



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 8 OF 2015

ELDORET EXPRESS COMPANY LTD.....APPELLANT

VERSUS

VICTOR OUMA OCHIENG.....1ST RESPONDENT

THUMA DISTRIBUTION CO. LTD.....2ND RESPONDENT

JUDGM/ENT

(Being an appeal from the judgment of Honourable T.D CHERERE,

Chief Magistrate delivered on 8th December, 2015 in Eldoret Cmcc No. 19 of 2013).

1. The Appellant (**ELDORET EXPRESS COMPANY LTD**) is aggrieved by the judgment of the in which judgment was entered in favour of the 1st Respondent **VICTOR OUMA OCHIENG** for Kshs.180,000/= condemning the appellant to 30% liability and the 2nd Respondent 70% liable for the accident.
2. The genesis of this is that the 1st Respondent had filed a suit against the appellant and **THUMA DISTRIBUTION CO. LTD** (the 2nd respondent) claiming that on 10/11/2012 he was a lawful travelling passenger aboard motor vehicle **KBT 199Q** Isuzu bus travelling towards **Nakuru** direction when the driver of motor vehicle **KBP 718E** Mitsubishi lorry so negligently drove the said motor vehicle and while trying to avoid something on his rightful lane encroached into the rightful lane of motor vehicle **KBT 199Q** and in the process the two vehicles rammed into each other.
3. The 1st Respondent blamed the Appellant for negligence saying its driver did not exercise due diligence in the manner he drove the said bus hence occasioning a collision with the 2nd Respondent's lorry registration number **KBP 781E** as he was over speeding and thus unable to control the said bus. He also blamed the Appellant's driver for failing to swerve to the left side so as to avoid a collision with the 2nd Respondent's lorry.
4. The 1st Respondent also blamed the driver of the 2nd Respondent's lorry registration **NO. KPB 781E** for over speeding and failing to keep proper look out for oncoming traffic and for failing to keep to his lane and for dangerously encroaching onto the path of motor vehicle registration **NO. KBT 199Q** Isuzu bus hence causing the accident.
5. As a result of the collision, the 1st respondent who testified as PW3 stated that he sustained injuries on the head (where he was scratched by a piece of metal), knees and pelvis and that he also had a headache. All the injuries were confirmed by PW1, (**DR PANEL KIPKORIR RONO**) and PW2 (**DR SAMUEL ALUDA**) who classified the injuries sustained as soft tissue injuries. The thus sought damages for the injuries he suffered.
6. The 1st respondent told the trial court that as they were travelling at night to **Nairobi**, an oncoming lorry which l he also blamed the lorry driver for veering on to their lane. He also confirmed that there was only one lane which could only accommodate the bus, and the lorry swerved onto the lane used by the bus. He also confirmed that the bus crashed, rolling on the left side of the road, because of the impact after it had been hit by the lorry.
7. On cross examination, the 1st respondent admitted that in his statement he said he was asleep and did not see what happened. According to a traffic police officer **PC David Chebet (PW4)**, there was a motor vehicle which had broken down on the lane that leads to **Eldoret**, and the lorry was avoiding it by overtaking it when the collision occurred. He confirmed on cross examination that the stationary vehicle (whose registration number he did not get) could also be blamed for the accident, and it driver could have been charged for the offence of obstruction. He was not able to establish whether the crew of the stationary vehicle had placed any warning signs on the road to alert other

road users. He also stated that there was a small foot-path and a valley next to the path on the left side of the road.

8. The appellant's driver **CHARLES MBUGUA MAKUA** confirmed the collision around **Chirchir** area as he was heading towards **Nairobi** where he was expected to arrive by 5.00am. He explained that he saw the stalled vehicle which was on the opposite lane, and also noticed that the lorry was approaching while in the opposite lane. He flashed the bus, headlight to warn the oncoming driver not to overtake the stationary vehicle, and even slowed down completely and tried to move off the road, (although he could not move off completely because there was a road (sic...river??)). However the lorry moved on to the opposite lane and hit the bus on the driver's side. He denied moving at a fast pace, saying that was not possible as the road was in a very bad state, and it had rained that night.

9. In her judgment the trial magistrate held that by a deduction theory, if the appellant's driver expected to arrive in Nairobi by 5.00pm, yet 1.00am found him at Chirchir area, then he would have to be driving at a very high speed to meet that expected time of arrival, and could not possibly have been able to slow down immediately. It was also her view that having seen the lorry approaching then the appellant's driver ought to have come to a complete stop.

The trial magistrate also blamed the 2nd respondent's driver for overtaking when the road was not clear. Liability was thus apportioned at **30%** against the Appellant, and **70%** against the 1st respondent, and general damages were awarded at **Kshs. 180,00** while specials were at **Kshs 2000/-**

10. The appellant having been dissatisfied with the said judgment preferred an appeal before this court on grounds that:-

a). The trial Magistrate erred in finding that the appellant was 30% liable and failed to consider the defendant's submissions on liability.

c). The trial Magistrate failed to consider the evidence that was tendered by the defence during the hearing of the suit as well as the Defendant's submissions on quantum.

11. The appeal was canvassed through written submissions where the Appellants stated that the evidence tendered by the defence witnesses pointed to the fact that a head on collision occurred on the left lane of the of the Appellants vehicle **KBT 199Q** when the driver of motor vehicle **KBP 718E** abruptly overtook a stationary lorry which had a mechanical defect on the road.

12. DW 1's evidence was that he noted a spoilt vehicle on the opposite side of the road heading to Eldoret. He also noted a spoilt oncoming vehicle wherein he reduced his speed and flashed his lights in an attempt to warn the said driver but he suddenly overtook the stationary lorry thus leading to a head on collision. The final resting place of the Appellant's vehicle was on the left side heading to **Nakuru**.

13. The trial court acknowledged the fact that the driver of the lorry blatantly disobeyed the traffic rules by overtaking when traffic was not clear but proceeded to find the Appellant 30% liable for the accident. The finding on liability was therefore erroneous as both Respondents did not tender any credible evidence to demonstrate that the Appellant contributed to the occurrence of this accident.

14. As regards to quantum of damages, the Appellants submitted that the award was excessive and in contravention of the principles for award of damages. The court is accused of simply comparing the proposed awards by both parties and gave an award of Kshs. 180,000 without any reasoning and that it did not consider the evidence presented by the 1st Respondent was contradictory with the pleadings.

15. The respondents contend that the trial magistrate's award of **Kshs. 180,000** as general damages is sufficient. The trial magistrate relied on facts and evidence put and proved before him by the 1st Respondent and did not take into consideration an irrelevant factor or omitted to take into consideration a relevant factor.

Analysis and Determination

16. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 demeanour of a witness is inconsistent with the evidence in the case generally (***Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270***).

17. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424***

The appropriate standard established in these cases can be stated in three complementary principles:

i). First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

18. In the case of Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others [1986] eKLR where the court of Appeal held that:-

“.....inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.....”

19. In assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. In the case of H. West and Son Ltd v. Shepherd (1964) AC.326 and stated thus:

“...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.....”

20. The principles upon which this court should proceed are those stated in the case of KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE, GATHOGO KANINI VS A. M. M. LUBIA & ANOTHER. [1998]eKLR.

“... It must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

21. The Court of Appeal in Hussein Omar Farah v Lento Agencies Civil Appeal 34 of 2005[2006] eKLR 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.”

22. In the present case, the Respondent/Plaintiff had a duty to prove that the accident was caused by the /Appellant’s driver on a balance of probability. *The evidence on record, did not demonstrate the omission or act of commission by the appellant’s driver as to amount to negligence leading to the collision. The 1st respondent confirmed on cross examination that he was asleep and did not know what happened.*

23. There was no dispute that the collision occurred on the lane which was being rightfully used by the appellant’s, and it was because of the action by the 2nd respondent’s driver in overtaking a vehicle that had stalled on the road at night. DW1 flashed to warn of the presence of his bus which was approaching from the opposite direction, and the duty lay on the 2nd respondent’s driver to wait, give way and allow the bus to pass before getting onto the opposite lane.

24. There is also the undisputed evidence that the appellant’s driver tried to take evasive action but was restricted by the narrow nature of the road, and the adjoining valley on the side. *In my own assessment whereas it is true that both drivers were under a duty to each other and other road users the evidence rests the blame squarely on the 2nd respondent. In particular, I find the driver overly negligent in overtaking when it was not safe to do so and failing to give way to the appellant’s vehicle which had slowed down, and could not move out of the lane as there was constraint by a narrow footpath and a valley on its side.*

25. Lord Reid put it more graphically that as much as I appreciate the fact that determination of liability in road accidents cases is not a scientific affair as in Stapley – Vs – Gypsum Mines Ltd (2) (1953) AC 663 at pg 681 that

“To determine what caused an accident from the point of new legal liability is a most difficult task. If there is any valid logical or scientific theory of 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 ...”

“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.”

In the present situation, it is not clear why the driver and/owner of the stationary/stalled vehicle was not enjoined in the suit nor charged for causing obstruction, and I can only speculate that perhaps the situation discussed by Lord Reid in the afore-cited decision was in play. The upshot is that the trial court disregarded relevant evidence and took into consideration matters which were not factually proved but based on speculative theory, to find the appellant liable, and this was an error in law and fact. Consequently the judgment on liability apportioned

against the appellant be and is hereby set aside. I hold that liability lays at 100% against the 2nd appellant and I so find. The costs of the appeal shall be borne by the respondents equally.

Delivered and dated this 18th day of October 2018 at Eldoret

H. A. OMONDI

JUDGE