REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 436 OF 2004

CATHOLIC UNIVERSITY OF EASTERN AFRICA.....APPELLANT

VERSUS

SECURITY HOLDINGS LIMITED.....DEFENDANT

J U D G M E N T

The appeal herein arises from the judgment and the decree of the then Senior Principal Magistrate at Nairobi Milimani Commercial Court H. T. W. C Wamae delivered on 25th May, 2004.

The Respondent, Security Holdings Limited in a plaint dated 30th August, 2000 and filed in Court on 19th October, 2000 sued the Appellant Catholic University of Eastern Africa claiming a sum of Ksh.450,539/-, costs of the suit and interest and any further relief that the Honourable Court may deem fit to grant.

In the plaint, the Respondent has pleaded that on or about the 28th day of June, 1998 its Motor Vehicle registration Number KAD 793Y was lawfully being driven along Langata Road in Nairobi when the Appellant's Servant/driver and/or agent drove motor vehicle Registration No. KAC 603S so negligently that he caused and/or permitted it to violently hit the Respondent's aforesaid motor vehicle thereby causing extensive damage to it.

The particulars of negligence are pleased in paragraph 3 of the plaint as follows: -

a. Driving motor vehicle registration number KAC 603S at a speed that was excessive in the circumstances.

b. Ramming into the Plaintiff's motor vehicle.

c. Driving the said motor vehicle without due care and attention.

d. Failing to keep any or any proper look out or to have sufficient regard for other traffic on the said road.

e. Failing to stop, swerve, slow down or in any other way control the said motor vehicle so as to avoid the accident.

f. Causing the accident.

It was further pleaded that as a result of the said accident the Respondent suffered loss and damage which it has assessed at Ksh.450,539/- and which it has claimed from the Appellant.

The Appellant filed an appearance on the 24th November, 2000 and a statement of defence on the 5th December, 2000. In its defence, the Appellant denied each and every allegation contained in the plaint including the Respondent's capacity to institute the suit. It, however, admitted the occurrence of the accident involving the two aforesaid vehicles but denied that its driver and/or servant was to blame for the accident. It blamed the driver of the Appellant's motor vehicle for causing the accident and has attributed particulars of negligence to him in paragraph 4 of the defence which are thus: -

a. Driving at a speed that was reckless in the circumstances.

b. Driving with full lights on with intent to daze oncoming vehicles.

c. Descending the steep bank without any due care and attention.

d. Failing to have any regard for other traffic reasonably expected to be on the said road.

A reply to defence was filed on the 22nd January, 2001 which has reiterated all the contents of the plaint and has denied the contents of the defence in toto.

During the hearing of the suit the Respondent called three witnesses while the Appellant called only one. Patrick Kundu Aketch (PW 1) was driving motor vehicle KAD 793Y at the material time along Langata Road towards City Centre, when he met motor vehicle KAC 603S which was being driven from the opposite direction in a zig zag manner. It was his evidence that he was driving at 40 KPH and that the collision occurred on his side of the road. The motor vehicle he was driving was damaged on the front side all the way to the rear. After the accident, he called his employer who alerted the police who took measurements and the vehicles were towed to the police station. He denied that he was driving fast and that he blinded the other driver with his lights.

On cross-examination, he told the court that he saw the other motor vehicle when it was 50 meters away and swerved off the road to avoid the accident. There were no other motor vehicles on the road at that time. It was his evidence that the collision occurred on the right side of the road.

Joshua Kioki Matheka gave evidence as PW 2. He is a motor vehicle assessor by profession. He assessed motor vehicle KAD 793Y following which he compiled reports dated 17th July, 1998 and 22nd August, 1998. He told the court that the vehicle was damaged on the right hand side. According to him, the value of the damaged parts was Kshs.156,111.10 cents and the cost of repair was Ksh.399,925.20 cents but after the motor vehicle was dismantled, other parts were found to be damaged which necessitated preparation of a supplementary report for a total of Ksh.436,243.90 cents. He charged Ksh.4,000/- for preparation of the reports.

Wilfred Musau gave evidence as PW 3. He is an employee of Kenindia Insurance Company Limited, Claims Department. His employer had insured motor vehicle KAD 793Y and after the accident they instructed the assessor to assess the damage to the vehicle. He confirmed that the motor vehicle was repaired by Toyota Kenya who raised an invoice of Ksh.436,243.90 which was duly paid by Kenindia Insurance. In total a sum of Ksh.450,539/- was incurred as repair costs and assessor's fees plus Ksh.100/- for police abstract.

On its part, the Appellant called only one witness, Rev (Doctor) Ceasar Lukudo who testified as DW 1. It was his evidence that he was driving motor vehicle KAC 603S towards Langata from Machakos. He told the court that he was driving uphill when he saw an oncoming vehicle with its full lights on, when he swerved off the road where his car was hit by the oncoming vehicle. According to him, the collision was on his side of the motor vehicle. He denied driving in a zig zag manner and it was his evidence that he was driving at 20 KPH.

He told the court that he was driving carefully and he was on the lookout for other road users and that it was the driver of the other vehicle who rammed into his vehicle and he does not know why the police blamed him for the accident.

In cross-examination, he said he is asthmatic and that is why he did not wait at the scene of the accident. He was taking drugs but they did not contribute to the occurrence of the accident.

After hearing the matter, the learned magistrate apportioned liability at 50:50 % between the Appellant and the Respondent and entered judgment on special damages for a total of Ksh. 450,539/- plus costs and interest.

