, and so he declared that, the matatu had been over on its off-side across the yellow line into its incorrect half of the road. He noticed that one of the front tyres of the matatu was completely smooth. He rejected the view that, the point of impact was on the off-side of the matatu’s half of the road as it travelled down the hill from Muranga towards Thika or that the bus was travelling at speed or was to blame. The matatu, he asserted, would have had time to see the bus crossing the yellow line on its off side right over into the path of the matatu and avoid smashing into it, if the matatu had been traveling at only 65 kph. The learned judge dealt with the credibility of two of the witnesses. He wrote:- “having watched Inspector Muli’s demeanour and heard him, while I do not call him a deliberate liar, I found him unreliable. He was an assuming witness, and I find that, the truth of the matter was that, he was unable to locate the point of impact. I P Muli implied that there had been interference with the information in the police file. “Exhibit 14”. It would, in these circumstances, not be safe to rely on what is contained in that exhibit. He was not a credible witness. This leaves us with only one independent witness as to the point of impact and that is Peter (P W 3). I found Peter to be an honest man who spoke the truth of what he saw. I believe what he said.”

.and he declared the accident occurred as (Peter) Kihara said it did. He then found Wambugu and Ngatia were not driving their vehicles at excessive speed when they hit one another. Ngatia was, however, on the wrong side of the road, he failed to have any or sufficient regard for the other users of the road, he managed or controlled his bus in a manner which was dangerous to other road users and he caused or permitted the bus to collide with the matatu and, in all, he was negligent and Wambugu was not negligent. So far as the record goes, Kihara was shown, in my view, to be probably not an independent witness. He says he did not remain at the scene, but a week or so later he went to Muranga Police Station just to look at the matatu and bus, and a policeman saw him doing so and asked if he knew anything about them, and he replied that as a matter of fact, he did.

This is possible but, in my view, improbable. The consequence was, he went on, his statement was

recorded. The statement, however, is part of the record in this appeal and it is dated April 30, 1980, and purports to show that Senior Sergeant Mwachira recorded it at 9.30 a.m. at that Police Station. And yet, in both abstracts of May 9 and November 7 1980 (Exhibits K and 8) from the police at this station, this independent honest witness whose statement was (or ought to have been) in the police file by then, is not mentioned 10 or 190 days later as a witness. The May abstract is signed by I P Nzuki who may have missed out the statement of Kihara or not checked the details on that abstract and so may Senior Sergeant Mwachira, when he signed the November abstract, but surely without justification, for he wrote out Kihara's statement and read it back to Kihara on April 30 and knew that he completely exonerated the matatu driver and implicated only the bus driver. Add to that, the fact that, there is not one word about Kihara and/or the Toyota anywhere in the plaint of April 14, 1981, which is filed nearly a year after the event, or in the evidence of Wambugu at the trial, and in my judgment, Kihara's statement and testimony about the Toyota being overtaken by the bus at that place on April 22, 1980, at 3 p.m. or so, are incredible.

And what were the learned judge's reasons for rejecting the evidence of I P Muli? They were these:-

"He did not say whether he looked, and if not, why he did not look, for the tyre marks of the bus. He admitted that contrary to what he wrote there were no skid marks at all and by the use of the phrase "skid marks" in the sketch, he meant the tyre marks of KQR 197 "(the matatu)" but if the vehicle overturned immediately upon collision and landed on its side, the tyre marks would appear only before the accident and after it had been turned back on its tyres. We do not know the condition of the road and whether it could record marks. It will be observed that, I P Muli, even noted on the sketch on the nearside to Nairobi as follows:- "Where KQR 197 rested before, lifted a lot of soil and broken metals of KQR 197"

Surely, if he so emphasized and, that was the only place he noted down metals, was that not the actual point of impact? Why did he not put down broken metals at the other point, yet he said in his evidence that, that was important in locating the point of impact? Inspector Muli shows the skid marks of each of the two vehicles after the point of impact and it was only after I pointed out to him that it looked strange, that the skid marks should be after the collision, that he changed his story [to] that he meant tyre marks and there were no skid marks."

I P Muli wrote on his rough sketch plan and, at first, in his evidence, spoke of skid marks and to that extent was inaccurate, as he readily admitted. They were tyre marks. This is, in my experience in the High Court, a common lapse for investigating officers and their cross-examination usually begins with sorting out skid, brake and tyre marks. www.kenyalawreports.or.ke It is correct, he did not testify, that he looked for or did not look for the tyre marks of the bus. I cannot find any indication, however, that he was asked about them one way or the other. He has plainly marked them on his plan. We do not know the condition of the road then, because the respondent's insurers' expert reported it was tarmac and in good condition (which is excellent for recording tyre marks of one sort or another).

His evidence is that, he found two places where there were traces of broken headlamp glass and soil and with the second, there were broken pieces of metal. His conclusion was that the first which was in the path of the bus in its correct half of this road, was where the vehicles cannoned into one another (and the matatu's driver's door was shorn off it's hinges and caught under the bus) and the second, which was in that half of the road for the matatu's progress, was where the matatu overturned. The finding of the particles of broken metal in the one and not on the other, does not, to my mind, necessarily establish where these vehicles bounced off each other. It must be remembered that the matatu then careened on out of control and overturned, so they might mark that spot instead.

I P Muli was there, soon after this happened, and found the bus and matatu still there with Ngatia and some passengers from both vehicles by them. Wambugu had been hurried off to hospital by someone in a Renault that came along before I P Muli did. His conclusions, which he was asked to give, were supported by those of D'Souza and Dhadialla who were asked for theirs. They are all just 'opinions' and are in line with Ngatia's account, but contrary to Kihara's version and what Wambugu swore he remembered happening before he lost consciousness.

We know, half-empty buses cut corners going up hills, matatus stuffed with passengers swing out after negotiating sharp bends going downhill and both travel, unwisely, too fast. Certainly, standing back from the recorded evidence and exhibits, however, I P Muli's reconstruction of what happened, has the added merit of being the more probable of the two preferred to the trial judge.

The upshot is, in may view, that I P Muli was able to locate the point of impact without wrongly assuming anything. He was the investigating officer, he says, and is so described in those abstracts in May and November 1980, by I P Nzuki and Senior Sergeant Mwachira. He put his report, including his findings, on the file before he was transferred in August, 1980. When he gave evidence, he discovered his report was not in it, but there was a different one at the beginning, written and signed by someone, whose signature he could not fathom. It had the wrong date for the accident, to make it even odder. This non-plussed him, as the record underlines, and together with the different conclusion set out in the report, must have affected his demeanour in giving his evidence.

Ngatia denied being charged with or convicted of using the bus when it was in a defective condition, contrary to section 55(1) of the Traffic Act Cap 403 but the learned judge held, it was true on the strength of a Police Form 43 and a police charge sheet. The first concludes particulars in I P Muli's writing, setting out Wambugu's negligence but followed in someone else's script by Ngatia's name as the accused, details of the charge and the result, which was a fine of Shs 50 and then the accident and ticket case numbers. The second, refers to the Muranga District Magistrate's court. The vehicle examiner's report of April 25, 1980, of the bus, mentions minor pre-accident defects but whether they were the torn and loose seats and or thin tyres or what, is difficult to tell. The charge sheet is singed by Senior Sergeant Mwachira. This is not, with respect, proof of the conviction.

There is also, on this police file, a certificate of Mr Charles Obondo, who examined and tested the matatu at Thika. He states its pre-accident condition was far with some defects, which in his opinion could not have contributed to the cause of any accident in the hands of a prudent driver. It mentions oil leaks from the engine and gearbox, torque blocks missing from the latter and damaged front lamps and rear indicators. Otherwise, everything else, including its tyres is "ok" (to use his argot). This is inconsistent with the matatu having been involved in any serious accident at all or the exhibited photographs of it after this one on April 22, 1980. The request for this examination, came from Kandara Police Station and is said to have taken place on March 27, 1980, which is about a month before the matatu and bus met on this hill. Finally, Senior Sergeant Mwachira, it was who, despite Kihara's statement, served Mbugua with a notice of intended prosecution 2 months later (on July 8, 1980) for driving dangerously and Mwangi and Ngatia, were not so troubled. Some, but not all, of these clues to where the truth of these matters probably lay, were put to this court but not the trial judge, by the advocate for Mwangi and Ngatia, who put the police file in the appeal record.

