IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Madan, Potter JJA & Simpson Ag JA)

CIVIL APPEAL NO. 36 OF 1980

BETWEEN

GAKERE.....APPELLANT

AND

NGIGI.....RESPONDENT

JUDGMENT

Simpson Ag JA On July 13, 1975, at about 8.30 am the respondent in this appeal driving his Mercedes Benz Motor car registration number KLT 335 from Nakuru towards Nairobi was involved in an accident with a car registration number KMM 641 travelling in the opposite direction. The respondent was seriously injured. Alleging negligence on the part of the driver of the peugeot, the respondent sued him (as second defendant) and the owner of the peugeot (as first defendant) in the High Court at Nakuru for general and special damage occasioned by such negligence. The learned judge found that the 2nd defendant had been negligent but that the plaintiff/respondent had contributed towards the accident. He assessed this contributory negligence at 10% and awarded the plaintiff general damages amounting to Kshs 198,000 being 90% of Kshs 220,000. He ordered the defendants to pay special damages amounting to Kshs 5,000 and 90% of the costs of the suit with interest thereon at court rates.

The defendants now appeal on two grounds, first, that the learned Judge erred in law and on facts in finding the respondent guilty of contributory negligence to the extent of 10% only and in not finding that the respondent was equally responsible for the collision and second, that the general damages awarded were manifestly excessive.

Mr Satish Gautama appearing with Mr Pramond Patel for the appellants submitted that the drivers of the two vehicles were equally to blame and damages should have been apportioned equally. To allocate only 10% of the blame to the respondent was illogical. He took no avoiding action nor did he slow down. Mr Gautama said he accepted every primary finding of fact in the judgment of the learned judge.

The evidence may be briefly summarised as follows:

The plaintiff/respondent saw the peugeot approaching in a zigzag manner being driven very fast. As the vehicle came nearer it moved to his side of the road. The plaintiff slowed down from about 60 kph almost to a standstill and pulled over further to his side of the road. “At the point of impact,” he said, “the other vehicle was completely on my side of the road.” After the impact his car “got out of control …and moved

to the other right side of the road." In cross-examination the plaintiff said "I did move off the tarmac road on the left side - I moved slightly off the tarmac road to the murram road. From my own memory, the point of impact was on my side of the road - on the murram. I cannot tell if my car was wholly on the murram road." He also said "When there was a collision most of my vehicle was on the murram road."

A police constable who visited the scene later in the morning found the mercedes stationary on the offside of the road facing Naivasha on the grass verge. The peugeot was on the same side. He was able to determine the point of impact from the presence of dried mud and broken glass from both vehicles from slight scratches on the surface of the road. The road had a general width of 20 feet but where the collision occurred it was 18 feet 4 inches wide. The point of impact was 4 feet 7 inches from the left-hand edge when one faces in the Naivasha direction. It was possible to go off the tarmac in an emergency but he saw nothing suggesting that either of the cars tried to leave the road.

Counsel for the defendants/appellants had no evidence to adduce.

The learned judge accepted the evidence that the plaintiff saw the other vehicle being driven towards him in a zigzag manner and that it was being driven fast "definitely much faster than the speed at which the plaintiff was driving fast. The only reason for this finding appears to be that the road being straight and clear there would be a temptation to drive fast but such a finding I think can be supported by the fact that the appellant's car finished up on the other side of the road approximately 260 feet from the point of impact according to the sketch plan and accompanying legend produced by the police constable.

"There wasn't the evidence to suggest that the plaintiff was reckless or negligent in the manner of his driving. It is relevant that the plaintiff had in his car his wife and children. The fact that the other vehicle was zigzagging at high speed did frustrate the plaintiff's ability to take avoiding steps. There is no certainty or likelihood that the plaintiff would have escaped injuries by braking or by reducing speed. The plaintiff was as it were confronted with a vehicle at high speed which was zigzagging. It was not possible to tell even with the coolest of judgment where the vehicle would land or hit."

At this stage in his judgment the learned Judge appears to tend towards the view that the second defendant was solely to blame for the accident.

He then however proceeded to express the opinion that had the plaintiff been driving almost completely off the tarmac, the accident could have been avoided. The plaintiff thus contributed to the accident by driving so fast that he could not avoid the accident. As appears from the following passage the Judge was unable to believe that the plaintiff took avoiding action by driving off the tarmac. He said —

"Still, the plaintiff's vehicle ought to have been completely on its correct side when it was hit. But it was not because the point of impact was near the centre of that road. And there was no evidence that the plaintiff's vehicle moved or was caused to move or swerve from its correct side towards the center of the material road. The evidence does not support the plaintiff's assertion that 'at the point of impact the other vehicle was completely on my side of the road'".

