



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 27 OF 2019

AINU SHAMSI HAULIERS LTD.....APPELLANT

-VERSUS-

JACQUELINE KAMBUA MUSYIMI.....RESPONDENT

(Being an Appeal from the Judgment of Hon. C.A Mayamba (PM) in the Principal Magistrate's Court

at Kilungu, Civil Case No.2 of 2014, delivered on 22nd March 2019)

JUDGMENT

1. The Appellant was the owner of motor vehicle Reg. No. KBQ 869V/ZD 7699 (*trailer*) while the Respondent was the owner of motor vehicle KAY 060X (*bus*). The two vehicles were involved in a road accident at Ngokomi area along the Nairobi-Mombasa highway on 23/11/2013. Consequently, the Respondent sued the Appellant in the lower court seeking compensation for the extensive damage of the bus. She prayed for a sum of Kshs.3,980,500/=, costs of the suit and interest.

2. The Appellant denied the claim and counter claimed for the damage caused to its motor vehicle in the sum of Kshs.5,446,828.15/=. It attributed the damage to the Respondent's negligence.

3. After the preliminaries, the matter proceeded for hearing and judgment was eventually delivered. The trial magistrate apportioned liability in the ratio of 80:20 in favor of the Appellant but dismissed the suit and counter claim in their entirety.

The Appeal and Cross-Appeal

4. Aggrieved by the judgment, the Appellant filed this appeal and raised 5 grounds as follows;

a) *The learned trial Magistrate erred in law and misapprehended the evidence on record showing the Appellant' motor vehicle insurance cover for the trailer registration No. ZD 7699 was third party insurance cover and thereby failed to arrive at a just and proper decision by not compensating him for the material damage loss.*

b) *The learned trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellants.*

c) *The learned trial Magistrate erred in law and fact by failing to appreciate that the Appellant's defence and counterclaim was brought under the doctrine of subrogation.*

d) *The learned trial Magistrate erred in law in failing to appreciate the fact that failure to award the special damages merely because they were paid for by the Appellant's insurer amounted to benefiting the Respondent, a tortfeasor liable for causing the accident. The finding went against the law and public policy.*

e) *The learned Magistrate erred in law on assessment of material (special) damages by failing to award the Appellant special damages and loss of user as pleaded and proved.*

5. The Respondent filed a cross-appeal and raised 2 grounds as follows;

a) *The learned honorable Magistrate erred in law and fact by failing to apportion liability as per the evidence presented before him*

and allowed an erroneous judgment.

b) *The learned Magistrate failed to consider the submissions of the Respondent on quantum.*

6. Directions were given that the appeal and cross appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

7. The Appellants' counsel Mr. Ojienda identified the following as the issues for determination;

a) *Whether the honorable Magistrate erred in holding that the claim by the defendant (now Appellant) against Plaintiff (now Respondent) of such sums that were advanced by a third party (insurer) amounted to double compensation and or unjust enrichment under the doctrine of subrogation.*

b) *Whether the cross- appeal should be allowed.*

8. On the first issue he submits that the doctrine of subrogation gives an insurer the right to take over the rights and privileges of the insured under an insurance policy hence the reason for filing the counter claim. He contends that if an insurer wishes to exercise these rights against third parties, it can only do so on behalf of and in the name of the insured.

9. He further argues that if the insured risk takes effect and the insurer settles the insured's claim, then the insurer is entitled to diminish the loss suffered by seeking compensation from the party who caused the loss. He relies on the case of **Joseph Obiero –vs- Stephen Kosgei Kwanbai & 4 Others (2019) eKLR** where the Court appreciated the doctrine of subrogation as discussed in '**Insurance Law**' by **Mac Gillivay & Parkington** at **pg 471** as follows;

“The doctrine confers two distinct rights on insurer after payment of a loss. The first is to receive the benefit of all its rights and remedies of the assured against third parties which, if satisfied, extinguish or diminish the ultimate loss sustained. The insurer is thus entitled to exercise, in the name of the assured whatever rights the assured sasses to seek compensation for the loss from third parties. This right is corollary of two fundamental principles of the common law. If a person suffers a loss for which he can recover against a third party, and is also insured against such a loss, his insurer cannot avoid liability on the ground the assured has the right to claim against the third party. Conversely, the third party if sued by the assured, cannot avoid liability on the ground that the assured has been or will be fully indemnified for his loss.”

10. On the question of double compensation, counsel relies on the case of **Leli Chaka Nodoro –vs- Maree Ahmed & S.M Lardhib (2017) eKLR** where the Chitembwe J held that;

“With regard to the issue of double payment, I am satisfied that the recovery of the special damages from the Respondents would not amount to double payment. Assuming the Respondents came to know about the settlement of the bills after they had paid the Appellant, could the Respondents claim the money from the Appellant or his insurer? My answer to this is “No”. This is because the Respondents are not party to that arrangement between the Appellant and his insurer. The Respondents are simply liable to satisfy the amount of damages suffered by the Appellant. This does not amount to double compensation.”