He could not put them to the learned judge, because until the file was produced as an exhibit, he had no right of it and its contents. The Commissioner of Police does not have the staff to prepare duplicate copies of it for the parties, and will not let them inspect it beforehand for good reasons. He permits the investigating officer to produce it at the trial, so that it is then in the custody of the court and thereafter the parties can study everything in it. It might be of help to them and the court, if it could be produced by the Commissioner's local representative at the pre-trial, summons for directions or discussions for, as this appeal underlines, the abstracts are insufficient and inaccurate, and so are the parties' instructions. The consequence is that, in my judgment, with respect to the learned judge, the answers to the first two issues should be reversed so that they become:- 1. Wambugu did not prove on the balance of probabilities Ngatia was negligent; but

2. Mwangi and Ngatia proved, by that yardstick, Wambugu was, alone. This is, alas, to depart from the clear findings of the judge who saw and heard these witnesses and had the feel of this case. He dealt with the credibility of two of them and the demeanour of one, albeit significant ones, but not the others, including the parties, Mwangi, Ngatia and Wambugu.

The law on this used to be that, there should be no interference by this court with the findings of fact about the contribution to an accident by two or more negligent drivers, save in exceptional circumstances,

because this is an individual choice or exercise of a discretion. British Fame (Owners) v MacGregor (Owners), [1943] 1 A11 ER 33. Sir Ronald Sinclair, P in Shariff v Sethna, [1963] EA 239, 249 (CA-K). Where the trial judge has found, however, that there is no contribution, this court should not interfere unless satisfied, he was wrong, but if satisfied, then this court has a duty to interfere and it is not restricted to exceptional cases. Sir Charles Newbold, P in Karis v Solanki, [1969] EA 319, 320 (CA-K).

A member of an appellate court, is not bound to accept the learned judge's findings of fact, if it appears either that, (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or, (b) if the impression based on the demeanour of a witness, is inconsistent with the evidence in the case generally. Khoo Sit Hoh v Lim Thean Ton, [1912] AC 323 (PC); Abdul Hameed Saif v Ali Mohamed Gholan [1955], EACA 270, 272 (CA-K). The English decisions are not binding on this court today but are, at any rate helpful, if not persuasive. Those of the former Court of Appeal for Eastern Africa, if not binding, must be persuasive, if still good law, which, in the absence of legislation or this court's own judgments, would seem to be so.

Here, in my respectful view, the learned judge's impression based on the demeanour of these two witnesses, was inconsistent with the evidence in the case generally and I am satisfied that, on these questions of fact and degree, he was wrong, so this court is under a duty to interfere with his decision.

Accordingly, I would allow the appeal with costs in this court and in the High Court. Delivered at Nairobi, at 22nd day of March 1983.

A A KNELLER

JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Potter, Kneller & Hancox, JJA)

CIVIL APPEAL NO 77 OF 1982

BETWEEN

EPHANTUS MWANGI ……..1st APPELLANT

GEOFFREY NGUYO NGATIA ….……. 2ND APPELLANT

AND

DUNCAN MWANGI WAMBUGU ……RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Chesoni, J) dated 29th June, 1982 In High Court Civil Case No 1046 of 1981)

JUDGMENT OF HANCOX, JA

This appeal arises out of a collision between a bus and a Peugeot 504 station wagon on the Thika Murang'a road, near Saba Saba during the afternoon of 22nd April, 1980. After the accident, the Peugeot overturned and was subsequently written off, and the respondent driver (to whom I shall refer as the

plaintiff), received serious injuries. The trial judge awarded the plaintiff Shs 110,000 general damages and Shs 91,252/50 special damages for the negligence of the 2nd appellant (to whom I shall refer as the 2nd defendant) who was driving the bus as the servant or agent of the 1st appellant (to whom I shall refer as the 1st defendant). The judge expressly found that there was no contributory negligence on the part of the plaintiff. The appeal proceeded on the issue of liability, both counsel reserving their arguments on the issue of damages in the event of the appeal on liability being wholly or partially dismissed.