There is however no evidence from which it might be inferred that the appellant's vehicle was not completely on its correct side nor is there evidence (other than some answers given by the police constable in cross-examination which are at variance with the rest of his evidence) that the point of impact was near the centre of the road. According to the constable the point of impact was 4 feet 7 inches from the left hand edge of the road facing Naivasha. There is no evidence of the damage to the respondent's vehicle except that the steering collapsed and the damage to the other vehicle according to the police abstract was to the offside rear. It would appear therefore that the front of the respondent's vehicle collided with the offside rear of the appellant's vehicle 4 feet 7 inches from the edge of the road at the respondent's side. If this is so the respondent's vehicle was completely on its correct side of the road and the appellants' vehicle was well over the mid-line of the road which at that point was 18 feet 4 inches wide. According to the evidence to which I have already referred, the width of each vehicle was 5 feet thus with its offside rear 4 feet 7 inches over the mid-line the peugeot even if its driver was attempting to return to his correct side when the collision occurred was very nearly completely on the respondent's side

of the road, although the constable was persuaded to say in cross-examination: “the point of impact is near the middle of the road.” When he said “The point of impact is not near the centre of the road - the point is a bit nearer to the middle of the road,” the constable presumably meant that the point of impact was nearer the middle of the road than the edge of the road as it indeed appears on the sketch plan (which is clearly not to scale), but according to his measurements it was approximately mid-way between the edge of the road and the middle of the road. Had the learned Judge examined the sketch plan and the legend in conjunction with the evidence of the police constable he would undoubtedly have found that the respondent’s vehicle was almost completely on its wrong side. He would not then have written the foregoing passage relied upon by the appellants. Indeed this passage is inconsistent with the conclusion of the Judge:

“The plaintiff was driving fast, reasonably fast but failed to take avoiding steps because of his speed and because of the zig-zagging of the other vehicle. He did contribute to the accident. I do not find that the plaintiff was driving a bit too fast – so fast that he could not avoid the accident. The plaintiff did contribute to the accident. I do not find that the plaintiff was guilty of substantial negligence. The negligent act on the part of the plaintiff is that he was driving a bit too fast - so fast that he could not avoid the accident. The plaintiff was hit on his correct side.”

The respondent was faced with a vehicle travelling towards him at speed on the side of the road. There is authority to which our attention was invited by Mr Bowry who appeared for the respondent, for holding that in such a dilemma a driver is not negligent if a collision occurs because he fails to take the appropriate avoiding action, but each case must be decided on its own particular facts. While the Judge might perhaps have been justified in concluding that no blame attached to the plaintiff I am not inclined to the view that he erred in finding some slight degree of negligence on his part. An alert and reasonably competent driver could probably have avoided a collision by reducing the zigzag approach of the other vehicle and by driving on to the murram verge. There is in any event no cross-appeal. In his discretion, the learned Judge assessed the degree of contributory negligence at 10%. I can see not reason to hold that it should have been higher.

I turn now to the second ground of appeal. Damages appear to have been assessed by the Judge in an undated ruling subsequent to the judgment and the record before us contains no submissions with respect to damages.

According to the surgeon’s report the respondent sustained the following injuries:

“1. Crack fracture at the base of the neck of the femur, comminuted fractures of the shaft of the femur.

2. Oblique fracture of the lower third of the right tibia.

3. Minor crack fracture at the lower end of the right tibia at the ankle joint.

4. Loss of skin about the ankle.

He also suffered from some concussion.”

He was discharged from hospital on October 24, 1975 and thereafter attended as an outpatient for dressings of skin ulcers near the ankle until the end of November. While in hospital the leg was operated on twice. Treatment included manipulation and skeletal traction with the limb on a Thomas’s splint. The plaster was removed at the end of December. The respondent used elbow crutches until April the in the following year. According to the surgeon he undoubtedly suffered a great deal of pain and discomfort as a result of his injuries. There is a 1.6” shortening of the lower limb and a 0.4” wasting of the right quadriceps muscle. He walks with a marked limp and is no longer able to play squash, tennis, football or golf or to walk around his farm. Osteoarthritis of the ankle joint is a likely complication. At the time he gave evidence the respondent was 40 years of age and still suffered pain particularly in cold weather.

