REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT ELDORET

HIGH COURT CIVIL APPEAL NO. 107 OF 2017

ANDREW KIMUTAI KIMWOLO.....APPELLANT

AND

MOSES KIGEN CHEMUGO.....RESPONDENT

JUDGMENT

1. Moses Kigen Chemugo (the Respondent) had filed a suit against Andrew Kimutai Kimwolo (the appellant) by an amended plaint where he sought that judgment be entered in favour of them against the appellant for returns of his Motor Vehicle Reg. KBV 170Z which suffered extensive damage following a collision with motor vehicle registration KAKA 538 K owned by the appellant and he incurred a total sum of Ksh.199,752/- as repair costs.

He also stated in the pleadings that he had to hire a motor vehicle registration NO. KAE 748 for a period of 2 months and 13 days pending repairs and receipt of spare parts from outside the county, at a cost of Ksh.1000/- per day making it a total of Kshs.74,000/-.

2. The accident which occurred at Chepkuya along Eldoret – Iten road was blamed on the appellants negligence fortified by the fact that he was charged in the ***Traffic case No. 1851 of 2013 Republic V Andrew Kimutai Kimwolo,*** convicted and fined Ksh.5000/- in default to serve 1 month imprisonment. He sought compensation.

3. The Respondent also sought costs and interest on the sums claimed.

4. The appellant denied liability and pleaded on a without prejudice basis that if the accident did occur, it was wholly caused and/or substantially contributed to by the owner of motor vehicle registration KBV 170Z. After hearing the matter, the trial magistrate in her judgment entered judgment in favour of the Respondent as prayed in the amended plaint plus VAT and costs and interest at court rates.

5. The appellant, aggrieved by the findings filed this appeal faulting the trial magistrate for holding him 100% liable and awarding the sums claimed saying these were not proved on a balance of probability. He urged the court to set aside the trial court's decision and hold that the trial magistrate failed consider the submissions on record and thus arrived at a wrong conclusion.

6. At the hearing the Respondent told the trial court that by virtue of the appellant's conviction in the traffic case, he became liable for the damage to his car.

7. He produced copies of proceedings in the traffic case, and a host of documents to demonstrate the assessment done on the damaged motor vehicle, and photographs of the damaged motor vehicle.

He blamed the appellant for the accident saying his motor vehicle was over-speeding prior to the accident, so that when it hit a pot-hole, the result was a collision with the Respondent's motor vehicle. He stated that after the accident, he hired his neighbour's motor vehicle @Ksh.74,000/- to use. The motor vehicle inspection report was also produced as exhibit.

The appellant offered no evidence. The parties subsequently filed written submission which were duly considered by the trial magistrate, who stated;

"The plaintiff's written submissions dated. I have read the same and keenly considered the same. The defendant's written submissions… plus all law as laid down in all the 5 legal authorities relied upon by the defendant. I have read the same and I have keenly considered the same as I should… the defendant has not controverted the plaintiff's evidence in any material manner.

...the plaintiff's evidence and contents of the exhibits have proved and/or established the plaintiff's case against the defendant on a balance of

probability…" because the defendant has not absolved himself of liability; the court shall find him 100% liable for the road traffic accident.."

8. The appeal was canvassed through written submissions whereupon the appellant's counsel argued that negligence was not pleaded and that this was fatal because it left room for speculation. He urged this court to be guided by the decision in Philomena Mutheu Nzyoka (suing as a legal representative of the estate of the late TKM) V Transpares Kenya Ltd [2016] eKLR which held that in the absence of a pleading as to how the accident occurred, and as to who was to blame; the plaintiff could not purport to adduce evidence through the advocate's submissions or her testimony to say that the defendant was to blame for the accident. The court held that the suit being anchored on the tort of negligence, which was not pleaded could not be sustained, paying defence to Order 2 rule 10 of the Civil Procedure Rules that

> "…Every pleading shall contain necessary particulars of any claim, defence or other matter pleased.

9. It was counsel's contention that the Respondent had not proved his claim because a mere collusion of two vehicles without proof of negligence was not sufficient – drawing from the decision in Sammy Ngigi Mwaura V John Mbugua Kagai & Anor' [2006] eKLR.

10. Further, that the plaintiff did not produce any document to prove that the appellant was the owner of the motor vehicle, either a log book or an insurance document.

11. As regards loss of user, the appellant's counsel submitted that the same was not proved as the Respondent did not even give details of the motor vehicle he had purportedly hired for use and there was no shred If and that he had hired a motor vehicle for the stated prod as to justify the sum awarded.

12. In reply the Respondent submitted that the issue of negligence was already determined vide Eld. Traffic Case No. 1851 of 2015 where the appellant was convicted on a charge of careless driving on his own plea of guilty. Pegged to Section 47A of the Evidence Act.

Further, that the details of the appellant's negligence are set out in paragraph 5 and 6 of the pleadings.

I admit that the pleadings do not set out the particulars of negligence in the traditional practice that pleadings are drawn. Yet would that also mean that;

> **a) The accident did not occur,**
>
> **b) As a consequence of the accident the Respondent's motor vehicle was extensively damaged,**
>
> **c) That even if the appellant was proved to be the owner of the motor vehicle, he admitted to being the driver at the time of the accident which resulted in the damage.**

13. Whereas it is a request that parties set out clearly in their pleadings the nature of their claim and particulars thereof, a look at the pleadings and the narrative thereto clearly communicates what the complaint is about, who is being blamed and what he did to warrant the blame.

This is different form a situation such as was previously the case of Philomena Mutheru Nzyoka (Supra) where a blanket statement was given and just by looking at the pleadings, it was left to the court to make an assumption as to what led to the accident and what conduct of the defendant amounted to negligence. In any event I hold the view that what is raised is a procedural omission which does not affect the substantive claim and life can be breathed into the matter by virtue of the Constitutional Provisions under Art 159 (d) that justice shall not be hampered by undue procedural technicalities.

b) Order IB of the Civil Procedure Rules (also known as the oxygen Principle which baths and gives life in the following terms.

I therefore do not find any false defect.

14. In any event, while the Mutheu case, in this present instance, the appellant himself admitted to having driven carelessly as to end up colliding with the Respondent's motor vehicle – that judgment has not been appealed against.

Section 47 A of the Evidence Act offers refuge that

> ***"A final judgment of a competent court in any criminal proceedings which declares a person guilty of an offence shall be taken as conclusive evidence that the person so convinced was so guilty of the offence as charged."***

15. Indeed as the Respondent points out in ***Francis Mwangi V Omar Al-Karby CA No. 87 of 1992,*** the court stated that,

> **"…a conviction is conclusive evidence of negligence but does not rule out the element of contributory negligence…"**

16. Although the applicant alleged contributory negligence of the Respondent, not an iota of evidence was led to prove such contribution.

Even though there was no evidence led to prove that the Appellant was the owner of the motor vehicle – by his own admission he was the

driver of the motor vehicle which crashed into the Respondent's motor vehicle and resulted in the damage alluded to.

Consequently the applicant cannot escape liability and I cannot fault the trial magistrate's finding.

17. As regards loss of user – this was a special damage claim which had to be pleaded and proved. The evidence presented was that the Respondent hired a neighbour's motor vehicle whose registration was not disclosed, @ Ksh.1000/- per day for 2 months and 13 days and there he executed an agreement with that neighbour.

(a) Why was it necessary to hire a motor vehicle for that period yet in his own

evidence on cross examination the applicant stated

…The time for repairs was 5 days…" I hired a vehicle for 13 days."

(b) There was no hire agreement executed by him and the neighbour produced in support of that claim,

(c) No details of the hired motor vehicle were given whether model or registration number.

18. This claim was not proved and ought not to have been awarded. It is this part of the judgment must and is hereby set aside.

19. Consequently I sustain the trial magistrate's finding on the award of damages to Ksh. 199,752/- (one hundred and ninety nine, thousand seven hundred and fifty two only), plus costs and interest rates from date of judgment until payment in full.

(2) The appellant is awarded $^{1}/_{3}$ costs of appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2019

H. A. OMONDI

JUDGE