The pleadings and the respective accounts given by and on behalf of each party to the accident showed a complete conflict of fact. The plaintiff, supported by his witness Peter Kihara, stated that the Peugeot, registration number KQR 197, which, was being driven as a matatu and carrying eight passengers at the material time, was on its correct side of the road, going down the slope and towards Nairobi, when he was confronted by the defendants' oncoming bus in the middle of the road. He was unable to avoid it, and was rendered unconscious by the resulting impact, regaining consciousness 5 days later in hospital.

The second defendant's case was, however, that his bus was halfway up, what he described as a 45 degree hill, also on its correct side, going at about 30 mph in the direction of Murang'a when, just before he reached Saba Saba, he saw the Peugeot emerging from the bend, which is visible in the first two photographs exhibited. It was overtaking another vehicle and was on its wrong side. In the course of or shortly after overtaking the other vehicle, the Peugeot struck his bus and ended up on its side in the middle of the road. The second defendant endeavoured, unsuccessfully, to move to his nearside to avoid the collision, and stopped immediately after the impact.

The accident occurred at about 3 p.m. and it was not suggested that, the weather was other than fine or the visibility other than good. The police party from Murang'a Police Station, led by Inspector Muli, and including PC Ndirangu, arrived at the scene after the plaintiff had been freed from the Peugeot and taken to hospital and the vehicle turned upright. The first police signal states that, the report was received at 3.30 p.m. and that the police party arrived at 3.35 p.m. Inspector Muli took measurements and drew the rough sketch plan, which was included in the police file produced in the High Court. Two other plans were produced by accident investigators and assessors, but were made some time afterwards. They were based on information from witnesses and from the police and not on direct observation. The third defence witness produced the photographs which he took a month after the accident.

According to Inspector Muli, the road at the point of impact was 6½ metres wide which accords with Mr De Souza's and Mr Dhadialla's estimates of 20 feet. The latter added that, the motorable verge on the side of the Peugeot was 11 feet and the other 10 feet in width. That was, of course, relevant to Mr Dhanji's submission on behalf of the defendants in this court that, even accepting the judge's finding, there was room for the plaintiff to have taken avoiding action and that, he was guilty of contributory negligence because he did not do so.

Inspector Muli showed skid marks, or more correctly, tyre marks, leading to both vehicles, but unfortunately only measured those made by the Peugeot, which were 22 metres and 70 centimetres from where he said was the point of impact (which he marked "X" on the plan) to where it was situated at the left side of the road facing Nairobi. There were two piles of soil and other debris, one of which Inspector Muli concluded was where the Peugeot had overturned and came to rest, and the other, which included particles of metal and broken glass, at which he fixed the point of impact. The learned judge did not think much of Inspector Muli's evidence. He said: "Having watched Inspector Muli's demeanour and heard him, while I do not call him a deliberate liar, I found him unreliable. He was an assuming witness, and I find that, the truth of the matter was that, he was unable to locate the point of impact. I P Muli, implied that there had been interference with the information in the police file "Exhibit H". It would, in these circumstances, not be safe to rely on what is contained in that exhibit. He was not a credible witness."

Accordingly, the judge was, as he said, left with Peter Kihara as the only independent witness to assist him in deciding between the two opposing versions of the accident. Peter Kihara had testified that, he was driving a Toyota KPJ 912, in the direction of Murang'a, when he was overtaken by the defendants' bus KPD 354, as they were descending the hill prior to the one on which the collision took place; that he was travelling at about 40 mph; that the bus "speeded up" as they descended the hill, and that it was unable to

get back on to its correct side (after overtaking the Toyota) before it encountered the Peugeot. Accordingly, Peter Kihara said the moment of impact occurred while the bus was still well over the yellow line, which is in the middle of the road. Mr Dhanji, who has represented this defendant throughout, submitted, on the authority of Abdul Hameed Saif v Ali Mohamed Sholan, [1955] 22 EACA 270 which was approved in two later cases, that the judge had clearly failed in reaching his findings of fact to take account of particular circumstances or probabilities, material to an estimate of the evidence, and that this court was, accordingly, entitled to re-evaluate the evidence and find that, the accident was caused by the Peugeot careering down the hill, overtaking another vehicle and hitting the bus, which was on its correct side.

