IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Madan, Law & Potter JJA)

CIVIL APPEAL NO. 1 OF 1979

BETWEEN

KAGO.....APPELLANT

AND

NJENGA.....RESPONDENT

JUDGMENT

Law JA The appellant was the plaintiff in a suit tried in the High Court in which he claimed damages for injuries suffered by him in an accident when a car, in which he was a passenger, collided with a bus which was being driven in the opposite direction by the second respondent, an employee of the first respondent. The plaint alleged that the accident was caused by the negligence of the second respondent, and the plaintiff further relied on the doctrine of *res ipsa loquitur*. By their defence, the respondents denied negligence, and pleaded that the accident occurred on account of factors beyond the driver's control, namely the bursting of the bus off-side front tyre.

The learned trial Judge (Miller J as he then was) found that the accident was not due to any negligence on the part of the driver and dismissed the suit. From that decision, the appellant now appeals.

The facts of the case are that on the July 8, 1974, the second respondent (hereinafter referred to as "the driver") was driving his employer's bus in the direction of Nairobi along the Naivasha- Nairobi road. The appellant was a passenger in a saloon car being driven in the opposite direction by Kamau Maina, who was killed in the accident. The road at the scene of the accident, which occurred at about 5.30 pm near Dagoretti, was straight and inclined down-hill towards Nairobi. The road surface was tarmac, 21 ft wide, with a 5 ft verge on each side. It had been raining, and the road surface was wet. The point of impact was just over the crown of the road, on the bus' wrong side. This was admitted by the driver. In these circumstances it was agreed that it was for the defence to begin. For the defence to rebut the presumption of negligence arising from "*res ipsa Loquitur*", it was for the defendants to avoid liability by showing either that there was no negligence on their part which contributed to the accident, or that there was a probable cause of the accident which did not connote negligence on their part, or that the accident was due to circumstances not within their control (see *Msuri Muhhddin v Nazzor bin Seif el Kassaby and Another* [1960] EA 201).

The driver gave evidence to the following effect. He had been a licensed driver for seventeen years and had never been involved in an accident. On the material day, his off-side front tyre suddenly burst with a noise like a gun. He could not turn to his left, because of the burst tyre, nor could he prevent the bus going

over the white line-dividing the road where it was struck at an angle by the oncoming car in which the appellant was a passenger. He was doing about 30 miles an hour. The tyre was a Firestone tyre, bought three months before, during which time it had done about 10,000 miles. The bus and its tyres were checked daily. In crossexamination he said that the tyre burst about 30 to 35 ft from the point of impact, and the bus could not then be controlled. The owner of the bus gave evidence to the effect that the bus was checked personally by him every day, and that he had bought the tyre which burst three months before. A Goverment Vehicle Examiner, Mr William Gateru, deposed that he examined the bus at the scene. It was in good mechanical condition. The off-side front tyre had burst. It was not a retreaded tyre, and had good "threads" (I think he must have meant "tread") and was in good condition before the accident. He had come across other instances of Firestone tyres bursting. He could not say whether the tyre burst before the accident or as a result of the impact. The appellant called as his first witness Inspector of Police Peter Wasike who deposed that he visited the scene two or three hours after the accident. He did not add much to the evidence already given, beyond saying that the bus and car finished up off the road, some 84 ft from the point of impact, touching each other, and he produced a rough sketch plan showing the point of impact as being just over the crown of the road on the bus' wrong side, and the point where the vehicles came to rest. He does not seem to have examined or even noticed the burst tyre. A passenger in the car, David Kimani, then gave evidence. He deposed that he was one of five persons in the saloon car., which was going up-hill at about 20 miles an hour, when he heard the driver say "what is that bus doing?" He saw the bus coming towards the car, trying to overtake a Volkswagen car ahead of the bus. There was a collision. The appellant then gave evidence. He was sitting behind the driver of the car, and heard him say "what of this bus?" He looked up, saw a bus, heard a bang, and knew no more. He said he was unconscious for 11/2 months, and it was admitted that he suffered very sever injuries as a result of which his right arm was amputated above the elbow.

The learned judge, after a full consideration of the evidence, came to the following findings —

1) the cardinal factor causing the accident was the bursting of the tyre.

2) that no negligence on the part of the bus driver had been proved

He accordingly dismissed the appellant's suit.

From this decision the appellant has appealed. Mr DN Khanna for the appellant has put forward a number of grounds of appeal which I will now consider. This being a first appeal, it is by way of re-trial and this Court is in as good a position as the learned judge to make findings of fact and to draw inferences from those facts, but should bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, see *Selle v Associated Motor Boat Co Ltd* [1968] EA 123. With these considerations in mind I approach the first ground of appeal, which is that the learned judge erred in not holding that the second defendant was negligent in overtaking a Volkswagen vehicle in face of an oncoming vehicle. For this ground to succeed, this Court would have to accept the evidence of David Kimani to the effect that the cause of the accident was the driver's negligence in overtaking another vehicle when it was not safe to do so. The learned judge did not say specifically that he rejected this evidence, but he must have rejected it in view of his finding that no negligence had been proved against the driver. On my own evaluation of the facts, I would have come to the same conclusion, for two reasons. Firstly, it was not pleaded as a particular of negligence that the bus was overtaking another vehicle when it was not safe to do so. Secondly, although the driver gave evidence before David Kimani, it was never suggested to him in cross-examination that the accident was caused in that way. I infer from this that David Kimani's story about dangerous overtaking was an after thought, and I reject it. I would dismiss this ground of appeal. The second, fourth and fifth grounds of appeal are directed against the findings of the learned judge that the bus' tyre burst before collision, the only direct evidence was that of the driver. The learned judge believe his evidence. He said "I think... it is more reasonable to accept the story of the burst tyre placing the bus off course out of control". The evidence of the Government Vehicle Examiner was that the tyre, although in good condition, had burst. He could not say whether it had burst before or after the impact. In my view, it cannot be said that the learned judge's conclusion of fact that the tyre burst before the collision occurred was wrong, or that his inference that the accident was inevitable was unreasonable. A somewhat similar case is that of *Embu Public Road Services v Riimi* [1968] EA 22.

That was also a case of burst tyre, after which a bus overturned, causing injuries to the respondent who successfully sued for damages. The appeal was dismissed, because it was held that the bus should not have overturned, although the tyre had burst, had the driver taken that amount of corrective action which should be expected of a competent driver. The driver had been guilty of negligence after the tyre burst. In the instant case, no such negligence was established against the driver. Faced with a sudden emergency, he did all that could be expected of a reasonably competent driver, but could not prevent the bus from moving over the crown of the road. I would dismiss these grounds of appeal, and also the final ground, that the learned judge erred in finding that *res ipsa loquitur* did not apply. As the defendants established satisfactorily that the accident happened without negligence on the part of the driver, and that they both made a reasonably careful visual inspection of the bus and its tyres daily to ensure there were no defects, the *prima facie* presumption arising from the circumstances of the accident was displaced.

I would accordingly dismiss this appeal with costs. I would not certify for two advocates. I share the learned judge's sympathy for the appellant, who was blameless but who remains uncompensated. The result of this case might have been very different if the appellant had joined as a defendant the legal representative of the deceased driver of the car in which the appellant was a passenger.

As **Madan** and **Potter JJA** agree, it is so ordered.

Dated and Delivered at Nairobi this 29th day of June 1979.

C.B MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR