REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 46 OF 2015

D. M. ENTERPRISE LIMITED .....APPELLANT

- V E R S U S –

JOHN KINUTHIA JOSEPH.....RESPONDENT

(Being an appeal from the judgement and decree delivered by

Hon. T. S. Nchoe (Mr) Ag Senior Resident Magistrate on 23rd

May 2014 in Nairobi CMCC No. 2308 of 2011)

JUDGEMENT

1. John Kinuthia Joseph, the respondent herein, was on 29.6.2011 driving his motor vehicle registration no. KAR 138F along Mombasa Road when motor vehicle registration no. KBL 493W belonging to D. M. Enterprises Ltd, the appellant herein, knocked his motor vehicle near Imara Daima Stage. The respondent proceeded to file a material damage claim against the appellant before the Chief Magistrate's Court, Nairobi. The suit was defended. Three witnesses testified in support of the respondent's case and the appellant closed his case without summoning witnesses in support of its case. Hon. T. S. Nchoe heard the case and eventually entered judgment in favour of the respondent in the sum of ksh.497,100/=. Being dissatisfied, the appellant preferred this appeal and put forward the following grounds in its memorandum:

1. The learned trial magistrate misdirected himself and erred in law and in fact by holding that the plaintiff had proved his case against the defendant on a balance of probabilities.

2. The learned trial magistrate misdirected himself and erred in law and in fact by disregarding the investigating officer's witness testimony and holding the appellant 100% liable for the accident the subject of this suit.

3. The learned trial magistrate misdirected himself and erred in law and in fact in failing to consider the evidence on record and hence arrive at an erroneous finding on liability.

4. The learned trial magistrate misdirected himself and erred in law and in fact by failing to consider that the plaintiff substantially and/or wholly contributed to the accident and thus arrived at an erroneous finding on liability.

5. The learned trial magistrate misdirected himself and erred in law and in fact by failing to properly consider the defendant's submissions on record thus arrived at erroneous finding on liability and quantum.

6. The learned magistrate erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis.

7. The learned trial magistrate erred both in law and in fact in awarding general and special damages that are way beyond his pecuniary jurisdiction.

8. The learned trial magistrate erred in law and in fact by awarding damages that were not specifically pleaded for nor proved at trial thus making the whole judgement erroneous.

9. The learned trial magistrate erred in law and in fact by awarding damages for loss of user in a claim for total loss of the suit motor vehicle thus making the whole judgment erroneous.

10. The learned trial magistrate erred in law and in fact by awarding damages of loss of user for an open ended period of time thus making the whole judgment erroneous.

11. The learned trial magistrate erred in law and in fact in failing to find that the plaintiff failed to mitigate his losses rendering him undeserving of the award for loss of user for a motor vehicle that was declared a write off.

2. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have further considered the rival submissions. Though the appellant put forward a total of 11 grounds of appeal, those grounds basically revolve around two main questions namely liability and quantum.

3. On liability, it is the submission of the appellant that the learned trial magistrate erroneously assigned the appellant liability yet there was no credible evidence to make liable. The appellant pointed out that the trial magistrate completely ignored the evidence of the investigating officer. It is the appellant's submission that the worst scenario should have been to apportion liability instead.

4. The respondent on the other hand was of the submission that the appellant had failed to present evidence that could have assisted the trial court to apportion liability. Having considered the rival submissions over liability, it is clear to this court that the appellant failed to summon witnesses in support of its case to shed light on what happened at the time of the accident. Simon Mureithi Mwangi, (PW3) was a passenger in the respondent's motor vehicle and the only eye witness. He told the trial court that the respondent's motor vehicle was packed on the side of the road at the stage when the appellant's truck knocked it from the rear forcing it to roll. This piece of evidence was not controverted by the appellant. The appellant cannot turn around on appeal and claim that no eye witness testified.

5. On liability, I am convinced that the trial magistrate came to the correct decision to hold the appellant wholly liable. If the appellant wanted to have liability to be shared then it should have laid evidence to assist the court arrive at such a finding but it instead closed its case without summoning witnesses.

6. On the question of quantum, it is the submission of the appellant that the decree as extracted is at variance with the judgment. It is pointed out that in the plaint the respondent sought for inter alia special damages for loss of user and in the judgment the trial court gave judgment as prayed in the plaint but the decree only indicated judgement in the sum of ksh.497,100/= and was silent on the claim for loss of user. The appellant further argued that the claim for loss of user could not be granted because the particulars were not pleaded. I have looked at the plaint and it is clear that the respondent had pleaded in paragraph 8 of the plaint a sum of ksh.3,000/= per day from 10.08.2010 until full payment. I agree with the appellant's submission that the claim for loss of user should be determined either way in calculating the decretal sum. If the decree extracted does not include the claim for loss of user then there is an error apparent on record which must be corrected on appeal. I do agree with the submissions of the appellant that a claim for loss of income and or user cannot be for an indefinite period. At the time of the accident it is not clear how old the respondent's motor vehicle was. The practice has been that a motor vehicle assigned to say public servants and some organization are replaced with a new motor vehicle after a period of 6 years.

7. The evidence tendered shows that the respondent's motor vehicle was not new at the time of the accident. Though there is no evidence as to how long that motor vehicle could continue to operate, had the accident not taken place, I think this court is entitled to assume that the motor vehicle could have continued to transport passengers for another year before it is retired.

8. In the end, the appeal as against liability is dismissed in its entirety.

9. However the appeal as against the order on quantum partially succeeds giving rise to the following orders;

i. The award of kshs.497,100/= remains unchanged.

ii. The prayer for loss of user of 3,000/= per day is given for only a year less 30% for wear and tear and the claim is tabulated as follows:

3,000x30(days)x12(months)x70/100 =756,000/=.

Therefore judgement is hereby entered in favour of the respondent and against the appellant in the sum of ksh.1,253,100/=.

Dated, Signed and Delivered in open court this 24th day of November, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent