REPUBLIC OF KENYA

IN THE HIGH COURT O F KENYA

AT MOMBASA

CIVIL APPEAL NO 139 OF 2014

EUSTUS NJOROGE MWAURA.....APPELLANTS

VS

ANMWARALLI & BROTHERS LTD

ALI AHMED MOHAMMED.....RESPONDENTS

CONSOLIDATED WITH NO 138 OF 2014

&

CIVIL SUIT NO. 52 OF 2013

JUDGMENT

Outline and introduction

1. On 2/5/2011 at Mnagoni along Mombasa-Nairobi Highway, there occurred a collision between motor tractor registration no. KTCB D22G and a motor vehicle registration no. KAW 443Y. As pleaded the collision occurred when the motor vehicle rammed onto the motor tractor from behind thereby occasioning to it extensive damage and persons then on board the motor tractor sustained bodily injuries. The motor tractor was owned by the Appellant in HCC Appeal No. 139/2014 while the motor vehicle was owned by the 1st Respondent and driven by the 2nd Respondent in the same appeal.

2. The Appellants in HCCA No. 138/2014 are the legal representativesand administrators of the one JAMES KAMAU WAITHARA who was travelling in the motor tractor as a turnboy at the time of the accident and as a consequence of the accident suffered fatal injuries.

3. As a result of the said accident various suits were filed at Mariakani Law Courts among then Mariakani RMCC No. 45/2013, whose judgment is the subject of Appeal in HCCA No. 138/2013, and RMCC No. 52/2014 whose judgment is impugned in HCC No. 139 of 2014.

4. On 12/5/2016, the two appeals were consolidated on the basis that Both arose from the same cause of action and further that proceedings taken in Mariakani RMCC No. 45 of 2013 was by consent applied to No. 52/2013 by the trial court. Consequently, the facts leading to the two appeals and the evidence on carsation are similar save that appeal no. 139/2014 is on material damage claim while that in 138 is a fatal personal injury claim.

5. At trial, the court, having taken evidence by the Appellant apportioned liability at 40:60% in favour of the Appellant in HCC No. 138/2014 while in HCC NO. 139/2014 the respondent was found 100% to blame.

6. Even though the appeals were consolidated, the judgments were different and therefore I will render a single judgment but give consider each appeal on a merit on both findings on the single issue. In doing so I will always remind myself that being a first appellate court I am duty bound to re-appraise, re-examine and re-evaluate the entire evidence at trial and come to my own conclusion as if I am proceeding by way of a retrial[1]

7. I propose to start with HCCA No. 138/2014 where in the evidence on causation was recorded. The suit was basically one grounded on the tort of negligence and the plaintiff provided particulars of negligence attributed to the defendant which included failure to keep a proper and sufficient look out and running onto the motor tractor from behind. The plaintiff equally filed witness statement of EUSTUS NJOROGE MWAURA. At trial a total of 5 witnesses were called the totality of whose evidence was that the accident occurred when the Respondents motor vehicle rammed onto the motor tractor from behind.

8. Against that plaint, the Respondents filed a statement of defence in which it was pleaded that the accident subject of the suit was caused or contributed to by the deceased by outriding upon a tractor with capacity to carry only a driver, by sitting on the tractor unsecured without a seat belt and thereby failing to heed the dictates of the highway code. There was a further and without prejudice pleading to the effect that the accident was additionally caused and contributed to by the negligence of the driver and owner of the motor tractor for allowing the deceased to board the tractor. It was pleaded that 3rd party proceedings would be issued against such owner and driver. It is however of note that no such third party proceedings were ever taken out and to that extent the two people were never parties to the proceedings and no finding could be rendered against them without an affront to the rule of natural justice ensuing. Also of note is the fact that the Respondent never filed any witness statement nor document and at trial opted to offer no evidence. Consequently the only evidence availed to court was that by the five plaintiffs' witnesses.

