IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Potter, Kneller & Hancox JJA)

CIVIL APPEAL NO. 77 OF 1982

BETWEEN

1. EPHANTUS MWANGI

2. GEOFFREY NGATIA..APPELLANTS

AND

DUNCAN WAMBUGU...RESPONDENT

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

JUDGMENT

Potter JA This appeal arises out of a collision between an omnibus, KPD 354, and a Peugeot 504 *matatu*, KQR 197, on the Murang'a-Thika Road on April 22, 1980. I shall refer to the two vehicles as the "bus" and the "*matatu*".

The driver of the *matatu*, Duncan Wambugu, who was the plaintiff in the action and who is the respondent in this appeal, and who suffered injuries as a result of the accident, sued the first appellant, Ephantus Mwangi, as the owner of the bus and the second appellant, Geoffrey Ngatia, as the driver of the bus. On June 29, 1982, Chesoni J (as he then was) gave judgment for the plaintiff, finding the driver of the bus entirely to blame for the accident, and awarded the plaintiff general and special damages.

The collision was on the Murang'a-Nairobi Road. The *matatu* was proceeding downhill, in the direction of Nairobi and the bus was proceeding uphill, in the direction of Murang'a. The collision occurred as the *matatu* was negotiating a left hand downhill curve in the road, and as the bus was negotiating a right hand curve uphill. The time was 3 pm. The road was some 6.5 metres in width.

The plaintiff driver of the *matatu* said in evidence that there is a sharp left bend as you come from Murang'a. As he "finished the corner", he saw the bus coming towards him in the middle of the road. He saw the bus moving into the middle of the road. He saw no other vehicle. It was a big bus. It was going fast but he could not estimate the speed. He was travelling at 65 kilometres per hour. The bus straddled the yellow line, but was more on his side of the road than on it's own. There was not enough room on his side of the road, for him to avoid the bus. His left hand tyre went off the tarmac, but he could not leave the road completely, because of the nature of the verge, which he described, as a slope. It was not a head-on collision. The front wheel of the bus hit his *matatu* on the right side. The *matatu* overturned.

The defendant driver told a different story. He was on his own side of the road when the *matatu* collided

with him, by hitting his bumper. The *matatu* was overtaking another vehicle on the corner at great speed. The other vehicle went on and did not stop. When the *matatu* came on his side of the road, he moved his bus to the extreme left of the road to avoid it. The bus was a Leyland with a seating capacity of 67. It had 30 passengers on board and was travelling at 30 kilometres per hour. He denied the evidence of prosecution witness, Peter Kihara, that just before the collision, he had overtaken Kihara in his Toyota KPJ 912. He further said that he did not see the Toyota at the scene of the accident.

One, Peter Kihara, gave evidence for the plaintiff. The accident occurred ahead of him. He was driving a Toyota car in the direction of Murang'a. The bus was behind him. The bus speeded down the depression in order to pass him and overtook him as he started to go uphill. Before it went back to its proper side, it collided with the *matatu*. When the collision occurred, the bus was more to its wrong side of the road. The *matatu* overturned. The bus blocked the road.

The witness was travelling at 40 miles per hour. He estimated that the hill was 45 degrees steep. That would seem to be a gross overestimate. It would indicate a gradient of well over 1 in 2!

Inspector Muli, was called as a defence witness. He investigated the accident. He was on the scene shortly after the accident, but not before the plaintiff driver had been released from the *matatu* and taken to hospital. He made the rough sketch plan which was in the police file on the accident (Exhibit H) which was produced by a previous defence witness, a police constable from Maragua Police Station.

He had marked the point of impact on the sketch with a green cross. It was on the bus's proper side of the road 2 metres, 20 centimetres from the bus's near side edge of the tarmac. (On a road 6.2 metres wide, that would put the point of impact about 1 metre or just over 3 feet from the centre line of the road, on the bus's proper side of the road). It was, easy he said, to ascertain the point of impact from the presence, in one spot, of soil and particles of metal and broken glass. From that spot, there were tyre marks made by the *matatu* to a point in the middle of the *matatu*'s side of the road, where there was more soil and broken glass. He was told that this was where the *matatu* overturned. There were further tyre marks to where the *matatu* was pushed after it had been righted. From the point of impact, there were marks made by the tyres of the bus leading to where he found the bus on its near side edge of the road. It seems clear, that the decisive factor in this case, is the location of the point of impact. The evidence of Peter Kihara, the Toyota driver, and Inspector Muli, the investigating officer, cannot both be correct about the point of impact. There were some unsatisfactory features about the evidence in this case.

The police investigation file was produced by an officer from Maragua Police Station, a defence witness, and it was marked 'Exhibit H'. It would appear that neither advocate had seen the file or its contents before. Mr Kamiti, who appeared for the plaintiff *matatu* driver, had "no objection to the file going in." Where documents are put in by consent, as for example, an agreed bundle of correspondence, the usual agreement is that, they are admitted to be, what they purport to be (so as to save the necessity for formal proof of each document), but no admission is made as to any assertions of fact, contained therein. It is better for the parties to be clear as to the evidential status of admitted documents.

