REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 2598 OF 1980

DUFFIELD & OTHERS................................PLAINTIFFS

VERSUS

KENYA RAILWAYS.......................................DEFENDANT

JUDGMENT

On September 16, 1979, the plaintiff was travelling with his wife, two children and *ayah*, Miss Agai, in his Peugeot 504 Station Wagon KVP 584 along the main Eldoret Uganda road, when a collision occurred at the railway level crossing, some four miles out of Eldoret, with a locomotive No 4602, owned by the defendant corporation and driven by their servant, Mr Barasa. It was a Sunday and they were going to look for giraffe. It was a bright sunny day and both the plaintiff and his wife had sunglasses. The car was virtually new and in excellent condition, including its brakes.

The plaintiff was rendered unconscious by the collision and spent a short period in Eldoret where he was taken by passers-by. Fortunately, he received only minor injuries but his car was a write-off. He therefore claims against the defendant for general and special damages for their negligence as particularized in sub-paragraph 13 of the plaint and breach of statutory duty, in particular, contravening Section 8(2)(b) of the Kenya Railways Corporation Act (Cap 397) which provides that it shall be the duty of the Board of Directors, *inter alia* to ensure.

> "that the undertaking of the Corporation is operated efficiently, economically and with due regard to safety."

The defendant's generally deny negligence and say there were adequate strips and warning signs and that the plaintiff failed to observe them or keep a proper look out.

At the time of the accident, the plaintiff said he could not exceed the running-in limit which was 100 kph. He had travelled on this road before and was not in a hurry. It was common ground that there were flag poles carrying banners, heralding a presidential visit. He was just ascending the upward gradient shown in the photograph Ex 1, when he encountered the rumble strips of which, again it is common ground, there were six on each side of the level crossing, the first on the Eldoret side being at a distance of 530 feet from the centre thereof and the last just over 100 feet. He became aware of the engine which was approaching on the track about 200 yards from the crossing. His driver's window was partly down but he heard no sound from the engine nor any whistle. Mrs Duffield said the first thing she knew was the engine silhouetted against the sky and the engine driver "whistled as he hit us … Just at impact." They could not swerve off the road to avoid the train as there was no hard shoulder and the ground sloped away steeply.

She saw what she said was a “slow” sign, though she did not say if it was in English or Swahili, but as I understand him, Mr Duffield did not see any signs on the road. Miss Agai said that she did not hear the engine at all before it hit the front offside of the car and she then lost consciousness. As to the surrounding scenery, she said that the engine was dark green in colour, as were the trees and bushes around and this would appear to be borne out by the photograph Ex B taken 11/2 years later. It was suggested by Mr Harris for the plaintiff at one stage that one way of improving the safety of the railway so far as road users were concerned would be to have the locomotives painted in a brighter colour, for example, orange or silver. Mrs Duffield said the background was of coniferous trees and that the engine was dull green in colour. The plaintiff himself said there was low grass and scrubs. “It was generally a dry area.” It is also common ground that there was a “*Pole Pole*” sign as shown in Ex B before the rumble strips, but as was emphasized repeatedly throughout the case, this would be of little use to a person new to the country as the plaintiff was and unfamiliar with Swahili unless it was accompanied, for example as was at one stage suggested, by a red triangle or by a train sign of the kind shown at p 767 of the 1974 Subsidiary Legislation.

The plaintiff’s expert witness Mr Kalsi, a former police officer, visited the scene on September 27 and took the photographs Ex 1 and Ex 2 from opposite sides of the crossing. These are unfortunately in black and white and not colour. He was emphatic that there was no railway crossed boards sign of the kind just visible in Ex B though there were three warning signs on the other side which is level (which was supported by Mr Oduor). The plaintiff and his passengers said the same. It was suggested that it is just possible to see the two poles that would normally support such a sign from the other direction in Ex 2, but even with the aid of the magnifying glass that the defendant’s last witness, the photographer, Mr Mutai, provided I would hesitate to base any finding on them. Mr Marende, for the defendant corporation said that none of the plaintiff’s witnesses could be regarded as independent and impartial, least of all Mr Kalsi because his firm was instructed on behalf of the plaintiff.

