REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 29 OF 2016

BETWEEN

PLATINUM CAR HIRE AND TOURS LIMITED.............APPELLANT

AND

SAMUEL ARASA NYAMESA....................................1ST RESPONDENT

ROGERS OMBOGO NYAKUNDI.............................2ND RESPONDENT

(Being an appeal from the Judgment and Order of Hon.J. Mwaniki, PM dated 13th October 2016 at the Magistrates Court at Keroka in Civil Case No. 368 of 2009)

JUDGMENT

1. The appeal is against the apportionment of liability by the trial magistrate between the appellant and third party. It is not in dispute that on 16th June 2009, the 1st respondent was a passenger in motor vehicle registration number KAW 882W Toyota Matatu ("the Matatu") and when it collided with the appellant motor vehicle registration number KAZ 201A Toyota Carina Saloon ("the Saloon") along the Keroka Sotik road at Rionsune area. In the course of the proceedings, the 1st respondent joined the 2nd respondent, the owner of the Matatu as a third party.

2. The thrust of the appellant's case as set out in the memorandum of appeal dated 31st October 2016 is that the trial magistrate erred in apportioning liability equally between the appellant and 2nd respondent despite overwhelming evidence on record exonerating the appellant from liability. Apportionment of liability is a question of fact within the court's discretion and since this a first appeal, the court is guided by the duty of the first appellate court so clearly set out in the case of ***Selle v Associated Motor Boat Company Ltd* [1968] EA 123** where Sir Clement De Lestang stated:

> *This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.*
>
> *However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.*

3. At the hearing only Samuel Arasa Nyamesa (PW 1) and Chief Inspector Ibrahim Ndewa (PW 2) testified on behalf of the 1st respondent. Neither the appellant nor third party called any witnesses. The evidence of PW 1 was that he was travelling in the Matatu while seated in the front seat when he saw the Saloon car coming ahead. He saw it swerve from its side to the Matutu's lane and then he heard a loud bang. He recalled that, *"When the other vehicle served towards our lane the driver tried to avoid it by swerving to the other side but unfortunately they knocked each other."* When cross-examined, PW 1 was not aware that driver of the Matatu had been charged and convicted. He also stated that the driver of the oncoming vehicle was not overtaking.

4. PW 2 testified that a report of the accident was made at Keroka Police Station. He told the court that on the material day, the Matatu was headed to Sotik when its front left tyre came off and it swerved to the right side and collided with the Saloon. Thereafter the Matatu driver was charged with driving a defective vehicle and was convicted of causing death by dangerous driving in ***Keroka Traffic Case No. 265 of 2009***.

5. In the judgment the trial magistrate held as follows:

In the absence of a different version on how the accident occurred by defendant and the third party, none of the two parties can possibly escape liability.

PW 1 blamed the defendant for the accident who is the driver of the vehicle No. KAZ 201A while PW 2 laid the blame on the third party the driver of vehicle No. KAW 882W by virtue of conviction especially on the charge of causing death by dangerous driving. The court can only in the circumstances of the case conclude both the defendant and third party were equally to blame for the accident.

6. The appellant filed extensive written submissions supported by various authorities. It pointed out that the evidence of PW 2, an expert witness was decisive in so far as he stated that the accident was caused by a defective vehicle and the third party driver convicted of driving a defective vehicle and causing death by dangerous driving. Its position was that the third party driver was fully liable and no negligence against it was proved. Counsel for the appellant also assailed the trial magistrates finding that neither of the parties could escape liability on the ground that the this amounted to shifting the burden of proof to the defendant contrary to established principle that the burden of proof rests on the plaintiff.

7. The 1st respondent supported the conclusions of the trial magistrate on the ground that the 1st respondent's testimony was unchallenged and thus the trial magistrate came to the correct conclusion that liability be apportioned equally.

8. Before I consider the evidence, I wish to point out that it was not disputed that the third party driver was charged and convicted of the offences of driving a defective vehicle and causing death by dangerous driving. By reason of **section 47A** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the 2nd respondent could not deny that there was negligence on the part of the of his driver. However, it was still open for the court to apportion liability between the parties. In other words, the court could still find contributory negligence against the appellant (see ***Robinson v Oluoch*** **[1971] EA 376** and ***Queens Cleaners & Dyers Limited v East Africa Community & Others*** **[1972] EA 376**).

9. From the evidence there were two versions of how the accident took place. Both equally plausible. The appellant urged the court to accept the testimony of PW 2 as an expert. I reject his line of submission as he only testified to the facts that were reported. He never examined the vehicle to reach an expert opinion on the cause of the accident and explain why the Saloon could not be held liable. When cross-examined by counsel for the 2nd respondent he stated that he never confirmed physically that the tyre came off the Matatu.

10. Given that there were two versions that the emerged from the testimony of PW 1 and PW 2 that left open the possibility that either party was to blame, neither the appellant nor 2nd respondent took the opportunity to call any evidence to support its case. No doubt in coming to the conclusion that both parties were to blame the trial magistrate had in mind the decision of the Court of Appeal in ***Berkley Steward Limited v Waiyaki*** **[1982-1988]1 KAR** where it cited with approval the decision in ***Baker v Market Harborough Industrial Co-operative Society Ltd*** **[1953] 1 WLR 1472, 1476** where Denning LJ., observed inter alia as follows:

Everyday, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them ….

11. In other cases, where the court is unable to determine who is to blame it has apportioned liability equally as illustrated by the Court of Appeal in ***Hussein Omar Farah v Lento Agencies*** **CA NAI Civil Appeal 34 of 2005 [2006] eKLR where the it observed** that:

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

12. At the end of the day and after evaluating the entirety of the evidence, I too come to the conclusion that following the collision, the appellant and 2nd respondent must share culpability in the absence of any other evidence exonerating one or either party.

13. I dismiss this appeal. The appellant shall pay costs of the 1st respondent which I assess at Kshs 40,000/- exclusive of further court fees.

DATED and DELIVERED at KISII this 11th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mukiite Musangi and Company Advocates for the appellant.

Mr Ochoki instructed by Omariba and Company Advocates for the 1st respondent.