The proper time for the parties' advocates to inspect the police investigation file, is at or before the summons for directions. Appropriate arrangements for safeguarding police records, should be made between the police and the Registrar of the High Court.

When Mr Dhanji, who appeared for the defendants, found statements of witnesses who had not been called at the trial in the police file, he applied to the judge to recall Inspector Muli, so that the inspector could read them to the court. The learned judge refused, in my view quite rightly, on the ground that a statement read by anyone, other than the maker of it, would be hearsay evidence. Dr Dhanji has made it one of his grounds of appeal, that the statements should have been admitted under sections 35 and 36 of the Evidence Act. Mr Dhanji did not apply to the learned judge for the admission of the statements under those provisions. This ground of appeal must fail.

Inspector Muli was posted from Maragua Police Station to Kiganjo Police Training College before he had completed the investigation. It is not clear, whether he ever made a fair sketch plan from his rough sketch

plan of the scene of the accident. He said, in evidence, that he had made a covering report, which was no longer on the police file, and he further said that, the covering report which was shown to him on the file, was not made or signed by him or by any of the police officers who went to the scene of the accident with him. The covering report, now on the police file, the authorship of which remains unknown, contradicted the rough sketch plan prepared by Inspector Muli as to the point of impact. Nevertheless, Inspector Muli's sketch plan was still on the file.

The name of the Toyota driver, Peter Kihara, did not appear as a witness on any of the abstracts in the police file, but his statement dated April 30, 1980, eight days after the accident, was on the file. That statement was substantially to the same effect as his evidence in court, except that in his statement he said:

"Today the 30th day of April 1980, I decided to call to Maragua Police Station and give my statement. Because of being a driver, I felt that this bus should not have overtaken on a hill where there is a continuous yellow line prohibiting the drivers to overtake."

In his evidence he said:

"After about a week, I was coming from home and I saw the bus and the vehicle at Maragua Police Station. I entered the Police Station and looked at the two vehicles and at that time, a policeman asked me whether I saw the accident and I told him "yes". He requested me to give a statement of (sic) which I did and then went away."

The public spiritedness of this witness is to be applauded. It would have been even more convincing, if he had stayed at the scene of the accident long enough to give his name to the police officers investigating the accident. Mr Dhanji went so far as to submit to us that, on the evidence, Peter Kihara never saw the accident at all. Mr Kimiti submitted that the inspector was biased against the plaintiff *matatu* driver, his client. He relied on what he was told by the bus driver and wrote his report without taking a statement from the *matatu* driver.

In his judgment, the learned judge examined the evidence of Inspector Gideon Muli very closely. Said the judge:

"He determined the point of impact by reference to the concentration of mud and broken metal and glass coupled with tyre marks of the Peugeot. He did not say whether he looked, and if not, why he did not look, for the tyre marks of the bus."

With respect to the learned judge, it is not easy to follow this criticism. A witness, whether in examination-in-chief or in cross-examination, only answers the questions he is asked. The tyre marks of the bus are clearly shown on the rough sketch plan made by the witness at the scene. Then the learned judge said:

"There were two spots with concentration of mud, broken metal and glass according to the sketch …."

Inspector Muli had explained in evidence that the first such spot, from which the tyre marks of both vehicles could be traced, must have been the point of impact. The other concentration of debris, from what he observed, indicated the point where the *matatu* overturned, or more accurately, fell on its side, before being uprighted and moved to the edge of the road. Then, the learned judge, criticised the inspector for using the words "skid marks" in his sketch plan, and then admitting that what he meant was, "tyre marks." But then, in the covering report on the police file, evidently not made by Inspector Muli, which was put to the inspector in crossexamination, it was stated:

"At the scene, there were no skid marks or anything that could show the exact point of impact."

With respect, it seems that, the learned judge should have directed this complaint, not merely to Inspector Muli, but the other authors of the covering reports stationed at Maragua Police Station. Then the learned

judge said:

"We do not know the condition of the road then and whether it could record any marks."

With respect, the evidence was that, the road was dry and there was no evidence to contradict Inspector Muli and his sketch plan, that there were tyre marks on the road. The covering report in the police file, which stated that "there were no skid marks", was put to Inspector Muli in crossexamination. His uncontradicted evidence was that, this covering report was not made by any officer who had visited the scene of the accident.

In the result, the learned judge found that Inspector Muli was an unreliable witness, and that he was unable to locate the point of impact. The inspector was not a credible witness, and it would not be safe to rely on his sketch plan. Consequently, he felt that he was left with only one independent witness as to the point of impact, Peter Kihara, whom the learned judge found to be honest and truthful.

I do not think that Mr Dhanji has made out his assertion that Peter Kihara was never on the scene. But, nor did I think that Mr Kimiti has shown us that Inspector Muli was particularly biased. He volunteered the opinion that the *matatu* driver was to blame for the accident, just as Mr Kihara said that he came to give evidence because the bus driver was to blame. It is with great reluctance, that this court contradicts a finding of fact by the trial judge, who has seen and heard and observed the witnesses. But, I can see no sufficient reason for the learned judge to have rejected absolutely the evidence of what Inspector Muli, a police officer, saw at the scene of the accident some 35 minutes after it had occurred. The inspector may have come to a firm conclusion that the *matatu* driver was to blame, without having taken a statement from him. He may have been embarrassed to be shown a covering report from the police file which was not his.