Mr Kalsi also gave the position of the whistle board on the railway track which curves round before it intersects the road, but since he said this was 310 feet, I think he must have been in error because at least three other witnesses said the whistle board was 1470 feet or thereabouts from the crossing. Possibly, he was referring to the secondary whistle board spoken of by the District Civil Engineer, Mr Chami.

The train driver, Mr Barasa, who had at least six years’ experience at the date of the accident, said he was driving this locomotive without any carriages along the track away from Eldoret and that the accident occurred at mile 129/4. He blew his whistle at this board. He was driving at 15 mph. He saw the car moving fast but though he applied the emergency brakes (the train has no other brakes, relying on its own weight and lack of momentum to slow down or stop), he was unable to avoid the collision. Though the engine was green and the nearby shrubs of similar colour, these were not tall, as the railway staff kept the area clear, the required limit being 300 feet each side of the crossing. He produced his report Ex D. In that report, he said as he did in evidence, that the car was coming “at a high speed” and commented as to the cause of the accident:

> “The car driver failed to observe signals of the level crossing.”

In evidence he said:

> “I did not stop before because I whistled and the motorist should stop.”

Apparently he slowed to 10 mph before the whistle board.

The second witness, Mr Kiprono from the locomotive shed in Eldoret, had twenty one years’ experience with the Railway. He had checked this engine 4602, which weighed, according to Mr Chami, 49 tons as to its oil, brakes, diesel, fuel and so on. It was in perfect condition and no one suggested otherwise throughout the case. I have no doubt he was talking about the same engine. The permanent way inspector, who had even longer service, went to the scene the next day and took measurements. He maintained that there was a crossed boards sign 100 feet the Eldoret side of the crossing and also that there was a sign saying “Slow Down” above the ‘*Pole Pole*’ sign, 812 feet from the crossing. There were also, 300 feet

from the centre of the track, two upright sleepers painted in yellow, indicating the limit of the cleared area. He inspected the area regularly having done so on August 1, before going on leave. According to Mr Chami, it was this witness' responsibility to replace a crossed boards sign if it had been knocked down by motorists swerving off the road to avoid the rumble strips. Mr Oduor did say that the gang would report a missing sign but that there was no such report on the 27th. He maintained that the requisite area was cleared and the visibility good. Under crossexamination, he could not explain why Mr Kalsi had seen no crossed boards sign on the Eldoret side on the 27th.

As with some of the other defendant's witnesses, Mr Oduor was astute to demarcate the responsibility for the various signs between the railways and the road authority. I think there can be no doubt from Mr Chami's and Mr Achieng's evidence that the railways regarded the cross boards sign as their special responsibility and the others of the Ministry of Transport. Whether their duty under the Act is thereby discharged is one of the matters which I shall have to decide in this case. Mr Oduor did add that, as Mr Chami subsequently said, if a crossed board's sign was missing, it would be replaced immediately. The railway track gradient at that point was 1% falling away from Eldoret.

Mr Achieng, the Assistant Traffic Superintendent went with PC (now Cpl) Lankeo, then attached to Eldoret Railway Police Station, to the scene at 1 pm just after the accident. They gave similar measurements to Mr Kalsi, save for the whistle board. Mr Achieng was not absolutely certain, but could not at first remember the crossed boards sign not being there as usual. Later he became certain, while PC Lankeo was quite definite, that it was there as was the '*Pole Pole*' sign. The visibility was good except for one tree, the area having been cleared. The police officer said that the surrounding scenery was similar to that shown in Ex B, taken, I again emphasize, nineteen months later. Mr Achieng said that it was better to have three long blasts on the whistle rather than continuous ones lest it be taken for a eg a siren. Again Mr Achieng's attitude was that it was "laid down" that the train had the right of way. He did not think the flags or 'buntings' would divert a driver's attention. There was much crossexamination of the witness as of Mr Kutai as to the crossed boards sign being visible in Ex B but not in Ex 1 or 2. Clearly it is near the upright pole just on the Eldoret side of the track; but it is equally obvious that whether it is in line with it or not must depend on the angle from which the photograph is being taken. At least Mr Kalsi's photographs, if not in colour, had the merit of being taken approximately a driver's view point.

