REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 89 OF 2016

BONTANA HOTEL.....APPELLANT

-VERSUS-

ISSACK MOHAMED IBRAHIM.....RESPONDENT

JUDGMENT

1. The Appellant was the registered owner of motor vehicle Registration No. KBP 108 E Isuzu Bus, when on 1ST May 2011 at a place called **Mataa ya Ndege** along the Mombasa – Nairobi highway, the motor vehicle was involved in a road traffic accident with a truck Registration No. KNA 739Z 7932. The driver of the truck Mr. Salaat Issack Mohammed aged 36 years suffered fatal injuries.

2. The Respondent, the Administrator of the Estate of the deceased, sued the Appellants at the Mombasa Chief Magistrate's Court and claimed general damages for pain, suffering, and loss of dependency special damages and costs of the suit. The respondent's case at trial was that the appellant's authorised driver negligently and recklessly drove motor vehicle KBP 108E thereby occasioning it to collide with the trailer under which the deceased slept and thus causing him fatal injuries

3. At the trial the Respondent called three witnesses. The Appellant on its part called two witness. The Learned Trial Magistrate thereafter in his Judgment found the Appellants 90% liable for the accident and found the deceased 10% liable for the accident. He awarded the Respondent damages as follows: -

(a) Pain and suffering – Kshs. 50,000/=

(b) Loss of expectation of life – Kshs. 100,000/=

(c) Loss of dependency – Kshs. 560,000/=

Total – Kshs. 710,000/=

Less 10% contribution Kshs. 639,000/=

(d) Plus costs

4. Being dissatisfied with the finding on liability, the Appellant preferred this appeal. The memorandum of appeal lists the following four grounds essentially challenging the finding on liability and not the assessment of damages: -

1. THAT the Learned Trial Magistrate erred in law and fact and misdirected himself in finding the Appellant liable notwithstanding the evidence on record to the contrary.

2. **THAT the Learned Trial Magistrate erred in law and fact in failing to properly analyze the evidence before him which clearly established that the deceased was substantially to blame for the accident for reckless abandoning his vehicle on the highway without a warning triangle or any other warning signal.**

3. **THAT the Learned Trial Magistrate erred in law in failing to appreciate and apply the principles applicable in a claim for negligence.**

4. **THAT the Learned Trial Magistrate erred in law in finding the Appellant liable on the face of all available evidence.**

5. The Appeal was canvassed by way of written submissions which were highlighted on the 30th January 2019. Counsel for the Appellant submitted that there were no warnings signs mounted on the road to warn other road users and relied on the case of **Agnes Mutinda Ndolo & another v Mboya Wambua & 2 others [2017] eKLR** were the Court apportioned liability at 50:50.

6. Counsel for the Respondent on the other hand submitted that in the police abstract nobody was blamed for the accident and that the speed of 60-70 KMPH at a bend was not reasonable speed bearing in mind that it was at a bend and the bus driver ought to have slowed down. Counsel further submitted that PW2 **Mr. Abdul Salim** testified that that they pulled on the side of the road and he cut plant branches in order to notify other road users of the stalled motor vehicle. On apportionment of liability he relied on the case of **Dorcas Wangithi Nderi v Samuel Kibiru Mwaura & another [2015] eKLR** where it was held that a Court on appeal should be hesitant in interfering with the finding of fact of the trial Court.

7. As a first appellate court, I have reconsidered and reevaluated the evidence before the Trial Magistrate while bearing in mind that I did not see or hear the witnesses testify. See ***Selle v Associated Motor Boat Company Limited* *[1968] E.A. 123*** and ***Williamson Diamonds Ltd v Brown* *[1970] E.A. 1.***

8. I have also considered the submissions of Learned Counsel and the authorities cited in support of those submissions. The issue for determination by this court is, *Whether or not the Respondent had established on a balance of probabilities that it was the Appellant who was to blame for the accident that resulted in the fatal injuries sustained by the deceased**?***

9. From the evidence adduced by both sides, it is common ground that an accident occurred involving the bus and the lorry. The appellant bus crushed into the rear of the lorry allegedly parked on a portion of the road. The fact of the lorry being on the road and the ramming by the bus from the back are not disputed. The dispute as I see it is whose fault, contributed to what extent in the accident and the resultant injury.

10. In civil cases like the one before me, the standard of proving who was to blame for the accident is that of on a balance of probabilities and the burden of proving that standard is upon the party who alleges as espoused in Section 107 of the Evidence Act Cap 80.

11. On liability PW2 testified that he and the deceased were lying under the Respondent motor vehicle when the Appellant bus hit them from behind. On cross-examination, PW2 stated that he had cut branches and placed a reflector on the road. DW 1 on the other hand testified that the driver of the Appellant's Bus was driving at a speed of 60-70 KMPH and they did not see the Respondent's truck because there was a corner just before the stalled truck and there were no hazard signs on the road. The bus driver applied brakes but it was too late as he did not see the truck in good time.

12. I have noted that there was no concurrence between the evidence of PW3 and DW2 who were both police officers as PW3 stated that no one was blamed for the accident as investigations were still pending while DW2 stated that the Respondent was to be blamed for the accident as no warning signs to warn other road users were put up. DW2 failed to produce the investigation report he was relying on when he concluded that the Respondent was to blame for the accident. However the two officers must get the benefit accorded to them by the law under section 147 of the Evidence Act. Theirs was to produce the documents only and were never called as witnesses

13. **Section *53(2) (a) & (b)*** of the Traffic Act is emphatic that:

> ***"... The driver of any vehicle shall, in case of a breakdown, remove such vehicle from the road as soon as possible and, until so removed the vehicle shall be placed as close to the side of the road as possible. If the vehicle remains on the road between the hours of 6.45 p.m. and 6.15 a.m., its position shall be clearly indicated by a light or lights visible to drivers of vehicles approaching from either direction ..."***

Whereas ***section 53(3)*** provides *inter alia;*

> ***"If any part of the vehicle remains on or near the road in a position so as to obstruct or likely to obstruct or cause danger to other traffic using the road, the driver shall place on the road not less than fifty meters from the vehicle two red triangles of such construction and dimension as may be prescribed, one a head and one behind it so that each is clearly visible to drivers approaching from ahead or behind, as the case may be ..."***

14. It is important to note that only **PW2** could be viewed as an eye witness to the accident. The police officers who testified on behalf of the Appellant and Respondent were not the witnesses and only confirmed that the material accident was reported to the police based on the police records. They did not visit the scene of accident, no sketch plans of the scene were produced and it was not established who was to blame for the accident. The police abstract only shows that the case was pending under investigations.

15. This court has the duty and mandate to reevaluate the evidence on record and determine who was to blame, on a balance of probabilities. On whether the Respondent adduced enough evidence to demonstrate that it was the Appellant's driver to blame for the accident, this court takes refuge in the provisions of Section 107 and 108 of the Evidence Act that he who alleges must prove the fact which is alleged.

16. In **Muthuku – Vs – Kenya Cargo Services Ltd (1991) KLR 464**, the court observed that

> ***"… in my view, it was for the appellant to prove, of course upon a balance of probabilities, one of the forms of negligence as was alleged in the plaint. Our law has not yet reached the stage of liability without fault…"***

17. From the evidence of PW2, it is stated that the Respondent's driver complied with the aforementioned traffic Act procedures while DW1's testimony was that the Respondents driver contravened Section 53(2) & (3) of the Traffic Act which are mandatory provisions of

the law and by so doing he was reckless and endangered other road users among them the Appellant. That disagreement must be resolved from the record of evidence at trial. That evidence to the effect that the vehicle was parked off the road and leaves put on the road to warn other road users was never controverted in cross-examination. If anything, the cross-examination elicited more reiteration of that evidence.

18. There was also the evidence by the defendant's only witness that the bus was drive at a bend with depression, within Changamwe, a built up area, at a speed of more than 50 kph contrary to the law on speed limits.

19. the legal question would be, between the parking on the road and the ramming from the rear, which was the proximate cause of the accident. I do take the view that parking on the road, ipso facto, was not the cause of the collision rather it was the manner of driving, the speed and thus inability to brake , slow down or stop in time and at all which caused the collision and the death sued upon. I do find that the higher contributor was the bus driver. He ought to have been on the look-out for any obstruction on the road. It is not open for any driver to assume that the road is always clear. When on a bend, a depression or any other obstructing situation, there is additional duty to maintain a speed that would permit an emergency brakes and manouvres to avoid hitting an object on the road. That I do find the bus driver to have failed to observe and he was thus negligent. But the lorry driver was also not entirely blameless. There was a collision because his vehicle was on the road and he opted to repair it there under darkness. He did expose himself to foreseeable danger of being rammed against as the bus did.

20. Having considered the evidence on record the trial court made a determination and rendered itself as follows:-

> **"I have gone through the evidence on record and duly considered submissions on record. The first issue and perhaps the only one for determination who is to blame for the accident. From the evidence on record it is without doubt that the deceased motor vehicle was stationary whereas the defendants motor vehicle was in motion approaching the deceased motor vehicle. Whereas it is in dispute as to whether the deceased motor vehicle was on the road or off the road. Save for Plaintiff Witness 2, Defendant Witness 1 and Defendant Witness 2 an eye witness and a police officer who took the court through the investigation report testified that the deceased motor vehicle had stalled on the road thereby remaining on the way of the defendants motor vehicle. Whereas there is mention for two motor cycles involved in the accident it is not clear to the court how the two contributed to the accident or otherwise. It is the courts finding therefore that there is sufficient evidence that the deceased trailer remained on the road.**
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> **Be that as it may it was the testimony of Plaintiff Witness 2 that he placed things to warn road users and approaching traffic of their stalled trailer, while this confirms further that the trailer must have been on the path of other road users. I must state that it is a legal requirement that such warning signs be of a particular reflective triangle hazard warning and not rudimentary things. Further if the court was not to give the plaintiff the benefit of doubt and considering the undisputed nature of the road (bend and descend) it was expected of the defendants driver to slow down such that if at all he did slow down he could have easily braked veered off or in many ways avoided hitting with a stationery truck on the road. It is unfortunate that the scene sketch maps and plan were not produced and further that the police never seemed to have thoroughly investigated this matter but the upshot of the evidence before court is that whereas the plaintiff had the onus of putting up sufficing warning signs on the road the defendant bore the larger responsibility of driving with due care under the circumstances and the nature of the road. It is obvious to the court that the defendants driver was driving at a high speed in the circumstances such that he could not see the plaintiff stalled trailer in good time to apply his brakes or swerve to avoid the accident.**
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> **As a consequence of his negligence for recklessness a life was lost for which I hold the defendant liable by 90% and the deceased 10%".**

21. My review of the evidence in light of the decision by the trial court reveal no misapprehension of the evidence to merit any interference with the decision thereby reached. In coming to this conclusion, I have taken guidance from the decision in **Khambi and Another vs. Mahith i and Another [1968] EA 70**, where it was held that:

> **"It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.**

22**.** Similarly, The Court of Appeal in **Michael Hubert Koss & Another – Vs – David Seroney & 5 Others [2009] eKLR** that: -

> ***"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or 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 …***
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> ***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 that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."***

23. The upshot of the above is that I find no merit in the appeal which I order dismissed with costs to the respondent.

Dated and signed at Mombasa this 29th day of November 2019.

P J O Otieno

Judge

Delivered and signed at Mombasa this 29th day of November 2019

Dorah Chepkwony

Judge