



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CIVIL APPEAL NO. 79 OF 2016**  
**(Formerly Nakuru HCCA No. 51 of 2013)**

*(Being an appeal from Judgment of the Chief Magistrate’s Court at Naivasha Civil Case No. 720 of 2011, E. Riany - RM)*

**WAWERU PETER .....APPELLANT**

**-VERSUS-**

**LYDIA MANOSO LAWRENCE KAZUNGU.....1<sup>ST</sup> RESPONDENT**

**MASH BUS SERVICE LIMITED.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. The uncontested background to this appeal is that on a rainy night on 10<sup>th</sup> October 2010, the 1<sup>st</sup> Respondent who was the Plaintiff in the lower court, was travelling in the bus **KBD 300P** from Kisumu to Mombasa. The bus, which is owned by the 2<sup>nd</sup> Respondent, and 1<sup>st</sup> Defendant in the lower court case was involved in a collision with a lorry **KAK 439E**, the property of the Appellant herein and 2<sup>nd</sup> Defendant in the lower court suit.
2. The accident occurred at Kasambara along Gilgil – Naivasha Road. The 1<sup>st</sup> Respondent sustained a deep cut on the left knee and was treated at Coast Provincial General Hospital. She filed a suit against both vehicle owners alleging negligence against the drivers of the respective vehicles. Both Defendants in the lower court denied negligence and liability, blaming each other for the accident.
3. The trial court having heard the parties’ evidence found in favour of the Plaintiff against both Defendants. Liability was apportioned between the said Defendants (the Appellant and 2<sup>nd</sup> Respondent herein) in the ratio of 30:70% respectively. Damages were awarded to the Plaintiff in the sum of Kshs 102,800/=.
4. The Appellant, aggrieved with the outcome filed a Memorandum of Appeal that contains six grounds of appeal as follow:

**“1. The Learned Magistrate erred in law and fact in apportioning liability between the Appellant and the 2<sup>nd</sup> Respondent at the ration of 30:70% respectively.**

**2. The Learned Magistrate erred in law and fact by apportioning a higher ration of the liability upon the Appellant despite finding that the 2<sup>nd</sup> Respondent (1<sup>st</sup> Defendant) was**

**speeding.**

**3. The Learned Magistrate erred in law by relying on the testimony of the 1<sup>st</sup> Respondent's witness to ascertain whether the Appellant had put hazards and/or a life saver.**

**4. The Learned Magistrate misdirected herself and based his finding on unreasonable considerations.**

**5. The Learned Magistrate failed to appreciate the submissions of the Learned Counsel for the Appellant by finding in favour of the Respondents herein.**

**6. In all the circumstances of the case, the findings of the Learned Magistrate on apportionment of the ratio of liability are insupportable in Law or on the basis of the evidence adduced.”**

5. The appeal was canvassed orally before me on 21<sup>st</sup> June, 2017. Mr. Kamau submitted on behalf of the Appellant that none of the particulars of negligence pleaded in the plaint or the 2<sup>nd</sup> Respondent's defence were proved at the trial. He pointed out that contrary to the Respondents' particulars, evidence tendered indicated that while the 2<sup>nd</sup> Respondent's bus (the bus) was in motion, the Appellant's lorry (the lorry) was not shown to have been in motion (as the said particulars suggested). He further emphasized that in that regard, the 1<sup>st</sup> Respondent was bound by her pleadings. Mr. Kamau, further highlighting the evidence of the 1<sup>st</sup> Respondent at the trial, asserted that she did not see the lorry prior to the collision and therefore could not tell how the same happened.

6. Regarding the 2<sup>nd</sup> Respondent, Mr. Kamau said they failed to prove negligence against the Appellant. He reiterated evidence by the 2<sup>nd</sup> Respondent's driver. To the effect that the accident occurred at a corner and that he saw the lorry too late, that it was raining, and that he was driving the bus at 60KPH. In Mr. Kamau's view proof of liability against the Appellant was the 2<sup>nd</sup> Respondent's burden. He further submitted that there was no reason given why the trial court preferred the 2<sup>nd</sup> Respondent's version of the accident against the Appellant's, and that there was no evidential basis for the level of apportionment of liability adopted by the court.

7. Moreover, he added, the fact that the 1<sup>st</sup> Respondent made a case against the 2<sup>nd</sup> Respondent did not automatically mean proof against the Appellant. He argued that the 2<sup>nd</sup> Respondent ought to bear higher if not all liability for the accident.

8. For the 1<sup>st</sup> Respondent, Mr. Njehu reiterated evidence by the 1<sup>st</sup> Respondent with regard to the absence of warning signs on the road, and by the Appellant's driver concerning the location of the Appellants lorry – a corner by the road. Citing Section 53 (3) of the Traffic Act, he stated that warning signs in respect of the parked lorry should have been placed 50 metres away from the vehicle. He took the position that in light of the failure by the Appellant's driver to comply with the foregoing, particularly on a dark and rainy night, the Appellant ought to bear higher liability. He urged the court not to interfere with the judgment of the lower court.

9. Mr. Juma for the 2<sup>nd</sup> Respondent highlighted the absence of hazard lights on the parked lorry and the fact that the 1<sup>st</sup> Respondent was not in a position to tell the speed of the bus. He stated that the 1<sup>st</sup> Respondent's evidence that the accident occurred at a straight portion of the road, and not a corner was contradicted by the Appellant and the 2<sup>nd</sup> Respondent. Like the Appellant, he pointed out that the police officer who visited accident scene and/or conducted investigations did not testify to shed light on matters in dispute.

10. Regarding the scene of the accident he stated that the Appellant's and 2<sup>nd</sup> Respondent's witnesses agreed that it was at a corner. He highlighted evidence by the 2<sup>nd</sup> Respondent's driver to the effect that

the lorry had stopped at that stretch with parts of it protruding into the road, and without any warning signs. Besides, the driver of the lorry could not according to Mr. Juma, tell how the accident occurred as he was busy attending to the mechanical faults that had forced him to stop the lorry. He submitted that there was evidence to support the trial court's decision on liability and that the findings should not be disturbed.

11. In a quick response Mr. Kamau revisited the "competing" evidence regarding absence of warning signs by the parked lorry and that proof thereon depended on the party thus alleging.

12. The Court of Appeal for Eastern Africa laid out the confines of the duty of the first appellate court in **Selle -Vs- Associated Motor Boat Co. [1968] EA 123** in the following terms:-

**"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.**

**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 Hameed Saif -Vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."**

13. I have considered the evidence led at the trial and submissions on appeal. It is beyond dispute that the collision in question occurred at a curved part of the road during a rainy night. Secondly, it is indisputable that the Appellant's lorry was parked by the road at the time of the collision in which the 1<sup>st</sup> Respondent sustained injury. It is correct, as pointed out by the Appellant, that the particulars stated in the plaint and by 2<sup>nd</sup> Respondent's defence do not specifically allege that the Appellant's lorry protruded on the road or further, that the driver failed to place warnings on the road as required.

14. The Appellant however pleaded in his defence statement the fact that the 2<sup>nd</sup> Respondent's motor vehicle rammed into his parked lorry. Particulars set out in paragraph 5 relating to the negligence of the bus driver state *inter alia*:

**" PARTICULARS OF NEGLIGENCE OF THE DRIVER OF MOTOR VEHICLES KBD 300P**

**a. Driving at a speed that was excessive in the circumstances.**

**b. Recklessly driving on a busy highway while it was not safe to do so and thus ramming into a parked stationary vehicle on the side of the road.**

**c. Failing to take due or diligent care or to follow the Highway Code when driving along a busy highway.**

**d. Exposing himself, his passengers and fellow road users to a risk, which he knew or ought to have known by driving recklessly fast as to be unable to stop, slow down, swerve or in any other way manage or control the said motor vehicle KBD 300P thus ramming into the rear of motor vehicle KAK 439E.**

**e. ....;]" [emphasis added]**

15. The matter of the presence of the Appellant's motor vehicle by the road side thus having been pleaded, and further supported through evidence, by all parties, the Appellant cannot turn around as attempted now, to claim for his benefit that none of the other parties pleaded that particular issue. I think that the real question in dispute is whether the 2<sup>nd</sup> Respondent's driver was solely or more liable for the accident than the Appellant's driver.

16. In this regard, I do not accept the Appellant's contention that the proof of the Appellant's negligence was the duty of the 2<sup>nd</sup> Respondent. For two reasons: the Appellant was enjoined initially by the Plaintiff herself and secondly, despite the 2<sup>nd</sup> Respondent intimating the intention in its defence, to enjoin the driver and owner of the lorry as third party, and to claim indemnity/contribution no notice to the latter effect was ever issued.

17. Order 1 Rule 24 of the Civil Procedure Rules provides for the latter instance as follows:-

**“1. Where a defendant desires to claim against another person who is already a party to the suit—**

**(a) that he is entitled to contribution or indemnity; or**

**(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or**

**(c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.**

**2. No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.**

**3. Nothing contained in this rule shall operate or be construed so as to prejudice the rights of the plaintiff against any defendant to the action.”**

18. The Appellant not having availed himself of the above provisions, both Defendants stood in the same position. The Plaintiff had a duty to prove her case in respect of the two Defendants against whom her suit was brought. And in light of their respective defences, the Appellant and 2<sup>nd</sup> Respondent were obligated to defend themselves *inter alia* by establishing their pleaded defences. Ultimately, the trial court reviewing all the evidence would draw its conclusion as to whether the case had been proved and the level of liability in respect of the parties sued.

19. This is what the trial court concluded *inter alia* upon reviewing the evidence:

**“.....the Second Defendant and was heavily refuted by the first Defendant. When the first Defendant's vehicle hit the second Defendant's which was given to be weighing about 16tonnes, the lorry moved over 10m and was only stopped by a wall..... I do find both Defendants liable for the accident with the first Defendant 30% liable and the second Defendant 70% liable.”**

20. The Appellant has faulted these findings, asserting that they were not supported by evidence or well-reasoned. The gist of the Plaintiff's evidence, maintained during her testimony, was that both the Appellant's and the 2<sup>nd</sup> Respondent's driver were to blame for the accident. With regard to the former,

she stated that the lorry was parked on the road without any warnings on a rainy night and with its lights off.

21. In respect of the 2<sup>nd</sup> Respondent's driver, she maintained that he drove the bus at a speed in the dark and rainy night. She did not however state exactly where the lorry was parked, whether on the road itself or by the side and none of the Defendants therein raised this matter with her during cross-examination. Nor suggest that the road was curved at the scene of the accident. The Plaintiff said in answer to a question by the 1<sup>st</sup> Respondent's advocate that at the scene of accident the road was straight. The witness was not shaken by cross-examination maintaining the substance of her testimony.

22. Apart from confirming that the accident occurred on a dark and rainy night, the 2<sup>nd</sup> Respondent's driver was more specific on the exact position of the Appellant's lorry. He stated that it was at a corner down a sloppy hill towards Nairobi, and that half of the vehicle protruded onto the road. He said that there were no warning signs on the road to warn motorist of the presence of the lorry. He also stated that although he was doing 50 – 60 kilometres per hour, when he braked to avoid the lorry, the bus skid and he rammed into the lorry which was then pushed forward for some distance.

23. For his part the Appellant's driver said that when his lorry developed a mechanical problem he drove it beside the road, stopping at a gentle corner to investigate the problem. He put the distance between the lorry and tarmac at 2 feet to half a metre. That he put on the hazard indicator and placed two warning triangles by the lorry. Although it was raining, he got under the lorry to diagnose the mechanical problem and did not see the bus approach and hit the lorry, moving it some 50 metres away.

24. The difficulty in resolving some of the key questions in this case, arose from the failure by the Plaintiff and the Defendants at the trial to summon the police officer who visited the accident scene or conducted investigations. Such a witness would have shed light on the exact location of the lorry and bus, and damage sustained thereon. The sketch or description of the scene of the accident - whether straight or curved would have been proffered by such witness. Be that it may, the evidence by the Plaintiff and lorry driver does not indicate that the bus driver went off the road to hit the lorry. Indeed the lorry driver did not witness the actual collision. Ditto for the Plaintiff: she only heard a bang from her seat in the rear of the bus.

25. If the lorry driver's evidence on the warnings he placed by and location of the lorry is believed, the collision should not have occurred. It however seems plausible that because of the curve at the spot of the road where the lorry was parked, even if the lorry was not completely inside the road, part of it was protruding into the road, hence the collision. The lorry driver took an unwise and careless decision by stopping his vehicle at the curved portion of the road. He admitted during cross-examination that the vehicle could have gone a further distance and therefore stop at a safer place. He elected not to do so.

26. On the other hand, the bus driver conceded that visibility was poor due to heavy rain on that night. Even accepting that the lorry was halfway inside the road and without any warning signs as the bus driver stated, it behooved the bus driver in those circumstances to exercise extreme caution due to the hazardous weather. The presence of other vehicles, difficulty in braking on wet road surface are admitted by the bus driver.

27. In my considered view the main reason why the driver was unable, at 10 yards of the parked lorry to safely stop, instead skidding and hitting the lorry at an impact which pushed the lorry forward, is that he was probably at a higher speed than 60 kilometres per hour. And in any event, in the circumstances the bus driver himself described, 60 kilometres per hour for a bus was a fairly risky speed.

28. There was admittedly other traffic on the road and on his bus were 48 passengers. In my own view the bus driver's negligence appears higher, the lorry driver's actions and omissions that endangered other road users notwithstanding. Looking at the reasoning adopted by the trial court in relation to the cause of the accident, I do not accept that the court misdirected itself or that its findings were not supported by the evidence available.

29. In my own view, the trial magistrate perhaps showed more leniency towards the Appellant than he deserved in the circumstances. The Appellant's driver was guilty of having elected to stop his lorry, and proceeding to park it at a corner of the road, and thereby intruding onto the road, and most likely, without any warning signs to other road users. That said, I cannot find any justification for interfering with the factual findings of the trial court or the apportionment of liability between the Appellant and the 2<sup>nd</sup> Respondent. The trial court's findings cannot be faulted.

30. In the case of **Ephantus Mwangi & Another -Vs- Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278, Hancox J.A.** (as he then was) stated succinctly that:-

**“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did”**

The first holding in the case was that:-

**“The court of appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if**

**(a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of evidence or**

**(b) .....**”

31. In light of the foregoing, I find no merit in the grounds canvassed on this appeal and will dismiss it with costs.

Delivered and signed at **Naivasha** on this **19<sup>th</sup>** day of **October, 2017**.

In the presence of:-

No appearance for the Appellants

No appearance for the Respondent

C/C – Barasa

**C. MEOLI**

**JUDGE**