



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI
CIVIL APPEAL. 19/2017

JIWANI IMPEX LIMITED.....APPELLANT/APPLICANT

VERSUS

JAMES NYINGE ERIKANA (Suing as the legal representative of the

Estate of NAOMI WANJIRU NGIGI.....1ST RESPONDENT

SEACON (K) LIMITED.....2ND RESPONDENT

JUDGEMENT

1. The appeal arises from judgment and decree of Hon. Mwiru Resident magistrate at Makindu as she then was delivered on **22/01/2014** where she held and apportioned liability at **50%:50%** between the Appellant and the 1st Defendant. The dispute arose out of the road traffic accident which occurred on **04/08/2011** along Nairobi-Mombasa Road in which Naomi Wanjiru Ngigi (deceased) suffered fatal injuries.

2. The Civil case No. **127/2012** Makindu was selected as a test suit. Being aggrieved by above decision, the Appellant lodged instant Appeal setting out 5 grounds of appeal namely:-

I. The learned Trial Magistrate erred in law and fact in finding that the Appellant and the 2nd Respondent were wholly negligent without considering that the 1st and 2nd Respondent had entered into consent where the 1st respondent conceded 20% liability.

II. The learned Trial Magistrate erred in law and fact in finding that the Appellant and 2nd respondent were equally to blame in the subject accident when in essence the 2nd Respondent did not tender evidence to rebut the evidence of the Appellant.

III. The learned Trial Magistrate erred in fact by not considering the submission by the Appellant and only relying on the submissions by the 1st Respondent.

IV. The Learned Trial Magistrate erred in fact and law by relying on the evidence of the 1st respondent and the Appellant in apportion liability between the Appellant and the 2nd Respondent when in essence the issue of liability ought to have bear between the Appellant and the 2nd Respondent.

V. The learned Trial Magistrate erred in all points of law and facts.

3. This being a first appeal, this court's duty is to re-evaluate the evidence on record, analyze it and come up with its own conclusion bearing in mind that it never heard the arguments raised and submissions made during trial, then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way.
4. See the case of **SELLE VS. ASSOCIATED MOTOR BOAT COMPANY LTD [1968] E.A. 123, 126** where the court considered the principles upon which it acts in a first appeal.
5. The plaintiff case was set out in the evidence of the **PW1 Monicah Nzilani Mutinda**. She testified that on **04/08/2011** she was travelling in a motor vehicle which she could not remember the number plate. She was seated in front with a driver holding a child aged 12 years. At a place called Man Eater, the Motor vehicle they were in hit a lorry.
6. The lorry wanted to overtake another vehicle that was ahead of it and in the process it entered their motor vehicle lane thus hit their vehicle. After collision their vehicle rolled once and landed on the trench. She sustained injuries but the child was unhurt. She blamed the lorry driver for the accident.
7. On cross-examination, she reiterated that there was a vehicle ahead of the lorry and it thus wanted to overtake the said vehicle. The lorry hit their vehicle on the driver's side and driver's door was pulled out. She stated that their driver did not attempt to overtake as there was no vehicle ahead of them.
8. The defence case was pegged on testimonies of DW1 and DW2. DW1 Francis Kimeu Ndege was driver of the lorry **KBK 709G/ZC4731** who stated that on **04/08/2011** he was driving to Nairobi from Mombasa when at Man Eater place a motor vehicle Noah Toyota started overtaking while headed opposite direction and driver tried to swerve back to his lane and he applied emergency breaks but the vehicle collided door to door.
9. His vehicle veered of the road and the Toyota Noah overturned into a ditch. He had not seen it at a distant as there was a corner and only noticed it while it was less than **20** meters ahead. He blamed the driver of the Toyota for the accident.
10. In cross-examination he stated that the place Toyota was overtaking has a yellow line prohibiting overtaking and there was a corner.
11. DW2 Benedict Mutua an assessor appointed by the 1st defendant and the insurance APA did the investigation including visiting scene. The evidence is that the investigation revealed that the small Toyota vehicle began to overtake another vehicle at a close range and owing to proximity, the small vehicle collided with the truck on its right side and small vehicle on left and it overturned. He blamed the small vehicle for the accident.
12. The trial court relying on authorities which are to the effect that where the court had no concrete evidence to distinguish the blame between the two drivers, the court ought to apportion liability equally held both driver of truck and Toyota equally to blame. See **BERCKEY STEWARD LTD AND OTHERS -VS- LEWIS KIMANI WAYAKI (1982-88) KAR 1118** and also **BAKER -VS- MARKET HARK BROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LTD (1953) IWLRL**.
13. The Appellant submission is that since the plaintiff 1st Respondent and the Appellant entered into consent on liability for first respondent to shoulder **20%** in contribution and the 2nd Respondent ought to have been held liable for **80 %** in contribution. It is Appellant submission that the consent determined suit in finality, thus seeks appeal to be allowed.
14. On evidence it is submitted that PW1 said it was Appellant driver who was overtaking while appellant 2 witness evidence is to the contrary. The driver of Appellant DW1 was in a position to see the happening of the accident.
15. He saw a Toyota Car overtake at a high speed thus even if the driver of the same car testified it could