All three insurance investigators, spoke of the damage to the Peugeot as being principally on its front offside, and Mr Wekesa (PW 2), said that he concluded it was not a head on collision, by which, I assume he meant that the whole of the front aspects of the two vehicles did not come into violent contact. Whether that is so or not, neither of these expert witnesses advanced, or were asked to advance, any opinion as to which account of the accident was more consistent with the damage to the vehicle. The only other factor that might have assisted, was the oil stain which Mr Dhadialla said in his report, was found 3 feet 3 inches on what would have been the Peugeot's correct side of the centre line, (presumably the continuous yellow line), but, as it would seem that this was after some period of time had elapsed, I do not think it assisted the case one way or the other.

The report added that there were no eye witnesses to this accident, but then said immediately after:-

"We understand that Mr T N Willy", presumably meaning Mr Timothy Njuguna, who features in the police file, "will state that the third party driver", that is, the plaintiff ":was in the process of overtaking an unidentified vehicle, when the collision occurred on the side of your insured."

This unidentified vehicle was, presumably, the blue Peugeot Pick-up which is referred to by the second defendant in his police statement, and in the police covering report, as being mentioned by D2 (that is Timothy Njuguna), which the plaintiff was said to be overtaking immediately before the impact and caused him to travel on his wrong side, thus supporting the defendants' story. The only other vehicle which featured in the evidence was the Volkswagen, stated by the second defendant to have been in front of the Peugeot and to have passed them immediately before the accident. Finally, there was the curious factor that, the other defendant denied that his driver was ever charged with using a defective vehicle, contrary to the documents on the police file. Mr Kimiti, who appeared on behalf of the plaintiff at the hearing and in this appeal, urged this court not to disturb the learned judge's findings of fact, and said that there was ample material upon which he could find that,Inspector Muli was a biased witness who gave a one-sided conclusion as towhere the fault lay, and, conversely, that Peter Kihara's testimony was reliable and acceptable.

Much was made by Mr Dhanji, of the judge's refusal to allow Inspector Muli to be recalled to give evidence of the statements of the witnesses in the police file. Apart from the witnesses who testified, these amounted to statements from Timothy Njuguna, a passenger in the Peugeot who received minor injuries, and who is recorded as saying that, the Peugeot was going at a high speed, and was overtaking the blue Peugeot, Jane Njeri, another passenger, who said that the driver of the Peugeot lost control but did not otherwise assist, and Musa Idi Kabugo, the turnboy in the bus, who did not see the actual events because his attention was directed to issuing receipts to passengers. Mr Dhanji said his case was that, Peter Kihara was not at the scene at all and that his story was fabricated for the purpose of supporting the plaintiff after he saw the wrecked vehicle at the police station, over a week later. It cannot be gainsaid, that there was some dissatisfaction with the early investigations of the case, because there is a minute from an inspector, dated 16th June, 1980, instructing a Corporal Odongo to take over the file and to compile it properly. And while the initial signals were sent by Inspector Muli, most of the statements were taken by other officers, notably, Senior Sergeant Mwachio, who completed the Police Abstract and also signed the Notice of Intended Prosecution of 8th July, (well after the time limit therefore had expired) informing the plaintiff that, he would be prosecuted for driving dangerously. Another curious feature of the file, appears from the vehicle examination certificate relating to the Peugeot, which is dated 27th March, 1980, (25 days before the accident). Yet, it shows for example "pre-accident" defects such as "o/s head lamp lens missing".

From the damage shown in the photograph, “Exhibit E”, such pre-accident defects could not possibly have been apparent after the accident. It would seem, therefore, that either there is a mistake in the date of the report, or the examination did, in fact, take place before the accident, or that it was not genuine. Inspector Muli, himself left the station on 23rd August, and at the hearing, he disowned the covering report which was put to him, stating that the one he had written, was removed from the file, after he had left the station. This led to Mr Dhanji’s submission that, we should apply the presumption in Section 119 of the Evidence Act (Cap 80) and draw an inference adverse to the plaintiff; that the original covering report would have been unfavourable to his case. This section is based on the former Section 114 of the Indian Evidence Act, under illustration (g), of which the court may presume that evidence which could be and is not produced, is unfavourable to the person who withholds it. Certainly, as regards the presumption as to the continuance of a state of things in illustration (d) of the former section, this court’s predecessor was prepared to hold that, the section did not apply; see Kanji and Kanji v R, [1961] EA at page 416. I would hesitate, however, to apply the presumption in this case because of the nature of the evidence given by Inspector Muli, and because in no sense, could the supposed evidence be said to have been “withheld” by the plaintiff. The police file was produced as “Exhibit H” and included the present covering report, which contained the following passage:-

