REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 8 OF 2019

DAVID MAINA.....APPELLANT

VERSUS

MARY WANJIKU WANJIE.....1ST RESPONDENT

SYLVESTER OGUTU.....2ND RESPONDENT

(Being an appeal from the Judgment of Hon. D.W Mburu - SRM dated and delivered on 14th December 2018 in Milimani Commercial Courts Civil Case No. 5689 of 2013)

JUDGMENT

1. The appellant is dissatisfied with the judgment of the trial court awarding the 1st respondent Kshs 510,000/- being the pre-accident value less salvage value and Kshs 3,931,200 for loss of user, both totaling to Kshs 4,454,700/- subject to 50% contribution.

2. The cause of action is captured from paragraph 4, 4A and 5 of the amended plaint where the 1st respondent averred;

4. That on 3rd day of July 2013, the plaintiffs motor vehicle registration number KBA 487M was lawfully driven along Jogoo road, Nairobi by her driver when the 2nd defendant by himself, driver, servant and/oragent so negligently drove controlled and or otherwise managed motor vehicle registration number KBJ 288C Toyota Premio Saloon violently hit the plaintiff's motor vehicle registration number KBA 487M Nissan Matatu thereby occasioning it intensive damage thus the plaintiff has suffered loss and damage.

4A. The Plaintiff holds the Defendants vicariously liable for the Acts of the authorized driver/servant or Agents.

PARTICULARS OF NEGLIGENCE OF THE DEFENDANTS

a) Driving motor vehicle KBJ 288C Toyota Premio Saloon at an excessive speed.

b) Failing to keep any or proper adequate control of the said motor vehicle KBJ 288C Toyota Premio Saloon.

c) Failing to stop or to have adequate control of motor vehicle KBJ 288C Toyota Premio so as to avoid causing accident.

d) And the plaintiff shall rely on the doctrine of res-ipsaloquitor so far as it is applicable.

5. By reason of the matters aforesaid the plaintiff has suffered material loss and loss of user of motor vehicle KBA 478M Nisaan Matatu at a daily rate of Kshs 4,200/= of which the Plaintiff holds the Defendants liable.

PARTICULARS OF SPECIAL DAMAGES	*Kshs*
Pre-accident Value	*630,000*
Less salvage value	*120,000*
Breakdown	*8,500*
Assessment fee	*5,000*

*Loss of user (Kshs 4,200*365(days)* 3(years)*	*4,599,000*
TOTAL	*5,122,500*

3. The claim was denied by the appellant and the 2nd respondent, who were the defendants before the lower court. They pleaded in the alternative and without prejudice that if an accident occurred then the same was caused by 1st respondent's driver who drove the motor vehicle KBA 487M ('*matatu*') in a negligent and reckless manner.

4. The appellant challenged the judgment of the subordinate court through his memorandum of appeal dated 10th January 2019 on the following grounds;

1. The learned magistrate erred in apportioning liability equally.

2. The learned magistrate erred in law and in fact in finding that the pre-accident value of the motor vehicle KBA 487M was Kshs 510,000/-.

3. The learned magistrate erred in law and in fact in awarding damages for loss of user of Kshs 3,931,200/-.

5. In due course the 1st respondent also filed a notice of cross appeal on the grounds that;

1. The learned magistrate erred in law and in fact by apportioning liability equally between the appellant and the respondent.

2. The learned magistrate erred in law and in fact in not appreciating that the respondent's claim was not controverted.

6. At the hearing before the subordinate court, Mary Wanjiku Wanjie testified as (Pw1). She recalled that on 3rd July 2013 she was informed about the accident involving her matatu and she proceeded to Makongeni Police Station where she found the vehicle damaged. She testified that the she intended to use the matatu for 3 years and sought loss of user for 3 years. Samwel Njoroge Karori (Pw2) was the driver of the matatu when the accident occurred. His testimony was that on the material day as he approached Hamza stage he was hit at the rear left by the 2nd respondent's vehicle. The impact was so great that the matatu rolled severally. James Maina Gichohi (Pw3) testified that upon assessment he formed the opinion that that it was uneconomical to repair the matatu as the cost of repair exceeded 50% of the pre-accident value. The motor vehicle was a write off. Antony Omondi (Pw4) testified that the accident was reported and a police abstract issued.

7. The appellant testified as Dw1. He recalled that on the material day at Hamza stage he saw the matatu picking up passengers. He told court that the road is a dual carriageway and he was on the right driving at about 30 Kph. He testified that the matatu suddenly without indication moved to the right and he swerved to the right then to the left in an attempt to avoid hitting the matatu. James Mwangi Karanja (Dw2) testified that he assessed the matatu and formed the opinion that the pre-accident value of the matatu was Kshs 400,000/- and the salvage value would be Kshs 200,000/-. He noted that it was uneconomical to repair the motor vehicle.