not have changed the position. The trial court found the only two witnesses to the accident gave diametrically opposite evidence on the liability thus held both drivers equally to blame.

16. The Appellant submit that at least the 2nd Respondent ought to have been held **80%** in liability. The 2nd Respondent supported the finding by the trial court. It is submitted that the only eye witnesses were PW1 and DW1 who did not give convincing evidence to the mind of the court.

17. Thus the court resorted to rely on cited authorities which hold that where the court had no concrete evidence to distinguish the blame between two drivers, the court ought to apportion blame equally. The 2nd Respondent urges court to uphold the trial court decision.

18. The 1st respondent submit that each sides witness insists that it was correct on how the accident occurred hence the conflicting evidence between two eye witnesses leaving court without clear evidence of who was to blame.

19. Thus the holding of the case of **HUSSEIN OMAR FARAH VS LENTO AGENCIES NAIROBI CA APPEAL NO. 34/2005 (2006 KLR** comes to play see also **HEWARD -VS- BEMROSE (1973) RTR 32.**

20. On consent recorded on liability the 1st respondent submit that it was not a party to the same thus not binding on it see **SAMUEL WAMBUAGU MWANGI -VS- OTHAYA BOYS H.S.CA 7/2014(20.4) EKLR.** -Halsbury Laws of England paragraph 329 4th edition City Chitty on Contracts 32 and Edition Chapter 18.

21. Thus the 1st Respondent supports the trial court holding.

22. I have gone through the pleading, the evidence on record and the submissions tendered. The issues arising are that:-

I. What is the importance of the 1st respondent and appellant consent on status of liability as between the appellant and the 2nd respondent?

II. Whether the trial court erred by apportioning liability equally between the Appellant and the 2nd Respondent?

III. What is the order as to costs?

23. The consent on liability was entered between the plaintiff (1st respondent) and the Appellant herein. The Plaintiff/1st respondent was to shoulder liability at 20% and thus reduction of his award to the extent of 20%. The appellant thus agreed to be blamed at 80% as between him and the plaintiff. The quantum between the two was thus agreed to that extent.

24. There was no apportionment of liability as between the Appellant and the 2nd Respondent. The contract was only binding as between the Appellant and the plaintiff/1st Respondent thus the court was to proceed into hearing of the suit and apportion liability as between the appellant and the 2nd Respondent.

25. The court therefore was in order in disregarding the consent and proceeding to determine the degree of the Appellant and 2nd Respondent liability. See **SAMUEL WAMBUAGU MWANGI -VS- OTHAYA BOYS H.S.CA 7/2014(20.4) EKLR** and -Halsbury Laws of England paragraph 329 4th edition City Chitty on Contracts 32 and Edition Chapter 18.

26. On fact of the case the testimony of the PW1 a passenger in her in law vehicle and that of the truck driver DW2 were diametrically opposite and conflicting. The trial court observed the demeanor of

the both witnesses and seems not to have been convinced as to who was telling the truth.

27. The court ended up blaming the two sides and apportioned liability equally. The trial magistrate court was supported by evidence on record and the law.

See **HUSSEIN OMAR FARAH –VS- LENTO AGENCIES NAIROBI CA APPEAL NO. 34/2005 (2006 KLR** comes to play see also **HEWARD –VS- BEMROSE (1973) RTR 32.**

28. The court therefore finds that the trial court never went into error and thus the appeal has no merit. Since the appellant and the respondent No 2 are equally to blame, and the first appellant aligned herself with the appellant position, the court orders parties to bear their own costs.

SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 26TH DAY OF APRIL, 2017.

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C. KARIUKI

JUDGE