I come to Mr Chami's evidence, I was impressed with him. He was, to my mind, absolutely fair and objective. He had been with the Railways for fourteen years and District Civil Engineer for six years. He detailed the visibility standards which were, as Mr Harris emphasized, set by the railways themselves. The most important feature of his evidence was as to the crossed boards sign. The 'St Andrews' or international sign as seen in Ex 2 on the Uganda side is the one now used. But if knocked down they replaced it immediately with the older type from their stores. The older type is familiar to Kenyan road users and is just visible in Ex B and more clearly so in Ex A, also taken by Mr Kutai from the other side of the road. The fact that the old one is shown, even in April 1981, was an indication that the international one previously on the Eldoret side had been knocked down at some time. After very intensive cross-examination from Mr Harris, I understood Mr Chami to agree that there could be an interval in time before replacement was effected. The regulation speed limit for an engine on this Eldoret Leseru section of the track was 35 mph. If it was going at 15 mph as the train driver had maintained, then he should be able to stop within 150 feet if emergency brakes were applied and, of course, 'thinking' time would have to be added to that. At 35 mph it would take 660 feet to stop the train. Either way, it should be able to stop well within the section from the whistle board to the crossing. It seems that the driver first saw the car at the point where the track curves round to cross the road, but he did not give the approximate distance. It seems there were also some improvements, such as 'flyover' "in train" but this was said not to be because the crossing was admitted to be dangerous, but because the increased road traffic justified it and to enhance safety. The suggestion that this crossing should be guarded rather than unguarded did not seem to find favour with the corporation witnesses.

When pressed by Mr Harris in cross-examination, Mr Chami could not gainsay that it was possible that there was an interval of time when there was no sign. While the present crossing was not, in Mr Chami's opinion, dangerous, the proposals he outlined would enhance safety. Indeed, as I understood him he was saying that the need to improve was because of the constantly increasing traffic. It was upon the motorist

to exercise due care and in his view, whatever signs there were or were not the rumble strips in themselves would warn the motorist of the approaching danger. A "Stop" sign would not make it safer because:

"It is for the motorist. He has to stop."

This to some extent typifies the "fundamentally wrong attitude" of train drivers referred to by Spry JA in *Railways v Corporation EA Road Services* (*infra*) at p 133. One remark however, I did find significant was his very similar answer to that of Mr Kalsi:

> "The colour of the vegetation is more or less the same "(as the engine)" you might miss the engine if you did not hear the whistle or the train and the (car) windows (were) closed."

and again

> "Q. At 500 yards you might not hear (the whistle)
> A. Quite possible. It depends."

Whereas Mr Kalsi had said:

> "Going towards Uganda on 27th you would not be aware till 150 feet before. Two speed bumps. As the ground levels off and you can see tracks. If you did not know."

Nearly all the witnesses referred to another accident at this point in which the German Ambassador was said to have been killed and I accept, as Mr Chami eventually admitted, there had been at least one other accident at this crossing.

To my mind, although Mr Duffield was an Engineer and technically qualified, he was nothing like as good a witness as his wife. However, having assessed the relative credibility of all the witnesses, I believe all three occupants of the car when they say there was no crossed boards sign on the Eldoret side at the time of the accident. I reject the defence evidence to the contrary. I think that what clearly happened was that Mr Chami's explanation as to what happened to these crossed board signs had happened on this occasion and that there was an interval of time including the 16th when there was no such board and I so find. After considering all the evidence, I make the following further findings:

1. That there was good visibility at least to within 300 feet of the centre line of the crossing.
2. That the train driver was travelling at 15 mph.
3. That he did whistle continuously from the whistle board 1470 feet away from the crossing and applied his (only) emergency brakes.
4. That this was not heard before the very moment of impact by any of the occupants of the car.
5. That there was a '*Pole Pole*' sign only and no other before the rumble strips commenced.
6. That there were six rumble strips ranging from a distance of 530 feet downwards towards the crossing.
7. That there was a considerable uphill gradient at this point.
8. That Mr Duffield was travelling at about 100 kph when he encountered the first rumble strip.
9. That he saw no sign of the crossing and was not aware of it or any other hazard, not having travelled on this road before, until he encountered these strips.
10. That he saw the train for the first time when he was about 200 yards from the crossing.
11. That there were buntings on each side of the road but that this did not interfere with his visibility.
12. That there had been at least one serious accident involving a death at the crossing previously (some details of this were given by Mr Oduor).

