**Hawaga v Bisuti**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 4 June 1974

**Case Number:** 839/1973 (35/75)

**Before:** Allen Ag J

**Sourced by:** LawAfrica

*[1] Insurance – Motor Insurance – National Insurance Corporation – Non-fare-paying passenger –*

*Liability of corporation limited to Shs.* 100,000/-.

*[2] Traffic and Road Safety Act* 1970, *s.* 32 (*U.*)*.*

**JUDGMENT**

**Allen Ag J:** This is an application by originating summons for the court to give directions regarding the meaning and applicability of s. 32 (2) of the Traffic and Road Safety Act 1970. The application was filed by Mr. Gaffa on behalf of the National Insurance Corporation which had taken over the conduct of the defence in the original running-down case in which judgment was entered for the plaintiff for Shs. 300,000/- general damages and costs by Nyamuchoncho, J. on 21 December 1973 after the N.I.C. had admitted liability. It has since turned out that the real defendant, Busuti, was in prison until recently and apparently unaware of the suit and the judgment against him. He has not yet filed an application to set aside the judgment so that he can then file a defence as, it seems, he wishes to do. Meanwhile the N.I.C. has invoked s. 32 of the act, the relevant part of which reads as follows: “(2) The liability of an insurance company under any contract of insurance as aforesaid shall be limited to one hundred thousand shillings for any claim (inclusive of all costs incidental to any such claim) made by or in respect of the death of or bodily injury suffered by a person who not being a passenger for hire was at the time of the accident in respect of which the claim has arisen being conveyed in the motor vehicle, trailer or engineering plant, or was entering or alighting from, or about to enter or alight from, the motor vehicle, trailer or engineering plant. (3) Except as provided in subsection (2) of this section, the liability of an insurance company for claims under the contract of insurance shall be unlimited as to amount. (4) Subject to subsection (2) of this section, the liability of an insurance company under any contract of insurance as aforesaid shall extend to indemnify the owner or his agent against all claims for contribution in respect of any such liability as is mentioned in subsection (1) of this Section.” For some reason best known to the legislators it was decided to limit liability in claims where the injured person was a non-fare-paying passenger or potential passenger. This limitation would apply in the present suit, apparently, because the plaintiff was a turnboy travelling on his employer’s lorry at the time of the accident. S. 35 (1) (*a*) of the Act provides that an insurance company may undertake the settlement of any claim in which it is liable to indemnify any person under the contract. The extent of their liability is set out in s. 32 as I have already indicated. S. 35 also allows the insurance company to take over and conduct proceedings in the name of the owner or other person in order to enforce or defend a claim. S. 35 (1) (*d*) provides for indemnification by the insurance company of the owner or person from whom it has taken over the proceedings with regard to costs and expenses. Subs. (2) seems to indicate that the insurance company can be expected to inform the person concerned of its intention to take over the handling of the proceedings. This apparently was not done in the present case. There would thus appear to be good reason to set aside the judgment and to allow the defendant to appear and defend himself as he wishes. Mr. Gaffa for the N.I.C. said that he is persisting in this application, not because he disagrees with the present defendant’s claim of right to defend, but because the N.I.C. has a number of similar cases pending payment and it needs the court’s interpretation of s. 32 (2) of the Act for present and future reference and use. O. 2, r. 7 states that: “No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.” Mr. Gaffa brought this application under O. 34, r. 5 which provides for the determination of any question of construction arising under an instrument such as a deed, will or other written instrument, but I do not really feel that it is applicable in this instance where we are looking at a statute. However, I do not wish to quibble about such a procedural point as I feel that the issue is too important for that. As things stand at the moment, the N.I.C. is willing to pay, or has already paid, Shs. 100,000/- to the plaintiff which they claim is in full settlement of their liability with regard to both damages and costs. This leaves the plaintiff to try to collect the remaining Shs. 200,000/- in costs from the defendant himself. Apparently while the poor man was lying in prison in ignorance of this his property was attached for this purpose. On 23 May 1974, Kantinti, J. made an order staying execution until the defendant’s application to set aside the judgment had been filed and heard. Meanwhile his property all remains with the auctioneer. Mr. Musoke for the plaintiff and Mr. Musaala for the defendant both cited various helpful and interesting English decisions concerning liability under contracts of insurance and referring also to the common law. However, I do not find these of much relevance in the present application because here we are faced with a statute. The courts may decide that private contracts are inequitable or unlawful or unjust and consequently reject or ignore clauses in them. This cannot be done with a statute, however, wherein the court can only endeavour to interpret and apply the law no matter how distasteful it is. Mr. Musaala for the defendant invited me to apply what is known as “the mischief rule” in the interpretation of this section because the insurers, he said, had undertaken the defence and they had failed to conduct it properly and so they were liable for the whole amount. I agree that that appears to be the position under English law, but they do not have a statutory provision covering these points as we do here. Accordingly, in my opinion there is no ambiguity in s. 32 (2) of the Act and I must reluctantly find that it means what it says; that is, that in these particular cases where the plaintiff is a passenger of the type described, the liability of the insurance company is limited to Shs. 100,000/- only, and that includes all the costs incidental to the claim. It appears to me to be clear enough. It may be that there is some good reason for this limitation but I do not know what it is. Apparently it then leaves the plaintiff to try to recover as much of the remaining amount due as he can from the defendant directly. It seems to me to be rather unfair to both parties, but there it is. The answer might lie in having this Act amended for it badly needs amending in other parts as well. In the circumstances each party will have to bear his own costs in this application.

*Order accordingly.*

For the corporation:

*F Gaffa* (instructed by *Kirenga & Gaffa*, Kampala)

For the plaintiff:

*J Musoke*

For the defendant:

*P Musaala*