**Dhukale v Universal Tpt Co and others**

**Division:** High Court of Kenya at Mombasa

**Date of judgment:** 27 May 1974

**Case Number:** 2/1971 (110/74)

**Before:** Sir Dermot Sheridan J

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*[1] Evidence – Privilege – Police traffic file – Generally not privileged – Evidence Act* (*Cap*. 80) s. 132

(*K.*).

*[2] Evidence – Privilege – Observations of public officer – Not privileged – Evidence Act* (*Cap*. 80) s.

132 (*K*.).

**JUDGMENT**

**Sir Dermot Sheridan J:** The Officer-in-Charge of Voi police station was summoned under O. 15 r. 1 of the Civil Procedure Rules to appear in court on 20 May 1974 to give evidence on behalf of the plaintiff and to produce the police accident file relating to her claim against the four defendants for damages for negligence arising out of an accident which occurred on 27 April 1970 when the vehicle owned by the first defendant, in which she was a passenger, collided with the vehicle owned by the third defendant on the Mombasa-Nairobi road and she was injured. By a letter dated 16 May from the O.C. Police Voi to the Deputy Registrar, High Court Mombasa, with a copy to the Senior Assistant Commissioner of Police Mombasa with a reference to F.O. No. 20/73 re Production of Traffic Investigation Files in Civil Cases, it is stated– “The Officer will attend Court as summoned but will not produce the requested accident file because this will amount to infringement of State copyright. The Officer will claim for privilege following the ruling in the case of *Mohindra v. Mathras Dass* (1941), 19 K.L.R. 67.” The Force Order dated 1 October 1973 is in the following terms: “*Production of Traffic Investigation Files in Civil Cases* It has come to notice that the officers-in-charge of Police Stations are receiving civil summonses (civil 16A) addressed to them, in respect of civil cases arising out of traffic accidents which are endorsed in the following terms. (i) ‘To produce Police Record of the accident which occurred on (date) together with all relevant documents also the Police investigation file traffic case No. (stated) and to give evidence.’ ( ii) Officers in charge of Police Stations are reminded that the production of any document, photograph, sketch plan is improper and infringement of state copyright. Similarly Police witnesses cannot be permitted to refresh their memories in Court from statements made earlier in the Police investigation as this entails such statement being open to inspection by the Court and both parties which in itself, is a breach of privilege. (iii) The only information which may be given to either party in such circumstances is a list of the witnesses interviewed and then only after completion of criminal proceedings. (iv) Officers in charge of Stations who receive civil summonses in the form mentioned above should appear in Court as required and then claim privilege following upon the ruling in *Mohindra v. Mathra Dass* (1941), 19 K.L.R. 67. ( v) Any officer in any doubt about the procedure to be followed in a particular case should refer the matter to the DCIO/PCIO. If any particular Court or Magistrate persistently issues summonses with such endorsement a report, giving all relevant details, will be submitted to this Headquarters through normal channels, for further action. (vi) All officers are asked to familiarise themselves with case and ensure that it is made subject of frequent lectures to Subordinate officers. The case will be included in the syllabus of the Police College, C.I.D. Training School and other training institutes.” This Force Order can only have the force of law if it comes within s. 132 of the Evidence Act as amended by the Schedule to the Statute Law (Miscellaneous Amendments) Act 1972 which provides: “132. No public officer shall be compelled to disclose communications made *by any person* to him in the course of his duty, when he considers that the public interest would suffer by the disclosure.” I have underlined the words added by the amendment. In *Mohindra’s* case (*supra*) it was held on appeal that the production in the magistrate’s court of a communication made by an informer to the police was rightly withheld under the section as it was not in the public interest that the names of persons who are the channel by means of which detection of crime is made should be unnecessarily disclosed. In that case it was stated that the police officer was acting on the instructions of the Commissioner of Police. With respect I doubt whether the Commissioner of Police can effectively issue such a blanket prohibition. Under the section each claim for privilege has to be considered on its merits. In *Raichura v. Sondhi*, [1967] E.A. 624 the East African Court of Appeal held that a police officer was not entitled to claim privilege in respect of the facts upon which he had reached his conclusion that certain property had been stolen without the complicity of the defendant. On s. 132 of the Evidence Act it was held (*a*) by a majority, that “Communications made to an official in the course of his duty” read with the marginal note “Privilege of official communications” ordinarily related to official source. This construction of the section probably led to the 1972 amendment; (*b*) “if privilege is claimed the witness may be required by the court to explain the circumstances in which the privilege is claimed to enable the court to decide whether the public interest would suffer by the disclosure (per Newbold, P.) but (per Spry, J.A.) not to the extent of considering whether the communication is in fact one of which disclosure ought not to be compelled”. Per Duffus, J.A. as he then was at p. 630: “The other question that arises would be whether the courts have any discretion or control in the matter or is the determination left entirely to the discretion of the public officer? There can be no doubt that the court can compel a witness to answer a question and further it is clear that it is for the public officer to claim the privilege under the section. If a public officer does claim privilege the court must undoubtedly satisfy itself that the communication comes within the definition of an official communication and I agree with the learned President that the court must then have some discretion in deciding whether public interest would suffer by the disclosure. I agree that the court must be able to inquire into the circumstances under which the claim is made so as to satisfy itself that the claim to privilege under s. 132 is properly made. This gives a broad construction to this part of the section but I am satisfied that this must have been the intention of the legislature as to hold otherwise may lead to a complete denial of justice in cases in which the privilege claimed could not possibly come within the meaning of s. 132.” Thus it is for the courts, and not for the Commissioner of Police, to decide whether privilege in the public interest can be claimed in respect of particular matters contained in a police file relating to a traffic accident. It is clearly in the public interest, and not against it, that the police should assist the victims of traffic accidents in obtaining compensation arising out of negligent driving on public roads. It is not unusual for these civil claims to come to court some three years after the accident, in which case the evidence of the police officer who visited the scene and from his own observations made a sketch plan showing the position of the vehicles, marks on the road etc. is often the only reliable independent witness of what occurred. By this time any criminal proceedings will have been disposed of. Also the production of the sketch plan can lead to the settlement of claims, which is desirable. As I see it s. 132 of the Evidence Act does not even apply where a police officer is giving evidence of what he observed and not of any matter which was communicated to him. As regards the Force Order I am unable to understand how any question of State copyright can arise. Nor can I see any objection to police officers refreshing their memories from the police file of past events. Para. 5 of the form of the abstract from a police record of an accident provides for the supplying of copies of witnesses’ statements with their consent and no privilege is claimed in respect of these statements. In my view *Mohindra’s* case has no application to the question of admissible police evidence of traffic accidents, if it has not in fact been overruled by the later *Raichura* case. It is for the police officer to satisfy the court in any particular case that he can claim privilege in the public interest in respect of any communications which are made to him in the course of his duty. He is in the same position as any other witness summoned to give evidence or produce documents under O. 15 r. 1 of the Civil Procedure Rules and failure to comply with the summons may result in the penalties provided by rr. 10, 11 and 12 of the Order. *Order accordingly.*

For the plaintiff:

*AY Jiwaji*

For the first defendants:

*IT Inamdar* (instructed by *Bryson, Inamdar & Bowyer*, Mombasa)

For the second defendants:

*WS Deverell* (instructed by *Kaplan & Stratton*, Nairobi)