It was also common ground that Mr Duffield pleaded guilty to a charge under section 67(j) of the Act, as is pleaded in the defence. He was committed and fined Kshs 250. The offence connotes a degree of lack of care, similar to that under the Traffic Act (Cap 403). Under the authority of Trevelyan J in *Queens Cleaners v EA Community* [1972] EA 228, citing *Robinson v Oluoch* [1971] EA at p 378, that must connote some negligence because of section 47A of the Evidence Act, and Mr Harris, fairly and rightly,

in my view, and concedes that. He said it might possibly be more than the 15% which Miller J (as he then was) found the lorry driver to blame for the death of the motor-cyclist who overtook him in *Osawa v Barua Estate* HCCC 2549/76. It matters not why he pleaded guilty. There it was because he was an uneducated man who did not fully understand the effect of section 47A. Here it was on advice, to save time, trouble and expense. But as Trevelyan J said, one cannot pierce the plea of guilty to find out why because to do so would qualify that which the legislature had enacted should be conclusive. So I hold that the plaintiff was contributorily negligent.

As to the railways there are two branches of possible liability, first the Corporation for not providing proper or adequate safety precautions, either under a duty of care or the Statute; secondly and vicariously for the train driver if he failed to exercise due care.

The latest reported EA case is *Railways Corporation v EA Road Services* [1975] EA 128 in which the trial Judge held the bus driver 25% to blame and the train driver 75%. On appeal, Musoke JA would have altered this to 60% and 40% respectively, but the majority upheld the judge. Mr Harris relied on a dictum of Spry JA commenting on a fundamentally wrong attitude of the train driver and I have to see whether that of the defence witness in this case, almost unanimous as they were, as to the train driver and motorists' duties, can be so characterized. Of course that was a case which happened at night and so as Spry JA observed, surrounding foliage was of lesser importance; but he did say:

> "I accept that the driver of a train is in a very special position, quite unlike that of the driver of a motor vehicle. He cannot swerve and a heavy train cannot be stopped in a short distance. For this reason road traffic should give way to rail traffic at crossings."

Wicks J's case was also at night. That case HCCC 420 of 1970, *Railway Corporation v Wairegi*, was cited by Mr Marende. The train driver and the Railways were exonerated. But of course there were no less than four warning signs on the Nairobi side of the crossing, namely:
i) At 590 ft a Road Authority warning board of a level crossing.
ii) At 387 ft a Railways 'beware of train' sign
iii) At 355 ft a Railways 'check engine silhouette' sign
iv) At 56 ft a Railways level crossing board, probably the crossed boards.

The first reported EA case was *James v Commissioner of Transport* [1958] EA 314, though I observe at once that this was what is called an accommodation crossing and Goudie J said that English decisions can only be a useful guide to a situation arising from vastly different conditions here. Morris LJ's statement of the law in *Lloyds Bank v British Transport Commission* [1956] 3 All ER at p 295-6 was quoted, but I have checked that report and this passage does not appear there. However at p 298, Morris LJ said:

> "I think it is undesirable to seek to equate the approach to this matter to that made to the driving of a motor car along a public thoroughfare. The driving of a train and the driving of a motor car are two quite different things. A train has priority on its track; it is being driven on a fixed track; it is normally expected to proceed to a time schedule; the driver has obligations to look out for signals by which in the main running of the train along the track is controlled. Of course he has a duty to all that is reasonable to keep a look out along the path that he will travel and to watch for any obstructions that there may be on the line. But I think that it would be too exacting to require him to look sideways to see whether something was approaching from a side road. He has the responsibilities of seeing that his engine is in proper condition and that the signals permit of his progress."

It must be emphasized that that too was an accommodation crossing case. However in *Trznadel v British Transport Commission* [1957] 3 All ER at p 198 the same Lord Justice said:

> "An engine-driver's duties are entirely different (from that of an ordinary driver). The engine-driver is driving on fixed tracks; he is driving on private property; he had, of course to watch for the signals and he has to have in mind that he is driving to a schedule of time. He must take all reasonable steps that he can to ensure that he stops if there is any obstacle ahead. It is not,

> however, like a roadway and those who have permission to use a railway track use the track with the knowledge that a train may be coming which is being driven at speed and cannot be pulled up in a very short space of time and which is being driven by an engine-driver who cannot have that full check on everything that is on the track that the driver of a motor car on a road must be expected to have."