SUBMISSIONS

8. The appellant in his written submissions maintained that Dw1 gave clear testimony that the accident was caused by the manner in which the matatu was being driven. He submitted that the court ought to have considered the testimony of Dw2 in regard to the pre accident value of the vehicle and faulted the trial magistrate for substituting the opinion of the expert witness for the magistrate's own opinion. He contends that the 1st respondent was not entitled to loss of user and advanced that she ought to have repaired the vehicle considering that the repairs would have taken one week according to Pw3's testimony. They advanced that the principle of mitigation of damages requires a party to take reasonable steps to lessen the effect of the negligent actions on them. They called into aid McGregor on Damages 19th Edition at page 253, '*the extent of the damage resulting from a wrongful act, whether tort or breach of contract, can often be considerably lessened by well advised action on the part of the person wronged. In such circumstances the law requires him to take all reasonable steps to mitigate the loss consequent to the defendant's wrong, and refuses to allow him damages in respect of any part of the loss which is due to his neglect to take such steps*'. It was his submissions that the 1st respondent abandoned the matatu at the Chief's camp in Embakasi and she is only entitled to a loss of user for 14 days. He argued that a careful examination of the daily work sheet Pexb 8 of the matatu indicates that the business earned Kshs 3,300/- daily.

9. The 1st respondent similarly attacked the finding of the trial court on liability. She urged that there was evidence that the 1st respondent's matatu was hit from the rear and extensively damaged. She argued that the evidence would have led to the conclusion that the appellant was fully to blame for the accident. She added that the appellant failed to keep safe distance between his vehicle, and the matatu that was in front of him. It was submitted that the court should dismiss the appellant's argument that he was driving at 30Kph considering the impact his vehicle had on the matatu. She advanced that her claim to loss of user was uncontroverted for the reason that after she amended her pleadings, there was no amendment to the defence. She challenged the trial's court award for Kshs 3,931,200 on the ground that there was evidence that the 1st respondent operated the matatu business for 6days of the week. The 1st respondent supported the trial's court finding that the pre-accident value of the matatu was Kshs 510,000/-.

10. This court has carefully re-evaluated the evidence adduced before the trial court and the submissions of parties. This court, being the first appellate court is obligated to re-evaluate and re-appraise the evidence adduced in the trial court in order to arrive at its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. (***See Selle vs Associated Motor Boat Company Ltd [1968] EA 123***.)

11. The appeal raises two issues, liability and quantum. Firstly, I will look at the issue of liability which must be determined by the evidence

adduced before the trial court. In making a determination on who is to blame for the accident the court in the case of **Stapley vs. Gypsum Mines LTD (2) (1953) AC 663** held as follows:

> *"To determine what caused the accident from the point of view of legal liability is a most difficult task. If there is any valid logical scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it….. The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but does not mean that the accident must be regarded as having been caused by the faults of all of them.…..."*

12. The direct witnesses of the accident were Pw2 and Dw1. Pw2's evidence was that as he drove approaching Hamza stage, the matatu was hit on the left side with great impact causing the matatu to roll severally. He testified that he became unconscious. On the other hand the appellant in his defence averred that the accident was caused by the negligence of Pw2. Dw1testified that he saw the matatu at Hamza stage picking and dropping passengers whereupon the driver abruptly entered the road forcing him to swerve to the right lane. It was his testimony that the matatu drove to the right lane forcing him to swerve on the left lane in an attempt to avoid hitting the matatu. Unfortunately despite his efforts to avoid any collision, he hit the matatu on the left rear side.

13. As stated earlier my duty as a first appellate court is to re-evaluate the evidence adduced before the trial court and come up with my own findings. While doing this, I ought to be minded that "*an appeal court would not normally interfere with the finding of facts by the trial court unless it is based on no evidence or it is based on misapprehension of the evidence or the judge has acted on wrong principle in reaching the finding he did*." (See ***Sumaria and another vs Allied Industries Limited 2017 eKLR and Ephantus Mwangi and Geoffrey Nguyo Ngatia v Duncan Mwangi Wambogo (1982-88) 1KAR 278***).

14. The Court of Appeal in ***Farah and Lentol Agencies and Multiple Hauliers Limited v Rahids Muthomi Kimani (2015) eKLR*** held that where there is no concrete evidence to determine who is to blame between two drivers, both should be held liable or proportionately to the degree of contributory negligence based on the circumstances after consideration of the entire evidence. (See also ***David Kajoji M'Mugaa vs Francis Muthomi (2012) eKLR.***)

15. In our instant case, other than the evidence of Pw2 and Dw1 there is no independent evidence to show exactly how the accident occurred. As it were, the evidence is the word of Pw2 against that of Dw1. **Section 3 (4) of the Evidence Act** provides that;

> *"A fact is not proved if it is neither proved nor disapproved."*

16. Having considered the evidence of the two witnesses I am constrained to agree with the finding of the trial court that both explanations on how the accident occurred are plausible. Therefore without any other additional evidence to corroborate the assertion of either party, liability was well apportioned at 50:50.