11. Accordingly, he submits that an insurer should not be a direct party to the proceedings against third parties.

12. On the second issue, counsel submits that the finding on liability is proper according to the evidence on record. Relying on **sections 107 and 109 of the Evidence Act**, he states that the Respondent failed to prove that the accident was solely caused or substantially contributed to by the Appellant or its driver.

13. He also submits that from the judgment, it is evident that the trial magistrate did consider the Respondent's submissions on quantum.

14. The Respondent's counsel M/s Mutunga submits that the trial Magistrate relied on Makindu SRMCC No. 412 of 2014 yet the judgment and proceedings were not produced in evidence. She contends that the trial magistrate was not bound by the judgment of a court of concurrent jurisdiction, but could only be persuaded by a judgment of his own court *to wit* Kilungu SPMCC No. 254 of 2016 where liability was apportioned in the ratio of 80:20 in her favour. She adds that the case was appealed to this court *vide* Appeal No. 259 of 2017 and the finding on liability was maintained.

15. She further submits that the trial Magistrate found that the Respondent had proved her claim under all heads but failed to award on quantum on the basis that the amount was set off against the Appellant's claim. She submits that the trial magistrate agreed with her submissions and the authorities quoted and was therefore bound to make the award.

Analysis and determination

16. It is now settled that the duty of a first appellate court is to re-analyse and re-evaluate the evidence on record in order to arrive at its own conclusion. It should bear in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Anor –vs- Associated Motor Boat Company Ltd & Others 1968 E.A 123**.

17. Having considered the grounds of appeal and cross-appeal, the rival submissions and the entire record, it is my considered view that the following issues arise for determination;

- a) Who was liable for the damage on the motor vehicles and to what extent?
- b) Whether allowing the Appellant's claim in light of compensation from its insurance company would amount to double compensation.
- c) Whether the Appellant and Respondent are entitled to the amounts claimed by each.

Issue no. (a) Who was liable for the damage on the motor vehicles and to what extent?

18. Pw1 **No. 93436 PC Dennis Githinji** from Sultan Hamud traffic base. He produced the police abstract as P. exhibit 2 and said that he was not the investigating officer. He also said that no one was charged as both drivers died in the accident. He could not tell who was to blame.

19. Pw2 **Michael Muli Mbwenze** was the bus conductor. He testified that on 23/11/2013, they were travelling from Kitui towards Mombasa and he sat near the driver. They met a lorry at Ngokomi which was travelling towards their lane having crossed the yellow line. He screamed to the driver to swerve but the driver had been thrown outside. He blamed the lorry driver, for the accident.

20. Upon cross examination, he said that their driver tried to swerve but the lorry followed them. He agreed that the accident happened on the right lane headed to Mombasa.

21. Pw3 **Stephen Mwendwa Wambua** was a passenger in the bus. He testified that he was seated opposite the driver and saw a vehicle with full lights on. He heard the conductor urging the driver to move out of the road. He blamed the other vehicle for the accident. Upon cross examination, he agreed that the accident happened on the right side headed to Mombasa.

22. Dw2 **No. 93436 Dennis Kithinji** who was from Sultan Hamud Traffic base had testified as Pw1. He was not the investigating officer (IO) but testified that the findings of the investigating officer were that the bus driver was to blame for overtaking carelessly. That passengers who were interviewed confirmed the fact. He produced the police file as D. exhibit 10.

23. From the evidence of both parties there is no dispute that an accident involving the bus and trailer occurred on the material day.

24. Further, from the totality of the evidence on record and especially the contents of the police file, it is crystal clear that the bus overtook carelessly and collided head on with the oncoming trailer. The bus was headed to Mombasa and was therefore supposed to be on the left lane but the evidence of Pw2 and Pw3 shows that the accident happened on the right lane. This buttresses the fact that the bus was indeed overtaking carelessly.

25. At this juncture, it is important to point out that this court is aware that various cases arising from the same accident were filed in different courts within the Makeni region and is also aware of the inconsistency in the findings on liability from the various judgments.

26. With regard to additional evidence admitted in **Makeni HCCA No. 13 of 2018, AINU SHAMSI HAULIERS LTD –vs- ANASTACIA NDINDA MWANZIA**, this court expressed itself as follows:

“I have looked at the additional evidence and I believe it is imperative to highlight the following extract from the covering report;

“The brief circumstances of this accident are that on the material day, date and time the actual driver of motor vehicle registration No. KAY 060X Nissan UD diesel was driving the said vehicle from Kitui to Mombasa with 60 passengers on board and on reaching at the location of the accident (Ngokomi area) along Nairobi-Mombasa highway, the driver of motor vehicle KAY 060X Nissan UD bus was trying to overtake another motor vehicle, going to the same direction, from Nairobi towards Mombasa and in the process he noticed another motor vehicle coming from the opposite direction and it was very near. The motor vehicle from the opposite direction splashed the full light as an indication of warning but unfortunately, the motor vehicle reg. No KAY 060X Nissan UD bus couldn't avoid the head on collision with the oncoming trailer reg. No. KBQ 869V/ZD 7699 M/Benz Axior...”

I have looked at the extract as well as the proceedings in the Kilungu case and I am convinced that indeed the bus should carry the bigger portion of blame. The difficulty is this; if this court agrees with the apportionment in the Paulina Mwende case (supra) and apply it across board, the effect will be to vary the consent in the Makindu case irregularly. On the flipside, if the court agrees with the Makindu case, the effect will be to overturn the finding in the Paulina Mwende case irregularly. The other difficulty is that in some cases, the registered owners of the bus were not included as defendants.”

27. The above extract related to an application by the Appellant herein in which it sought to align the judgment on liability in **Kilungu SRMCC No. 254 of 2016** with the finding in Makindu **PMCC No. 117 of 2014**. The application was declined and it is noteworthy that this court was never moved properly on the liability issue.

28. As for the case cited by the Respondent, (**Makeni HCCA 259 of 2017- AINU SHAMSI HAULIERS LTD –vs- ANASTACIA NDINDA MWANZIA & ANOTHER**), this court did not deal with the liability issue as the parties had consented on it in the trial court. It is therefore misleading for the Respondent to submit that *‘the finding on liability was maintained on appeal’*.

29. Be that as it may, it is my considered view that based on the evidence presented before him; the learned trial Magistrate arrived at a correct finding on liability in the current case.

Issue no. (b) Whether allowing the Appellant's claim in light of compensation from its insurance company would amount to double

compensation?

30. The learned trial Magistrate opined that the Appellant's pleadings should have contained particulars to show that it was the insurance company claiming through the Appellant. In the absence of such particulars, he concluded that the insurance company was not claiming anything and declined the Appellant's claim because it had been compensated. I draw guidance from the case of **Reinan –vs- Pacific Motor Trucking Company** where the Court stated as follows: -

*The term "double recovery" implies that a plaintiff has received and will retain the same remuneration from two outside sources – the defendant and a third-party benefit provider – to compensate for a single harm. However, rarely will that assumption prove entirely accurate. A plaintiff who receives life or medical insurance benefits from a third-party provider generally will have paid premiums for those benefits or will have earned them as compensation for employment. Similarly, a plaintiff who receives retirement benefits, whether from a private corporation or a government program, generally will have earned or invested those funds. In addition, there are many instances in which the third-party benefit provider retains a right of subrogation for any tort award that beneficiaries recover. As a result, the collateral benefits paid by a third party may only reimburse the plaintiff for his or her prior labor or investment or may be returned to that third party. See, e.g., ORS 742.538 (providing insurers with right to subrogate insured's proceeds in tort actions); William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* 252 (1987) (noting that plaintiff who recovers insurance benefits and damages from defendant does not receive double recovery because "the plaintiff paid for the benefit in his insurance premium").*

31. Having found that the Respondent was 80% liable for the accident, in my view, she remains a tortfeasor regardless of whatever arrangements may have been in existence between the Appellant and its insurer. I am inclined to agree with the Appellant that holding otherwise is tantamount to benefitting a tortfeasor.

32. While dealing with a similar issue in the case of **Leli Chaka Ndoro (supra)**, Chitembwe J. expressed himself as follows;

"I do entirely agree with this view as the opposite would be to allow negligent tortfeasors to go scot free only because their victims were careful enough to take up personal accident policies.....I do agree that the Respondent's liability is not dependent on the Appellant's wise decision to take up an accident or medical cover."

33. Similarly, I am not convinced that the absence of the said particulars in the pleadings should allow the Respondent to go scot free.

Issue no. (c) Whether the Appellant and Respondent are entitled to the amounts claimed by each

34. With regard to the damage on the motor vehicles, both parties produced reports by assessors and there is no dispute with regard to the amounts assessed for each. The assessment report for the bus (P.exh 8) shows that it was treated as a constructive total loss. The pre- accident value is indicated as Kshs.3,600,000/= and the salvage value is Kshs.600,000/=. The claimed amount of Kshs.3,000,000/= is therefore correct.

35. The Appellant's witness (Pw4) produced a receipt of Kshs.30,000/= (P.exh 3) being towing charges from the scene to Sultan Hamud police station and another one for Kshs.40,000/= (P.exh 4) being towing charges from the police station to Nairobi. A receipt of Kshs.10,000/= for preparation of the assessment report was produced as P.exh 7. Another receipt of Kshs.7,000/= for assessor's court attendance was produced as P.exh 9. The special damages pleaded and proved were therefore Kshs.3,087,000/=.

36. With regard to loss of user, Pw4 testified that her daily earnings after expenses were Kshs.15,000/=. She produced a speed governor compliant certificate as P.exh 5 and a business plan as P.exh 6. She claimed that the bus was out of business for two months hence the amount claimed was $15,000 \times 60 = \text{Kshs.900,000/=}$.

37. From the business plan, the net collections for the stated days were as follows; 24/08/2013-Kshs.17,900/=, 26/08/2013-Kshs.25,100/=, 30/08/2013 -25,100, 01/09/2013-Kshs 27,800/=, 11/09/2013-Kshs.26,500/=, 13/09/2013-Kshs 24,000/=. In my view, the claimed daily earning of Kshs.15,000/= was reasonable. There was no contest as to whether the bus was out of business for 60 days and as such, I find that loss of user was proved.

38. The total amount proved was therefore; $3,087,000 + 900,000 = 3,987,000/=$. Out of this amount, the Appellant was only responsible for 20% hence; $20/100 \times 3,987,000 = \text{Kshs 797,400/=}$.

39. On the other hand, **Dw1**, Fatah Muhhamed Abdi, testified that he was the Appellant's director and owner of the trailer. He produced ownership documents, his driver's driving licence and inspection report. He repaired the trailer at a cost of Kshs.1,528,428.50/= and produced a report as D.exh 5. He was compensated by the insurance and tendered evidence as D.exh 6. The assessors and investigators were also paid by the insurance and he produced evidence as D.exh 7 (51,302/=) and D.exh 8 (53,960/=) respectively. He stated that the business was earning Kshs.352,854/= and produced a receipt as D.exh 9.

40. In cross examination, he said that the prime mover had a comprehensive cover but the trailer had a third party cover. The prime mover was written off and log book returned to the insurance but he was compensated for the loss. He was however not paid for the trailer.

41. The Appellant's motor vehicle consists of a prime mover and a trailer. The evidence shows that the prime mover was comprehensively insured but the trailer had a third party cover only. The documents from Occidental Insurance Company show that the prime mover was compensated at Kshs 3,027,500/= and the amount was arrived at by deducting the excess (172,500/=) from the pre-accident value (3,200,000/=). The insurance also paid Kshs.51,382/= to Pelican Investigation Services.

42. D.exh 5 shows that the cost of repairing the trailer was assessed at Kshs.1,528,428.15/= and since there was no rebuttal report from the Respondent, the amount was proved to the required standard. In my view, the fact that it was repaired at the Appellant's garage is irrelevant.

43. As for loss of user, the Appellant exhibited a truck report (D.exh 9) showing the monthly average net profit as 352,854/=. Having looked at it, I find that the pleaded daily rate of Kshs.11,000/= is reasonable. There is also no contest that the trailer was out of business for the pleaded 60 days. Accordingly, I find that the loss of user of Kshs.660,000/= (11,000 x 60) was satisfactorily proved.

44. The total amount proved by the Appellant for repairs plus loss of user for the trailer is Kshs.1,528,428.15 + Kshs.660,000 = Kshs.2,188,428.15. out of this amount the Respondent was responsible for 80% hence; $80/100 \times 2,188,428.15 = \mathbf{Kshs.1,750,742.52}$.

45. In his judgment, the learned trial magistrate stated as follows;

“The defendant has also prayed for Kshs 1,528,428 as costs of repair but at the same time admits that he was compensated by the insurance.

46. It must have escaped the attention of the learned trial magistrate that what was paid for by the insurance was the loss of the prime mover and not the trailer. The insurance certificate [D.exh 4(b)] clearly shows that the trailer had a third party cover and as such, the Appellant could not have been paid by the insurance.

47. From the above computation, the Appellant was liable to pay the Respondent Kshs.797,400/= and the Respondent was liable to pay the Appellant Kshs.1,750,742.52/=. After doing a set off, the balance comes to Kshs.953,342.52/=. This is the amount that the Respondent should pay to the Appellant.

48. The upshot is that the appeal has merit while the cross appeal lacks merit. The learned trial Magistrate's dismissal of the suit and counter claim in its entirety is set aside. I enter judgment for the Appellant for the sum of **Kshs. 953,342/52** (*nine hundred and fifty-three thousand, three hundred and forty-two shillings and fifty-two cents*) on the counter claim, with costs and interest from date of judgment. The Respondent's claim stands dismissed with costs.

Delivered, signed & dated this 24th day of June 2020, in open court at Makueni.

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H. I. Ong'udi

Judge