As to the position of the Railway authority at an ordinary level crossing, I have found that which I consider to be an admissible statement of the law by Mukasa Ag J in *EA Railway v Lalani* [1970] at p 444 as follows:

> "In cases of crossings over a public road the railway authorities have a duty to ensure the safe operation of the railway. They must be considerate about some people who will be crossing without knowing that trains also cross a level. It is not like a case of an accommodation crossing where the person does use it, well aware that trains do cross and they must approach it with care."

I am content to adopt that passage as representing this law, coupled as it was with Denning LJ's statement in *Lloyds Bank v Railway Executive* [1952] 1 All ER at p 1253:

> "It is I think now clearly established that the defendants must take reasonable care to prevent danger at these crossings and this is an obligation which keeps pace with the times. As the danger increases, so must their precautions increase. The defendants cannot stand by while accidents happen and say: 'This increased traffic on the road is no concern of ours.' It is their concern. It is their trains which help to cause the accidents and it is often the increased number of trains which increases the danger as well as the increased traffic on the road. The defendants must therefore do whatever is reasonable on their part to prevent the accidents."

The other citation I wish to make is as regards the situation of a person to whom the crossing was well known (as in *James'* case (supra)) as opposed to a stranger to it. It is from Scrutton LJ in *Burrows v Southern Railway* set out in *Knight v GWR* [1942] 2 All ER at p 287:

> "But I ask myself and I have considered the evidence very carefully, whether at this crossing as we see it and on the facts we know, there was anything to distinguish it from any other private crossing where the railway company has for some reasons granted rights to particular people in the locality but not to the whole public, because obviously there are great differences between cases where any member of the public, not having seen the crossing before may come to a crossing and cases where the crossing is only used by people who are always using it because they are in the locality and using it for the purposes of business."

In my view, the endorsement below the "St Andrews Cross" sign at p 762 of the 1974 Subsidiary Legislation put forward by Mr Marende:

> "All vehicles must give way to any train on or near crossing."

must be taken in the light of the above statements of the law by Mukasa Ag J and Denning LJ. However, the plaintiff said:

> "Normally if you see a locomotive you slow. If I see the crossed sign I would only stop if I see an engine on or near the crossing."

He maintained that the strips tended to accentuate rather than reduce his speed, as only half the brakes would be operating at a given moment.

With all these principles and the facts in mind, I consider the plaintiff was going up this incline at the top of which visibility ceases too fast. He should have kept a look out and proceeded as a prudent road user. He should have reduced speed before the rumble strips as he saw the engine 200 yards ie 600 feet away, 70 feet earlier than the rumble strips which I should consider have further warned him of danger.

At the same time, bearing in my mind the above dicta of Mukasa Ag J and Denning LJ and indeed of Spry VP, I consider the railways adopted an unduly arrogant view of their rights. This may have led them not to be too careful about signs. Even the crossed boards sign would have helped but apart from that, it is in my judgment useless for them to say that it is such and such a Ministry who must provide the warning signs. It is their duty under section 8(2)(b), whatever other concurrent duties there may be, and the failure to provide adequate signs well in advance of the crossing was also in my judgment a breach both of their statutory duty and their duty of care. The '*Pole Pole*' sign alone is quite inadequate. In my view, the train driver was not negligent. In this I have taken account of the fact that various particulars of negligence alleged by the plaintiff were curiously adopted in para 4 of the defence. After due consideration of all the facts found, the circumstances and the authorities I have endeavoured to set out, I consider the railway authority was 55% to blame for this accident. The plaintiff was, in my view, 45% to blame.

Certain items of special damage were admitted and some were testified to by Mr Mulwa (PW 5). I assess special damages, as accepted by Mr Marende at Kshs 119,328 on the basis of 100% liability. As to special damages, the injuries were, mercifully, relatively minor. In 1958, in a similar case Goudie Ag J gave £ 300, but the plaintiff was then in hospital two or three days as opposed to a few hours here. No stitches were needed and as far as I know there is no residual injury. This accident occurred over twenty years later. Taking everything into account, I award the plaintiff £ 600 as general damages ie Kshs 12,000. There will therefore be judgment for him for 55% of Kshs 131,328 ie Kshs 72,230.40 plus interest and costs as prayed.

Dated and delivered at Nairobi this 3rd day of December, 1982.

A.R.W HANCOX

JUDGE