Evidence at trial in Rmcc No. 52 of 2013

9. The 1st witness, the plaintiff gave evidence to the effect that she was the mother of the deceased and a co-administrator to his estate with the 2nd plaintiff. She produced a grant of letters of administration as exhibit P1 and death certificate as exhibit P2. That death certificate showed the deceased to have died at the age of 29 years. Her evidence was that the deceased had worked for some 5 years and earned about Kshs.20,000 per month and that the deceased would send her some Kshs.2,000/= per week. She then produced receipts for special damages and an obstruct from police to show that the driver to the pick-up which collided with the motor tractor was charged convicted and fined Kshs.20,000/= for to offence of causing death by dangerous driving. On cross examination by the defence counsel did not yield much exempt that the deceased was helping with education of sibling at Baraton University and also took care of his own child named after PW 1. The next witness PW 2 gave evidence to the effect that he had employed the deceased and would pay him Kshs. 400/= per day for six days in a week. PW 3, a police officer attended court to produce police records to the effect that the 2nd Respondent as driver of the pick-up which collided with the tractor was charged with the offence of causing death by dangerous driving convicted and fined Kshs.20,000/= and that the deceased was travelling while seated on the tractor.

10. PW 4, an Executive Officer, Mariakani Law Courts gave evidence regarding the court records regarding the prosecution of 2nd Respondent and the outcome thereof. The 5th witness was the only eye witness to have been present at the scene of the accident. He was the co-worker and driver of the tractor at the time of the accident. His evidence was that while driving the tractor, the pick-up driven by the 2nd Respondent hit them from behind and occasioned the death of the deceased.

11. He confirmed that the deceased was his conductor for 5 years and that he would be paid Kshs.400/= per day. On cross examination he said that the tractor had one seat and that the deceased was seated on the tractor at the time of the accident and that he suffered fatal injuries and stressed the fact that had the

pick-up driver kept a proper look out there would not have been no collision and no injury to the deceased.

12. The totality of the evidence, and which was never contributed can be summarized that the accident occurred when the 1st Respondents motor vehicle while being driven by the 2nd Respondent collided with the tractor on which the deceased was travelling by hitting it from behind and thereby caused the death of the deceased.

13. The second Respondent was charged with the offence of causing death by dangerous driving and was convicted and find Kshs.200,000/=. There was also the evidence that the deceased would earn Kshs.400/= per day for six days a week, this Kshs.2400 per week and that he would send to the mother same money per week.

14. Having taken that evidence and written submissions by the parties and in a reserved judgment, the trial court held the Respondents 60% to blame for the conduct while the Appellant was held 40% to blame. In coming to that conclusion the court said:-

> **"In the present case, the deceased was hanging onto the tractor given that there is only one seat in it. This in itself would render him blameworthy provided that his negligent conduct can be attributed to the accident itself. I doubt if this has been alleged or demonstrated. The deceased was a passenger and cannot be said to have contributed to the accident unless the contrary is proved.**
>
> **Reasonably, there is a real likelihood that the fatal injuries were escalated by the deceased position at the time. I may not go as far as holding that no injuries would have been sustained but obviously, the deceased must share blame for his actions which inadvertently raises the voluntary assumption of risk. I will hold him 405 liable to the fate that befell on him. The 02nd defendant was to blame for causing the accident and shall shoulder the 605 blame. The first defendant in vicariously liable".**

15. It is that finding that is the sole ground of appeal albeit truncated into some 7 grounds. Even if so expressed all grounds add upto one and fault the trial court for having apportioned liability contrary to evidence, did misapprehend the evidence and law applicable and for failing to apply the principle of ***res ipsa loquitor*** to find the deceased blameless for the causation of the accident.

16. Being a first appeal, this court can only interfere with the finding at trial if it be convinced and persuaded that in coming to the decision it did, apportionment of liability, which is a factual finding, the court mis-apprehended the facts or took into account an irrelevant matter or failed to take into account a relevant matter or that the finding is out rightly contrary to the evidence adduced[2].

17. In the words of the trial court the reason the deceased was found to have been to blame partly for the accident was the fact that he took a ride on top of a motor tractor. That may as well have been a reckless and negligence on the face of it including being an affront to the traffic act. However, the negligence that was material to the determination of the court was what the law calls proximate cause. Here even if the deceased assumed the risk by ridding as aforesaid, how that was act related to or contributed to the accident! Was that action, by itself, *ipso facto*, the cause of the accident and resultant injury?

18. For me I do find that merely riding on the tractor was not by itself the case of the accident unless it be proved that the rider interfered with the drivers attention and control of the tractor. The proximate and only cause of the accident was the manner of driving of the pick-up which resulted on ramming onto the tractor from behind. It is the singular duty of every driver, on a public road, to be on the look-out at all times in order that he does avoids and obviate colliding with or causing injury to other road users[3].

19. The equitable principle that first in time is stronger in law can be applied to the rule of the road that he who is first on the road has a right of way even if he was there unlawfully[4]. From that rule flows the other rule of logic that the driver who rammed unto another from behind is *ipso facto* at fault and

negligent. A motor vehicle being driven on the road when hit from behind must be viewed to be moving away from the one that hits it from behind. To assign any wrong to the person hit from behind unless there be evidence that it was reversing or suddenly stopped, would be to assign liability without fault yet the law is that in such matter there cannot be liability without fault[5]

20. Put in the context of this case it being uncontroverted that the motor tractor was rammed onto from behind, the proximate cause of the accident was the negligence of the pick-up driver and the deceased had no part to play in the manner and velocity with which he so rammed. I cannot but find that the sole cause of the accident which resulted in the death of the deceased, and therefore the damage suffered by the plaintiff, was the negligence of the 2nd Respondent, and him having been the undisputed driver and servant of the 1st Respondent, the said 1st Respondent was and remain vicariously liable for such negligence. Having so found it follows that the deceased had no blame for accident and therefore the trial court's finding and apportionment of liability was contrary to evidence and erroneous on the application on the principle of proximate cause when looked at from the prism of the evidence led. It being erroneous, it cannot be upheld but must be upset and interfered with. I do interfere; set the finding on liability aside and in its place a substitute a finding that the Respondents were wholly to blame.

21. Accordingly the appeals succeed wholly on liability and to that extent the finding on liability is set aside and on its place substituted with a finding that the Respondents were wholly to blame and are therefore jointly and severally liable to the Appellant and for the entire damage occasioned.

HCCA No. 139 of 2014

22. In this appeal, by the judgment delivered on 7/10/2014, the court found the Respondents wholly liable to the Appellant. Having so found, the trial court then in considering the damages sought by the Appellant, rendered himself and held that the plaintiff had failed to prove the special damages in the sum of Kshs.243,200/= as well as loss of earnings. The trial court gave three grounds for disallowing those claims; the ownership of the tractor was never proved, no proof where the tractor was taken for repairs and lastly that there was no evidence availed to prove how much the tractor fetched per day. In dismissing the claims, the trial court made three critical observations:-

> **"I would distinguish the present matter in that first the plaintiff in this case does not even know where he took the tractor for repairs; second, no invoices of whatever nature were raised; third, the person who produced the assessment report was not the maker thereof. I could not help but feel that the case left glaring gaps while the plaintiff hid under the guise of informal sector. With respect, if the plaintiff could look for an assessor for court purposes, he could manage to keep the proof of payments too. Curiously, the plaintiff's documents filed on instituting the suit were accompanied by a copy of receipt for purchase of some tractor tyre. The same seems to have fallen by the wayside. It follows that this claim was not proved and I would disallow it entirely".**

24. Before I consider the justification for those observations by the trial court, it is important to reappraise what evidence was led before him in line with the pleadings filed.

25. In the plaint, the plaintiff specifically pleaded at paragraph 3 to have been the owner of the tractor. He also produced at trial the police abstract and a motor accident report for Blueshield Insurance Company Ltd, all saying that he was the owner and policy holder with regard to the tractor. In his evidence, the Appellant, as PW 2, said that he was the driver of the tractor co-owned with one George Mwangi Mwaura. In cross-examination he maintained that the tractor was so co-owned but he had no logbook for it in court. No suggestion was made to him that he was an imposter of a masquerade as far as ownership of the tractor was concerned. Even the assessment report, receipt for towing charges as well as receipt for assessment and court attendance were all issued to the plaintiff and were produced without opposition. In addition no evidence was tendered in rebuttal to that aspect of evidence. Further the plaintiff did cite to court the decision in ***Geoffrey Omondi vs Emergency Assistance Radio Service HCCA No. 340 of 1997***, in which Waki J, as he then was, held that the standard of proof in civil case must remain within the balance of probabilities. The Judge said:-