“At the scene, there was no skid mark or anything which could show the exact point of impact. The broken glasses were scattered all over the road www.kenyalawreports.or.ke and they made it very difficult to establish the point of impact. There were some soil which were on the road and were therefore taken as the point of impact. But then, from the statements, it became difficult to decide who is right from the two drivers involved. Not even one party, has given statement to match the sketch plan of the scene.” It seems to me, that, that might well describe the situation for, I confess, I have found Inspector Muli’s rough plan unsatisfactory in several respects, notably, his failure to measure the tyre marks made by the bus. In these circumstances, the judge was faced with a difficult situation. Could he accept Inspector Muli’s evidence as to the point of impact, bearing in mind the unsatisfactory state of the file, to which he adverted, and the confusing nature of that which is after all, only a rough sketch plan, containing it’s numerous measurements? True, most of the witnesses, whether called or not, did not see Peter Kihara’s vehicle, and he, in turn, did not see the Peugeot until after the collision, “as the bus was big”. It is also true, that he did not come forward for over a week. But he was not the only one. Timothy Njuguna (who worked in Nairobi, as did Peter Kihara) returned to give his statement on the same day as Peter Kihara, and Jane Njeri did not give hers, until 25th July. Moreover Peter Kihara told a circumstantial story, with details, such as, the plaintiff being taken to hospital by a passing Land Rover, to make way for which, the bus had to be moved out of the way. The Land Rover was also referred to, by the second defendant and by Musa Idi Kabugo, in their police statements.

Mr Dhanji also attacked the judge’s finding, that neither vehicle was going at an excessive speed, in view of the extensive damage to the Peugeot and Dhadialla’s evidence, yet, there is support for his view, first, from Mr Wekesa, who described the 504 as an “egg-shell”, and said that the damage would not necessarily have been caused by its going at a very high speed, and secondly, because there was evidence that, the bus was a heavy vehicle and the hill was steep enough to have an effect on it’s speed. A Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it 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 findings he did. After careful consideration, I am far from satisfied that, Peter Kihara manufactured his evidence to fit the plaintiff’s case and I think, there were grounds for regarding Inspector Muli as an assuming witness. But in any event, the judge, who must have been well aware of when he came forward to the police, accepted Peter Kihara’s evidence and rejected that of Inspector Muli. In my judgment, he was entitled to do so. Undoubtedly, as Mr Dhanji submitted, this court, as was said by Sir Kenneth O’Connor P, in Peters v Sunday Post Ltd [1958] EA at p 429, has jurisdiction to review the evidence, in order to determine whether the conclusion originally reached on that evidence should stand. But earlier he had said:-

“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 witnesses. 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.”

That passage, was cited with approval by Sotiros Shipping v Sauviet Soholt, Times 16th March 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 trial judge who saw and heard the witnesses and were in an incomparably 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." In my judgment, the finding of the High Court has not been shown to have been wrong on liability, and, although I have the misfortune to differ from my brethren, I would dismiss the appeal on that issue.

I would finally observe that, Mr Dhanji's ninth ground of appeal, states that the learned judge erred in failing to consider and evaluate the statements of Jane Njeri d/o Kinyanjui, Timothy Njuguna s/o Kamau and Inspector Gideon Muli, on the police file "Exhibit H" and failed to admit the same in evidence, under Section 35 and/or Section 38 of the Evidence Act (Cap 80). Mr Dhanji conceded, before us, that his submission to the judge in this respect, did not refer to Section 35 or Section 38, but was on a different basis. There was therefore, no error on the part of the judge at all. He took the view, correctly as I think, in view of the content of the submission, that to get in these witnesses' evidence through Inspector Muli, would have offended against the rules of hearsay. Inserting grounds of appeal as a makeweight, as it were, assists nobody, least of all, the client, whose hopes of success may be unduly raised thereby, see R v Pybus & Others, The Times February 23rd, 1983. I would dismiss his appeal.

Delivered at Nairobi, this 22nd day of March 1984.

A R W HANCOX

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR