



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.88 OF 2017

TIMMY ELPHAS OCHIENG.....APPELLANT

VERSUS

HASHI HAULIERS LIMITED.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. E. M. Onzere (SRM) in Tamu SRMCC NO.16 of 2016 delivered on 7th December, 2017)

JUDGMENT

1. **TIMMY ELPHAS OCHIENG** (*hereinafter referred to as appellant*) sued **HASHI HAULIERS LIMITED** (*hereinafter referred to as respondent*) in the lower court claiming damages for injuries allegedly suffered on 20.3.15 when motor vehicle KAH 333Q which he was driving along Kisumu Muhoroni road collided with respondent's motor vehicle KBD 412G ZC 9454 (*hereinafter referred to as the Trailer*) which was allegedly being driven negligently as a result of which appellant was injured.
2. The defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.
3. In a judgment delivered on **7th December, 2017**, the learned trial Magistrate found that the appellant did not prove his case on a balance of probability and dismissed it with costs to the respondent.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal filed on 19th December, 2017 which set out 2 grounds of appeal to wit:

1. The learned trial magistrate erred in law and fact by ignoring appellant's evidence and version of the circumstances leading to the accident and relied wholly on respondent's witnesses' evidence

2. The learned trial magistrate erred in law and fact which was at variance with the pleadings and against the weight of evidence

SUBMISSIONS BY THE PARTIES

5. When the appeal came up for mention on **20th March, 2018**, the parties' advocates agreed to canvass it by way of written submission which they dutifully filed.

Appellant's submissions

6. Appellant holds the view that the police abstract which ought to have resolved the stalemate as to the point of impact was not produced and on that ground urged the court to apportion liability at 50:50%. He placed reliance on the case of **the following authorities**:

1. Hussein Omar Farah v Lento Agencies [2006] eKLR

2. Augustine Dula Sunday V Johanness Okoth & another Kisumu HCCA 42 OF 2013

3. Commercial Transporters Limited v Registered Trustees of the Catholic Archdiocese of Mombasa [2015] eKLR

Respondent's submissions

7. It was submitted for the respondent that the appellant had a duty to prove his case and respondent was under no obligation to disapprove evidence relating to the point of impact which the appellant did not establish.

Analysis and Determination

8. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See *Mbogo v Shah & Another (1968) EA 93; Selle & Another v Associated Motor Boat Co. Ltd. & Others 91968) EA, 123* and *Mwanasokoni v Kenya Bus Services Ltd [1985] eKLR*). It then behooves this court to summarize the evidence that was tendered before the trial court.

The evidence

9. Appellant testified that he swerved to the left off the road to avoid a collision with the trailer and that after he swerved back to the road, there was a collision between the two vehicles on the lawful lane of his vehicle as a result of which he lost control of his vehicle which landed in a ditch and he was injured. He denied veering to the right side of the road.

10. DW1, the respondent's driver blamed appellant for driving onto the lawful lane of the trailer causing the accident. DW2, a police officer who visited the scene stated that there were debris on the lawful lane of the trailer.

11. I have perused the entire record of appeal and considered the submissions by on behalf of both parties. I note that the appeal revolves around the issue of liability.

12. Both the appellant and DW1 blame each other for the accident. The plaintiff claims the accident occurred on the lawful lane of his motor vehicle while DW1 stated it was on the lawful lane of the trailer. DW2 who was expected to assist the court resolve the stalemate regarding the point of impact simply repeated what DW2 said and his evidence was therefore of no assistance to court. In the result, I find both drivers liable and in so finding, I find fortification in the Court of Appeal decision in *Hussein Omar Farah v Lento Agencies (Supra)* where the court faced with a similar situation as the one subsisting in this case held as follows:

“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.”

DISPOSITION

13. Consequently, the appeal succeeds and the trial court's order dismissing the plaintiff's case is set aside and substituted with an order on liability at 50:50 % as between the appellant and the respondent. The amount of general damages assessed by the trial court remains **undisturbed. Each party shall bear its own costs of this appeal. .**

DATED, DELIVERED AND SIGNED THIS 24th DAY OF May 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - N/A

Respondent - Mr. Gichaba holding brief for Mr. Mumma