The Appellant being unhappy with the judgment filed the Memorandum of Appeal herein on the 25th June, 2004 which raises four (4) grounds as follows: -

1. The learned magistrate erred in law and fact in failing to consider the fact that the cause of the accident was so speculative that no reasonable or probable inference could be drawn that either driver was negligent.

2. The learned magistrate erred in law and fact in failing to consider that there was lack of evidence and not a conflict of evidence and that the paucity of evidence was such that any finding would be purely speculative.

3. The learned magistrate erred in law and fact in failing to consider fully the glaring contradictions in the Plaintiff's evidence and thereat misdirected himself in finding that both parties were to blame equally.

4. The learned magistrate erred in law and fact in making a finding that both parties were to blame equally in spite of the fact that both parties tendered opposing versions of the events leading to the accident.

It has sought that the judgment and decree of the learned magistrate be set aside on it's entirely with costs to it.

On the 16th November, 2015 this court gave directions that the appeal be disposed off by way of written submissions. The order was given in the absence of the Respondent but it was served on it on the 2nd day of March, 2016 and was duly received but by the time of writing this judgment there are no submissions on record for the Respondent.

The Appellant filed its submissions on the 12th day of February, 2016. Am alive to the fact that this being the 1st appeal, this court is under duty to re-evaluate the evidence afresh and come up with an independent conclusion. See the case of **Selle Vs Associated Motor Boat Co. Ltd 1968 E.A 123.**

The Appellant has submitted that there were glaring contradictions in the evidence adduced by the witnesses who testified on either sides and that from the evidence on record, it was clear that, there was no evidence that it is the Appellant's driver who rammed into the Respondent's vehicle. That though both vehicles were damaged there is no evidence which vehicle hit the other. It was also submitted that the point of impact on the road was indeterminate and no effort was made to ascertain the same and in the circumstances, it would be speculative to hold that the Appellant's vehicle left its side of the road and rammed into the Respondent's vehicle. According to the Appellant the converse is equally probable and accords with the evidence on record.

It was further submitted that there was no direct evidence that either driver was negligent nor could it be inferred from the circumstances. To support this contention, counsel for the Appellant relied on the case of **Haji Vs Mariar Freight Agencies Limited (1984) KLR** where Nyarangi Ag JA as he then was) stated:

"Where it is proved by evidence that both parties to a motor accident are to blame and there is no means of making a reasonable conclusion, the blame can be apportioned equally on each….. The position must however be different where there is no evidence to establish that any party was negligent. That would be the case where the evidence adduced points one way and there is no conflicting evidence. In that case, it cannot be right to apportion blame there being no evidence on which apportionment could be based. As was stated in <u>Lakhamshi- Vs Attorney General [1971] EA at page 121 by Spry Vp</u>, it is difficult to appreciate how a party can be held to have been negligent if there is no evidence that he was in fact negligent."

The Appellant has urged the court to be guided by the holding in the above cited case.

The Appellant submitted that it is the duty of the Plaintiff/Respondent to prove its case on a balance of probability and in so doing, it ought to have proved that the Appellant was at fault and according to it, this burden was not discharged by the Respondent. The learned counsel for the Appellant relied on the case of **Wareham t/a A. F. Wareham & 2 Others Vs Kenya Post Office Savings Bank [2004] 2KLR** where it was held as follows: -

"The burden of proof is on the Plaintiff and the degree of proof is on a balance of probabilities. In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

The Appellant urged the court to allow the appeal and dismiss the Respondent's claim as the case was not proved.

I have considered the Memorandum of Appeal filed herein and the submissions made by the counsel for the Appellant. I have also gone through the proceedings and the evidence adduced before the lower court. The Respondent blamed the Appellant for the accident while the Appellate blamed the Respondent. The driver of motor vehicle KAD 793Y owned by the Respondent in his evidence told the court that motor vehicle KAC 603S was being driven in a zig zag manner and that the collision was on his side of the road. On his part the driver of the Appellant's motor vehicle who testified as DW 1 said he saw an oncoming vehicle which in this case. I assume is KAD 793Y with full lights on and he swerved off the road from where his car was hit by the oncoming vehicle.

Apart from the evidence by the two drivers, there is no other material evidence available to court. Each driver blames the other for the accident. I am alive to the fact that a Plaintiff must proof his case on a balance of probability. However, in this case parties by their evidence and pleadings blamed each other for the accident.

In my view, in a claim based on negligence where there is a collision between two vehicles, one of the drivers could be fully liable for the accident or both of them could be found to have contributed to the accident in which case, the court will determine the degree of such contribution.

The case before the court is peculiar in that going by the evidence on record, there is no direct evidence that either driver was negligent nor could it be inferred from the circumstances. The court will in the circumstances be bound by the holding in the case of **Haji Vs Mariar Freight Agencies Ltd** (supra) and find that the cause of the accident was so speculative that no reasonable or probable inference could be drawn that either of the drivers was at fault.

In the circumstances aforesaid, the most appropriate orders to make in this appeal is to order for a retrial. The matter is returned back to the Chief Magistrate's Court at Nairobi (Milimani) for hearing afresh. Each party shall bear its own costs of the appeal.

Dated, signed and delivered at Nairobi this 28th day of July, 2016.

……

L NJUGUNA

JUDGE

In the Presence of

…….. for the Appellant.

…….. for the Respondent.