17. I now turn to the issue of quantum, it is trite law that an appellate court can only interfere with an award of damages where the award was either based on wrong principles or is so inordinately high or low as to be a wholly an erroneous estimate (See ***Kemfro Limited t/a Meru Express Services v Lubia and Another [1987] KLR30***).

18. The Court of appeal in **Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR** found that loss of use of a profit making chattel such as a lorry or matatu through an accident is a claim in general damages.The court in ***Samuel Kariuki Nyangoti v Johaan Distelberger supra*** held that;

> ***"The appellant was required to mitigate his losses. He filed the suit on 21st June 2001, seven months after the accident. The award for loss of the vehicle was made on 28th October 2003. It is unreasonable to hold the respondent liable for delay in filing the suit and for the delay in conclusion of the court process. There are also considerations it would be improbable that the vehicle would operate continuously for a whole year. It would probably be grounded occasionally for maintenance and for any other reason. There are no reasons given for claiming loss of use for one year or the steps the appellant took to mitigate the damages. In Chinese Technical Team for Kenya National Sports Complex, a period of 6 months was considered as a reasonable period for computing loss of user of a matatu which we also consider to be reasonable for this case. That would yield a figure of Kshs. 240,000 (2000 x 20 x 6) which we award to the appellant."***

19. On this question I note the trial court has addressed this issue elaborately and eloquently at page 7, 8 and 9 of its judgment capturing the appropriate principle of law and linking the same to the circumstances of this case.

20. While I agree with the computation for loss of use, I find that the court applied the wrong principle by making an assumption that the subject motor vehicle would be at work day in and day out without hitches. It is improbable that the vehicle would operate continuously for the whole period. It certainly would have from time to time be grounded for repairs. It would be affected by external factors like strikes in the industry. It would be affected by fluctuations of business based on the state of the economy and obviously its efficacy would dwindle as it got older.

21. The court ought to have given due allowance for these circumstances and discounted the period for earning reasonably.

22. I accordingly find fault with the computation of damages for loss of use and considering all the circumstances, discount the period of earning from 3 years to 2 years. The total sum calculates thus;

Kshs 4,200 x 52 weeks x 6 days x 2 years = Kshs 2, 620, 800/-

23. In regard to the award for the pre-accident value of motor vehicle KBA 487M, the trial court was presented with two valuation reports, one by J.M Gichohi (Pw3) and the other by James Mwangi Karanja.

24. The report by J.M Gichohi shows that the assessment was done on or around the 4th of July 2013. He placed the pre-accident market value at Kshs 630,000/- and indicated that the salvage was worth Kshs 120,000/-.

25. The report by James Mwangi Karanja shows that the assessment was done pursuant to the instructions given on 4th November 2014. He placed the pre accident value at Kshs 400,000/- and the salvage value at Kshs 200,000/-. Notably this assessment was done over a year down the line after the accident.

26. The determination of the pre accident value depended on the conflicting evidence of the professionals that was presented before the court. Such evidence is opinion evidence and **section 48 of the Evidence Act** makes provision for it.

27. There is no doubt that the witnesses called by both sides as experts were each qualified in motor assessment. That, notwithstanding, as a general rule, evidence by experts being opinion evidence is not binding on the court, the court has to consider it along with other evidence and form its own opinion on the matter in issue.

28. In **Amosam Builders Developers Ltd vs Betty NgendoGachie& 2 other (2009) Eklr** the Court of Appeal stated;

> ***"In the case before us, there is a conflict of opinion by the experts called by both sides. It was the responsibility of the trial court to come to a decision one way or the other after analyzing all the evidence before it……''***

29. The principle is also enunciated in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held that;

> *"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."*

30. The trial court in addressing this issue stated;

> *"The court notes that Dw2 carried his assessment about 1 year and 4 months after the accident. While Pw4 carried out his only two days after the accident. This might explain the difference in their findings. Be that as it may, the court is unable to agree with the statement by Dw2 that the motor vehicle did not depreciate for the period of over one year when it was grounded. In any case, Dw2 did not even avail photographs to the court to show how the appearance of the motor vehicle was when he assessed it……..My finding on this issue is that the plaintiff's assessor's report is more reliable and accurate and I do hereby accept as a true representation of both the pr accident and the salvage values of the motor vehicle. The plaintiff is entitled to Kshs 510,000/= under this head being the difference between the ore accident value and the salvage"*

31. From the foregoing it's clear that the trial court addressed itself to the evidence of the experts as well as other evidence and correctly applied the principle in **Amosam Builders Developers Ltd Case (supra)**. The court arrived at the correct finding and cannot be faulted.

32. In the end, the appeal nominally successful and the cross-appeal without merit. I set aside the award of Kshs 3,931,200/- for loss of use and substitute thereof an award for Kshs 2,620,800/-. Save for this finding the appeal and cross appeal are dismissed with each party bearing their own costs.

Dated, Signed and **Delivered** at **NAIROBI** this **27th** day of **February, 2020.**

A. K. NDUNG'U

JUDGE