"By requiring that the pleaded special damages be strictly proved, I doubt that it alters the well-known standard of proof in civil matters, that of proof on a balance of probabilities and not beyond reasonable doubt"

28**.** Having re-examined and reappraised the evidence on record, I do find that the trial court ran into error in find that the appellant had not proved ownership. For that error I do reverse the finding by the trial court and find that ownership was adequately and sufficiently proved.

29. In the instant case, the Appellant produced as exhibit the motor vehicle assessor report which said the cost of repairs was Kshs.117,900. There is no evidence on record that the said report was discredited neither did the trial court say he disbelieved the report but was concerned that the plaintiff did not know where he took the tractor for repairs and that the person who produced the report was not the maker.

30. That finding to this court was not merited. Not merited because the suit belonged to the parties. Having been referred to a binding decision by the High Court, ***Geoffrey Omondi vs Emergency Assitance Radio Service, HCCA No. 340 of 1997***, the distinction he put forth did not amount to a distinction at all. Rather he seems to have gone behind the evidence tendered by the parties. That evidence show that the assessment report was produced without objection from the Respondent, without the credibility of the witness being questioned nor was the report's authenticity brought into issue. In those circumstances the trial had no right to just trash it.

31. For repairs, PW said:-

"We were told that Kshs.117,900/= would be required for repair. We paid that amount".

And on cross examination the witness said:-

"We spent Kshs.117,900/= to repair the tractor. I don't have the receipts".

32. It would appear, from the reasons given by the trial court, that it took the view that receipts was the only way to prove repairs. That was erroneous it being the law that a detailed assessment report is sufficient proof of cost of repairs. In **Nkuene Dairy Farmers Coop Society Limited & James Kimathi –vs- Ngacha Ndeiya (2010) eKLR,** the Court of Appeal expressed itself as follows:

"In our view special damages in a material damages claim need not be shown to have been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damage item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty"

33. The reasons given to dismiss the claim being erroneous, I do set aside the decision dismissing the claim and in its place I substitute a judgment awarding to the appellant the pleaded and proved special damages in the sum of **Kshs 143,200**.

34. There was also a claim for loss of use in which the appellant claimed Kshs 10,000 per day for 14 days. In handling that claim the court said he would have awarded Kshs. 60,000 being net earnings of Kshs. 6,000 per day for 10 days but proceeded to disallow same on the basis that the ownership had not been proved. Having said that the ownership was proved, the basis of dismissal of that head of claim must follow that finding with the outcome that the dismissal is set aside and the sum assessed by the trial court is thus awarded.

35. In the end, for appeal **No 139 of 2014**, I do set aside the dismissal order and in its place I substitute a judgment for the appellant as follows;-

a) Motor vehicle search …..Kshs 1,200

b) Valuation report ……..Kshs 5,000

c) repair charges…….....kshs. 117,000

d) towing charges……....Kshs 20,000

e) loss of use…….Kshs 60,000

Total Kshs. 203,200

36. On the sums awarded, the appellants get interests at court rates from the date of the suit, for special damages, and from the date of the judgment of the lower court, for general damages. I also award the costs of the two appeals as consolidated to the Appellants.

Dated and delivered at Mombasa on this 31st day of May 2019.

P.J.O. OTIENO

JUDGE

---

[1] Niels Bruel vs Moses Wachira & Other [2014] eKLR

[2] Keruga vs Kiruga [1988] KLR 348

[3] Livingstone Otundo vs Naima Mohamed [1990] eKLR

[4] Imperial Bank Limited v David Kamanza Nguta [2017] eKLR

[5] **Kiema Mutuku –Vs- Kenya Cargo Handling Services Ltd [1991] 1Kar 258** where the court held;

"There is as yet no liability without fault in the legal system in Kenya and a Plaintiff must prove negligence against the Defendant where the claim is based on negligence."