



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 307 OF 2012**

**KIJABE FARM LIMITED.....APPELLANT**

**VERSUS**

**JOSEPH GITHERE KIMANI.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 18<sup>th</sup> May, 2012 by Hon. Mrs. Wamae (CM)  
Milimani Commercial Courts in CMCC No. 5747 of 2004)**

**JUDGMENT**

1. The Appellant, Kijabe Farm Ltd was sued in the lower court by the Respondent, Joseph Githere Kimani. The Respondent was the owner of a lorry Reg. No. KAN 546E which was involved in an accident with the Appellant's tractor Reg. No. KAC 751B on 30<sup>th</sup> May 2001. The Respondent attributed the accident to the negligence of the Appellant's tractor. The Respondent's motor vehicle was damaged in the accident.
2. The claim was denied as per the amended statement of defence filed in response to the amended plaint. The Appellant's side blamed the accident on the Respondent's side. The Respondent in a reply to the amended statement of defence denied any negligence on it's driver's side.
3. The case proceeded to a full hearing. Judgment was entered in favour of the Respondent on 100% liability basis for the sum of Ksh.734,588.70, interest and costs. The Appellant was dissatisfied with the said judgment and appealed to this court on grounds that can be summarized as follows:
  - (a) That the judgment was against the weight of the evidence.
  - (b) That the trial magistrate failed to appreciate that the Respondent's driver was charged with the offence of careless driving and the acquittal was merely on a technicality.
  - (c) That the award of Ksh.62,000/= paid as insurance premiums was not recoverable.
  - (d) That the award of Kshs.34,389.70 to the Respondent was erroneous.
4. During the hearing of the appeal, the parties opted to file written submissions. I have considered the said submissions.
5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own

independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

6. A total of six witnesses testified on the Respondent’s side. PW4 Thomas Regare was the driver of the Respondent’s lorry. His evidence was that the tractor was driving ahead of his motor vehicle. That he indicated to the right and started overtaking the tractor but the tractor suddenly turned to the right without any warning and a collision occurred at the middle of the road. The scene was visited by police officers and after investigations the lorry driver was charged with the offence of careless driving but was subsequently acquitted. He produced the proceedings in the traffic case as an exhibit.

7. PW5 Joseph Gikoya Maina and PW6 Elizabeth Nyagothe Githere who were passengers in the lorry gave evidence that corroborated that of the lorry driver (PW1) in respect of the manner in which the accident occurred. The evidence of the two passengers is that their driver was overtaking the tractor when the tractor suddenly turned to the right without having put on his indicators.

8. The rest of the evidence from the Respondent’s side was that of the Respondent (PW 2), the owner of the lorry. His evidence was that his damaged motor vehicle was repaired and the insurance company paid him Kshs.746,941.80 for the repairs. He paid Kshs.110,500/= insurance excess fee, Kshs.28,000/= towing charges and Ksh.91,893.70/= worth of spares parts which were not fitted as they were not available.

9. PW3 Obed Kariuki from Monarch Insurance Company confirmed that the Respondent’s motor vehicle was insured by them and stated that the Respondent paid the insurance company Ksh.110,500/= excess fees. That the motor vehicle was repaired at Kshs.634,695/= and out of the sum of Kshs.91,893.70cts not paid for the other spare parts that were not available, Kshs.62,004/= was deducted for premiums not paid and the balance of Kshs.34.389.70 paid to the Respondent.

10. PW1 John Kimotho the motor vehicle assessor gave the cost of returning the motor vehicle to it’s pre-accident position as Ksh.746.941.80cts. He produced his reports and an invoice for Ksh.3,500/= as exhibits. His further evidence was that spare parts not fitted would have cost Kshs.91,893/=.

11. The tractor’s driver passed on before he testified in the lower court. The burial permit and death certificate were in court as exhibits. The said driver had however testified in the traffic case.

12 DW1 Japheth Wanyonyi an employee of the Appellant Company testified that he was informed of the accident and preceded to the accident scene. He found both the tractor and the lorry at the scene. He produced photographs of the scene and stated that he blamed the lorry driver for causing the accident. According to DW1, he found the tractors indicators were still on. He did not however specifically state whether it was the indicators to the right or to the left.

13. The trial magistrate entered judgment for the Respondent as follows:

Repair costs ) Ksh.634,695.00

Paid to garage )

Paid as premiums           Ksh. 62,004.00

Paid to the Respondent   Ksh.34,389.70

Assessors fees             Ksh.3.500

14. The claim for loss of user was dismissed.

15. On liability, the lorry driver (PW4) and his two passengers (PW5 & 6) blamed the accident on the tractors turning to the right without indicating so. They gave the lorry's speed at the material time as 40Kph. 40 Kph for an overtaking motor vehicle is a very low speed particularly taking into account the 5 metre skid marks left on the road surface and further taking into account the impact of the accident which left the lorry with extensive damage. This comes out in the evidence of P.C. Thomas Kigoude who visited the scene and testified in the traffic case.

16. DW's1 evidence that the tractor's indicators were still on when he arrived at the scene is not helpful. He did not state whether the indicators were to the left or right. DW1 could not tell whether the indicators were on at the time of the accident. In the proceedings in Tr. Case No. 149/2001 the tractor driver, Simon Rono testified that he indicated his intention to turn to the right and as he turned to the right he was hit by the lorry.

17. At the end of the trial, the trial magistrate found the prosecution case against the lorry driver was not proved beyond reasonable doubt. The lorry driver was acquitted. The acquittal however in a traffic case does not absolute such a driver of liability on a 100% basis.

18. It is clear that both drivers blamed each other for the accident. Although the driver of the tractor has since passed on, his evidence in the traffic case ought to have been taken into account. The presence of 5 metre long skid marks on the road surface is an indication of higher speed than the one given by the Respondent's side. The tractor driver was alone at the time of the accident so there were no other witnesses to corroborate his evidence. It is however noteworthy that the evidence of the investigations carried out blamed the lorry driver for the accident.

19. From the analysis of the evidence on record, it is not possible to tell who caused the accident and to what extent. Liability ought to have been apportioned equally in the circumstances. As stated by the court of Appeal in **Hussein Omar Farah v Lemto Agencies [2006] eKLR** 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.”**

20. On the amounts awarded, the Ksh.62,004/= and Ksh.34,389.70 reflected in the lower court judgment as paid respectively for premiums and to the plaintiff were paid out of the sum of money for the spare parts that were not available. This comes out clearly from the evidence of PW3 the assistant manager, Monarch Insurance Company and the evidence of the Respondent (PW2). In any event, according to the motor vehicle assessor, it would have taken a total of Ksh.746,941.80cts to restore the lorry to its pre-accident position.

21. With the foregoing, I find the appeal has merits on the issue of liability. I apportion liability on a 50%:50% basis. The sum of Ksh.734,588.70 plus interest therefore ought to be paid equally by the Appellant and the Respondent. The costs in the lower court to the Appellant. The appeal having been partially successful, each party to bear own costs of the appeal.

Date, signed and delivered at Nairobi this 27<sup>th</sup> day of April, 2017

**B. THURANIRA JADEN**

**JUDGE**