Inspector Muli's sketch plan was the subject of ineffectual crossexamination. In this court, it was the subject of criticisms by Mr Kimiti, that I did not find logical or acceptable. I do not accept the learned judge's reasons for condemning the evidence of Inspector Muli as unreliable. However impetuous or over-assertive he may have been, I see no reason for rejecting his evidence of what he saw on the road at the scene of the accident.

For all the foregoing reasons, I am compelled to the conclusion that the appellants are right in their main grounds of appeal, that the learned judge was wrong to reject the evidence of Inspector Muli and his sketch plan as to the point of impact. Unless there was good reason for rejecting the evidence of Inspector Muli as to the point of impact, it was clearly the best evidence on that issue.

I would allow this appeal. In my judgment, the *matatu* driver was wholly to blame for this accident. Accordingly I shall not consider any question as to damages.

As Kneller JA agrees, this appeal is allowed with costs.

Kneller JA. On June 29, 1982, the High Court (Chesoni J) gave judgment for the respondent Duncan Mwangi Wambugu against the first appellant, Ephantus Mwangi and the second appellant, Geoffrey Nguya 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 a 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). Wambugu's advocate, then closed his case. Ngatia, the driver of a large Leyland omnibus KPD 354, Mwangi, the owner of the bus, D'Souza, their assessor, Constable Muiruri of Maragua Police Station who produced the police traffic accident investigation file, Inspector Muli, who went to the scene of the accident within 40 minutes of its happening and so began the investigation Dhadialla, Mwangi and Ngatia's private investigator, then testified for the defendants.

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: *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123, 126 (CA-Z) and *Williamson Diamonds Ltd v Brow*n [1970] EA 1, 12 16 (CA-T).

Wambugu was driving the *matatu* down the hill at Saba Saba between Muranga and Thika on April 22, 1980, at 3 pm when Ngatia was driving Mwangi's bus up the hill, from Thika to Murang'a. 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. Its 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 pm, 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 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 going 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”. Dhalilla 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.

Inspector of Police Muli is a vital witness in this case. He says, he was at the scene by 3.30 pm 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 travelling 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. Inspector 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 (PW 3). I found Peter to be an honest man who spoke the truth of what he saw. I believe what he said.”

He declared the accident occurred as Peter Kihara said it did.

He then found Wambugu and Ngatia were not driving their vehicles at excessive speeds 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 Murang’a 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 am 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 Inspector 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 pm or so, are incredible.

And what were the learned judge’s reasons for rejecting the evidence of Inspecor 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, Inspector 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.”

Inspector 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. 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 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 its 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 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.

Inspector 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 Inspector 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 down hills and both travel, unwisely, too fast. Certainly, standing back from the recorded evidence and exhibits, however, Inspector 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 my view, that Inspector 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 Inspector 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 includes particulars in Inspector 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 signed 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 fair 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 Mirachira, 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 sight 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 v MacGregor* [1943] 1 All ER 33. Sir Ronald Sinclair P in *Zarina Akbarali Shariff and another v Noshir Pirosesha Sethna and others* [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 *Karisa and another v Solanki and another v Solanki* [1969] EA 318, 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 Tong*, [1912] AC 323 (PC); *Abdul Hameed Saif v Ali Mohammed Sholan* (1955) 22 EACA 270, 272 (CAK).

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.

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 April 22, 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 second appellant (to whom I shall refer as the second defendant) who was driving the bus as the servant or agent of the first appellant (to whom I shall refer as the first 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 five 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 pm 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 pm and that the police party arrived at 3.35 pm. 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 6 ½ metres wide which accords with Mr De Souza's and Mr Dhalilla'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, 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 come 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. Inspector 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 going 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 Mohammed 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 careening 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 Dhalilla 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 TN 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 DW2 (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 to where 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 June 16, 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 July 8, (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 March 27, 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 August 23, 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 apply: see *Kanji and Kanji v R* [1961] EA 411 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 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 have 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 July 25. 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 Dhalilla’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 its 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 this is a jurisdiction" (to review the evidence) "which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

Duffus VP, in *Shah v Aguto,* [1970] EA 263, at 265.

In *Karisa and another v Solanki and another* [1969] EA 318 at p 320, this Court's predecessor said that where a trial judge finds that one of the parties to an accident has not been guilty of any negligence, the court, even if it is doubtful that it would have arrived at the same decision, should not interfere with that finding unless it is satisfied the trial judge was plainly wrong.

As I have said I am not persuaded that the judge was wrong, or that any of the conditions which I set out earlier are satisfied in this case. As was said recently in *Sotiros Shipping Inc v Slimejet: The Solholt*, 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 Kinyanjui, Timothy Njuguna 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 this appeal.

Dated and Delivered at Nairobi this 22nd day of March 1984.

K.D.POTTER

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JUDGE OF APPEAL

A.A.KNELLER

....

JUDGE OF APPEAL

A.R.W.HANCOX

....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR