REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO. 216 OF 1976

MUKAI MWANZA .....PLAINTIFF

VERSUS

JOSEPH MATHEKA & 4 OTHERS.....DEFENDANT

JUDGMENT

On Damages

These suits were consolidated. The issues which I have to decide today are whether or not each plaintiff proved on the balance of probabilities each defendant (save for the fourth who was never served) is liable and if so, in what proportion?

I recorded evidence from IP Nyahere of Voi Police Station who produced the police inquiry file, Mrs Mukai Mwanza, a MKamba widow and the plaintiff in Mombasa High Court Civil Suit 216 of 1976, CIP Mathu formerly of Voi Police Station who investigated the accident from a few minutes after it occurred, for the plaintiff and SP Makazi who took photographs of the scene and vehicles at dawn the next morning, for the fifth defendants. The first, second and third defendants called no witness.

These witnesses were doing their best to remember what happened on June 8, 1975 at about 8 pm (when the first three defendants' bus KPJ 397 collided with the fifth defendant's tanker KQB 534 and trailer ZA 1455 on the main Mombasa-Nairobi road near Ndii which is near Voi, both vehicles overturned, both burst into flames and both drivers and twenty eight passengers were killed) or what they saw at the scene shortly afterwards the next morning.

I came to the conclusion that they spoke the truth about what they remembered or recorded in their plans and photographs. The widow was an especially firm and convincing one on the speed of the bus just before the impact. She was unnerved by its swiftness or some of them saying its driver was driving it too fast. I did not believe she was too engrossed with caring for her baby to have been able to notice this or hear the other complains about it.

The collision in my finding occurred in the centre of the road. The bus was going towards Mombasa and the tanker trailer towards Nairobi. This was a good macadam road and the weather was fine. The vehicles and their lights were not shown to have been in anything but a satisfactory condition before the accident.

Whose fault then was this? The bus driver's or the tanker driver's or both and in what proportion?

We have no estimate of the speed of the tanker. Speed in itself is not necessarily negligence. CIP Mathu says there were marks made by the tyres of the tanker for 92' (feet) before it overturned and these were consistent with a skid or braking action. He also saw evidence that the tanker was not wholly in its correct

half of the road before the accident and that it moved back towards its correct side. SP Makazi's own photographs and those submitted to him do not support these assertions.

It is probable that the driver of the bus took no action at all, according to the evidence, to avoid this violent meeting. He did not ease over further to his nearside or slow down. He was not, of course, required to steer his bus with its passengers over to his nearside straight into the culvert. He must have seen the tanker and trailer approaching long enough to rule out any decision having to be made in the agony of the moment.

Chesoni J in another action - *Willi Joseph v Highway Carriers Ltd* Nairobi High Court Civil Suit 1679 of 1976 (unreported) - delivered a judgment there on November 5, 1979 in which, with respect he dealt admirably with the law on liability in such cases. He did not have the first three defendants before him because they were not parties but they called no evidence in this Mombasa suit. Mr Manek has appeared for them here and he has cited authorities on the relevance of one vehicle's speed if proved, the rule of the road and what is the position of a driver who makes a decision in the agony of the moment which with hind sight was wrong (or not quite right as Mr Manek put it) which I found helpful and have dealt with together with the facts in this case in the previous paragraph rather briskly (for it is the last day of term and I am off to Nairobi) but adequately I trust.

On the facts on this trial, I find the plaintiffs proved the defendants were negligent, but, I cannot with a good conscience on the same material apportion the blame. So on the law which Chesoni J summarized and which I agree is correct, the defendant's are equally to blame. Those are the answers to the issues relating to liability in the suit. Chesoni J reached the same result (and he heard move witnesses including two experts and the brother of the tanker driver) which I find fortifying.

On Liability

Special damages in this suit have been agreed at Kshs 3,500. Nothing else has and now I am to assess general damages for Mrs Mukai Mwanza, the plaintiff, under two separate heads. First, those for shock, pain, suffering, physical disablement and loss of amenities. Secondly, for future loss of earnings. They should be stated separately: *Jefford v Gee* [1970] 2 QB 130 (CA): *George v Pinnock* [1973] 1 WLR 118.

The plaintiff is a MKamba widow from Kitui aged thirty three. On June 8, 1975, with seven children between the ages of nineteen and five to support, she was a passenger in an omnibus, owned by the first four defendants, which had a head-on collision at 7.15 pm or so with an oil tanker and trailer, belonging to the fifth defendant on the Nairobi-Mombasa main road. These vehicles overturned and burst into flames and both drivers and twenty eight passengers including the plaintiff's four month old baby were cremated.

The plaintiff was admitted to the hospital at Voi in a state of severe shock and about thirty percent of her body was very severely burnt. There were deep burns at the back of her chest, abdomen, left arm, right shoulder and front of right forearm and not so deep on the left side of her face, the back of her scalp and her left forearm.

Two days later she was transferred to the Coast Province General Hospital, Mombasa where she came under the care of the Provincial Surgeon, Hermes Francis Xavier Mondes, FRCS (Edin). He treated her state of shock with intravenous solution. Ten days later, June 20, 1975, he operated on her and excised the deep burns. Three weeks after that - July 11, 1975 - he operated again and this time took skin from the front of her thighs and grafted it over the places where she had been burnt. Nine more days passed and then she was discharged from the hospital to attend for dressings. Altogether she was in hospital about three and a half months and for three months she came in as an out-patient.

Mr Mendes saw her on February 11, 1976 and wrote a report (Exhibit B) on her condition. He found all the burns had healed. There was a scar formation on the left side of her face which had caused some disfigurement of which she was conscious and so she kept her face covered with a scarf when she could. There was a scar formation over the burns on her back. There was tenderness over the one in the left

lumbar region because the burns were deep there and the nerves were caught in the scar tissue but this would settle, as Mr Mendes terms it, in due course. She could not raise her left arm beyond 90° because there were contractures in the left axilla and there would be no improvement in future. The scar tissue on her back has hypotrophied in parts which made it uncomfortable for her to lie down on her back and there was unlikely to be any improvement in that quarter. He next saw her about July 9, 1982 and her condition was no better. Her expectation of life had not been shortened and she had not lost her strength. She could still bend but it would be more difficult for her to do so since this accident. The rays of the sun would cause irritation in all exposed portions of the scar tissues on her body. It was understandable if she now feared to travel by bus anywhere. None of Mr Mendes' report (Exhibit B) and evidence was challenged by the defendants. The plaintiff added to those symptoms the detail that she feels dizzy after this accident if she suddenly stands up.

She had been proposed to by her lover, a man of Kitui with some children of his own, before this accident and they would have been married in November 1975, all being well, but he broke off the union and abandoned the idea of marriage when he saw her scarred body and realized she would not be as useful a help-mate, with his and their children and land, as she would have been before the accident. She thought she might in some ways be "better off" without this man as her husband.

There appears to be no reports of any decisions by courts in this part of the world of awards for similar injuries. Those of foreign courts, although helpful as a guide, do not necessarily represent the standards which should prevail in Kenya, where the conditions relevant to the assessment of damages, such as wages, rents and the cost of living generally may be very different: per Law JA, in an *ex tempore* judgment on November 19, 1970 in *Kimothia v Bhamra Tyre Retreaders and Another* [1971] EA 81 H which was an appeal from an award of damages by Harris J for personal injuries.

Two foreign awards were cited: *Lloyds v British Airports Authority and Brocks Fireworks Limited* 1976 CA No 441 A; December 10, 1976 Megaw, Rosskill and Shaw, LJJ from Cantley, J at London and *Bromley v Reed Paper and Board (UK) Ltd*, on January 12, 1978 (unreported) by Judge Langhton-Scott, QC. They are on pages 4111 and 4011 and 4061 of Volume 2 of Kemp & Kemp on the Quantum of Damages in Personal Injury and Fatal Accident Claims, 4th edition, 1975.

Cantley J, awarded Lloyd £ 6,500 for pain, suffering and loss of amenities which the Court of Appeal increased to £ 10,500. This was at the end of 1976. Lloyd was fifty one when on August 16, 1972 he was severely burnt when he was trapped in an aircraft that caught fire. He too had burns over 50% of his body of which 20% were deep burns. They were on both hands, arms and shoulders, two thirds of the upper back, the neck and all the scalp, including the ears. His left ear was so severely burnt the top half had to be removed. He was in and out of hospital six times for his burns to heal and then for operations and he suffered agonizing pain and discomfort during all this time which was about fifteen months. He made a remarkable recovery and went back to work with different duties and less pay. His permanent disabilities were extensive and unsightly scarring of his scalp and body. He had no hair on his scalp. There was a 30% loss of flexion in his shoulder joints and some limitation of extension in the elbow joints and slight limitation of extension and supination of the wrists. There was constant irritation in his shoulders and upper arms. The skin grafting was not stable in some areas and he might have to have further treatment for this. His sex life had terminated, he tended to tire easily, he had lost a good deal of enjoyment of his life and he was a most irritable person.

Bromley was awarded £ 6,000 on January 12, 1978. He was twenty three and his right arm was caught between two moving reels. He sustained friction burns on the forearm and right hand which were minor but the upper arm was very badly scarred. Scar tissue sometimes as much as 14" x 5" extended from the side of the arm across the back of the arm and then along the back of the shoulder. He had had grafts from his right thigh and the effect was that of patchwork because within the scarring the skin was different and in turn those patches were different from the surrounding skin. Some portions were keloidal. This part of his body was "grotesquely defaced" and a severe and probably permanent embarrassment to him in his social life particularly in his relationship with young women. It hindered him in a variety of athletic pursuits he had previously enjoyed.

Mr Ghalia, for the plaintiff, submitted that the proper award here should be about Kshs 210,000. There were no words he could choose to describe the shock, pain and suffering she had undergone and the loss of amenities including the severance of her liaison with her man from Kitui and all prospect of remarriage. Lloyd was a man aged fifty one when his disaster occurred and she was thirty three and not only endured these terrible burns but also lost her small child at the same time. Lloyd's award was 51/2 years old. Mr Manek and Mr Kinyanjui for the defendants urged the court to find Kshs 12,000 or so the more appropriate compensation which is what Bromley was awarded in 1978 or four years ago. Her ears were unaffected, she had no trouble with her elbow and wrist. She did not tire easily as Lloyd did and there was nothing to suggest she was irritable now. She did not require further treatment as Lloyd did.

The photographs (Exhibit C1-5) give some indication of the plaintiff's burns and I saw them at the time of the trial. The award I make for the first part of the general damages, I will reserve to the end of the judgment, because I am anxious not to duplicate any of the factors affecting these decisions but consider them all together as a whole, though for the sake of convenience, I have divided this judgment under the same headings.

What did she prove was the probable effect of these injuries on her income in the future? When she married the husband, he had a 20 acre plot in Kitui District and when he was in Mombasa in some unstated employment, she remained at home looking after their children and two cows and chicken and cultivating this garden with maize, beans and cowpeas. When her husband died in August 1974, she began a profitable side line which was journeying by bus from Kitui to Machakos and Mombasa. She purchased chicken for Kshs 18, 19, 20, 25 according to size and ghee at Kshs 15 a bottle at Machakos and sold the chicken for Kshs 22, 23, 30 and the ghee at Kshs 30 a bottle to anyone in the street or from door to door or market who would buy them. The return bus fare was about Kshs 55 and she might spend Kshs 75 a night on accommodation here while she was disposing of her wares. The crops were used to feed her children and herself and any surplus was also sold. She made these trips about once a week and the profit was as much as Kshs 700 a trip and Kshs 800 for the surplus vegetables every two months. When the rains came twice a year to her homeland, she employed labourers at Kshs 50 a task. After the accident she could not work on the farm because she was virtually one-armed and the sun or heat upset her skin and although the children did what they could, they were away at school or too young and not a great deal of help. Her income, she claimed, had fallen from Kshs 2,000 to Kshs 700 a month as a consequence of those injuries which is a loss of Kshs 1,300 a month of Kshs 15,800 a year (£ 780).

The advocates for the defendants challenged all this. There were no records of her business; had she remarried she would have been too busy as her new husband's labourer to travel to and from Mombasa. She can travel by taxi if she is unable to do so by bus. A younger brother helps her with the fees for the schools to which her children go.

Mr Ghalia suggested that the multiplier, if she proved loss of income or earning capacity in the future, should be ten and Mr Manek and Mr Kinyanjui put it at a figure between seven and twelve.

So much for a brief survey of the salient parts of the evidence and submissions.

The plaintiff's shock, pain, suffering, loss of amenities and permanent disablement are in my judgment so great that the award of damages should be Kshs 210,000.

Her loss of earnings in the future amount to Kshs 1,200 a month which is Kshs 14,400 a year. She has not claimed any as special damages from the date of the accident to the filing of the plaint. The right multiplier is, I agree, ten. She shall have an award of Kshs 144,000 under this heading. General damages therefore amount to Kshs 354,000.

Accordingly, I enter judgment for the plaintiff against the defendants jointly and severally for Kshs 3,500 special damages and Kshs 354,000 general damages and costs and interest on those sums at court rates from the appropriate dates.

Orders accordingly.

Dated and delivered at Mombasa this 2nd day of April , 1982.

A.A Kneller

JUDGE