In his ruling the Judge cited only one case, *Bhogal v Burbridge & Another* [1975] EA 285 Mr Gautama

submitted that the Judge had misdirected himself in seeking assistance from that case which he said was not comparable, the injuries being much more serious than those suffered by the respondent in this case. The injuries were described by Law Ag P as follows:

"Mr Burbridge suffered multiple injuries in the accident, including a comminuted fracture of the upper end of the left tibia, a fracture of the left ankle, a fracture of the left wrist, cerebral concussion and a laceration of the left temporal region of the head. His condition at the time of trial, more than four years after the accident, was that the wrist and ulna fractures had not properly united, nor had that of the femur. There was osteoarthritis in the knee. He still could not walk more than half a mile without suffering severe pain, and was therefore quite incapable of active farm work. The arthritis will get worse. Further operations may be necessary to fuse joints where there has been incomplete union."

Mr Burbridge also suffered deterioration of his eyesight which was in some measure a consequence of the accident. The trial Judge's award of Kshs 300,000 was reduced by the court of Appeal for East Africa to Kshs 220,000. The learned Judge in the present case made no mention of inflation. Whether or not he had it in mind there is no doubt that had the case been heard today the court would have awarded Mr Burbridge a very much higher figure. Since we are not aware of any other comparable case cited to the learned trial Judge it cannot be said that he misdirected himself in seeking assistance from the *Burbridge* case.

Mr Gautama referred us to a comparable English case *Merritt v Strutt* 10-319 in Kemp - vol 11 in which an award of £5000 was increased by the Court of Appeal to £6500 but this was in 1972. He also invited our attention to two recent English awards contained in the 1979 Current Law Year Book. In *Lewis v Gray* (No 719) £5500 was awarded for a comminuted fracture of the left femur and bruising to the neck and left shoulder. From the brief details given it is apparent that the injuries sustained in that case were by no means as serious as those sustained by Mr. Ngigi in the present case. In *Hopkins v Mccluskie* – Beattie (No 720) not only were the injuries less serious but the amount £5000 was an agreed settlement. No other cases were cited by Mr Gautama. The appellants in my opinion have failed to show that the learned trial Judge acted on any wrong principle, that he in any way misapprehended the relevant facts or that the award was so high as to be entirely erroneous. I see no reason for reducing the award of general damages and would dismiss the appeal with costs to the respondent.

Madan JA. The appellants unreservedly accept every finding of fact made by the learned trial judge. The more essential ones are that before the collision the respondent who had his wife and children with him in the vehicle at the time was driving on his correct side of the road; he was neither reckless nor negligent in the manner of his driving. The other vehicle was being driven towards him zigzag at high speed and definitely much faster than the speed at which he was driving; it was travelling at a speed which frustrated the respondent's ability to take avoiding steps and there was no certainty that the respondent would have escaped injury by braking or reducing speed, it being not possible to tell with the coolest of judgement where the other vehicle would land or hit. The respondent's vehicle was hit when it was completely on its correct side, and the appellant's vehicle was almost completely on its wrong side. The dilemma which faced the respondent was that a vehicle travelling at a fast speed was approaching him zigzagging on the wrong side of the road.

A driver who is neither negligent nor reckless and is driving on his correct side of the road and a vehicle is approaching him from the opposite direction on the wrong side of the road zigzagging at high speed which is much faster than the driver's own speed and which frustrates his ability to take avoiding action in circumstances when it is also not possible to tell even with the coolest of judgment where the other vehicle will land or hit or that injury will be avoided by braking or reducing speed, it would be unwarranted unless there is some special circumstances to justify it, to place the burden of a higher degree of care upon such a driver for it would require of him a computer precision reaction which I fear human beings are not yet capable of.

Again, subject to each case being judged upon its own facts those who make assessment of general damages for personal injuries and those who challenge the quantum to reduce it must realize that the old values have taken a heavy tumble and they still continue to go down because of the enormous fall in the

value of money and the persisting inflation, that now comparisons with the old awards though no doubt reasonable at the time according to the wisdom of those who made them could hardly be realistic.

As **Potter JA** agrees, it is so ordered.

Dated and Delivered at Nairobi this 29th day of January 1981.

C.B.MADAN

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

A.H.SIMPSON

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR