REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 111 OF 2006

1. BONIFACE KASOE NDEMWA

2. BENJO TRAVELLERS LIMITED ……..…….....……... APPELLANT

VERSUS

TITUS MBUKU NZIOKI …….……..... RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate's Court at Kitui of Hon E.K. Makori (SRM) in Principal Magistrate Civil Case No. 278 of 2004 dated 26th January 2006)

****

(Before B. Thuranira Jaden J)

J U D G M E N T

1. The 1st and 2nd Appellants, **Boniface Kasoe Ndemwa** and **Benjo Travellers Ltd**, were the 1st and 2nd Defendants respectively in the suit before the lower court. The 3rd and 4th Defendants were **Steve Sola Mutia** and **Ali Mohamed** respectively but they are not parties in this appeal.
2. The Respondent herein, **Titus Mbuku Nzioki** was the Plaintiff. He had sued the 1st and 2nd Defendants as the driver and owner respectively of motor vehicle registration No. **KAH 608P Mitsubishi Matatu** (hereinafter the matatu). The 3rd and 4th Defendants were sued as the driver and owner of motor vehicle registration No. **KUH 159 Isuzu Isuzu Bus** (hereinafter the bus).
3. The Respondent's case before the lower court was that at the material time he was travelling as a fare paying passenger when the matatu was hit by the bus. The Respondent sustained injuries in the accident. The Respondent blamed the accident in the negligent manner that he stated that the two motor vehicles were being driven.
4. The 1st and 2nd Appellant filed a written statement of defence and denied liability. The 1st and 2nd Defendants blamed the accident on the 3rd and 4th Defendants' negligence.
5. The Respondent in a reply to the defence attributed liability on all the four Defendants at 100%.
6. By the time the case proceeded to hearing the 3rd and 4th Defendants had not entered appearance or filed any defence. Consequently, interlocutory judgment was entered against the 3rd and 4th Defendants. The case proceeded to hearing with the participation of the 1st and 2nd Defendants who are the Appellants herein.
7. The evidence of PW1, **Rose Mumo** was that she was a passenger in the matatu. Her evidence was that the matatu she was travelling in together with the Respondent was approaching a bus stage when the bus which was behind the matatu hit the matatu. According to PW1, the matatu and the bus were competing for customers at the time of the accident. PW1 produced the proceedings in

SRMC Kitui Traffic Case No. 1067/2000 – Republic –vs- Steve Sola Mutia wherein 3rd Defendant was convicted and sentenced for the offence of dangerous driving.

8. The Respondent testified as PW1. His evidence was that he started suffering from confusion after the accident. His evidence was that he sustained head injuries. He produced a medical report and a receipt for Kshs.1,500/= charged by the doctor for the preparation of the same.
9. The 1st Respondent testified as the only defence witness. His evidence blamed the bus driver for the accident for hitting him from behind. He further testified that the bus driver was charged and convicted for the offence of dangerous driving. Although the 1st Respondent conceded that he wanted to pick passengers at the bus stage where the accident occurred, he denied having blocked the pathway of the bus. The 1st Respondent admitted that the Respondent was his passenger in the matatu.
10. At the conclusion of the case, the trial magistrate found both vehicles to blame for the accident but did not apportion liability amongst them. The trial magistrate apportioned liability at 100% against the 1st – 4th Defendants. The Respondent was awarded Kshs.230,000/= as General Damages and Kshs.1,620/= for Special Damages.
11. The Appellants were aggrieved by the judgment and appealed to this court on grounds that can be summarized as follows:-
    i. **That the trial magistrate decided the case against the weight of the evidence.**
    ii. **That the conviction on the charge of dangerous driving was not taken into account.**
    iii. **That the trial magistrate failed to apportion liability properly.**
    iv. **That the case was time barred.**

12. During the hearing of the appeal, the counsels for the parties relied on their written submissions. The Appellants' submissions essentially expound on the grounds of appeal.
13. The Respondent's counsel's submissions supported the judgment of the trial magistrate. That the question of liability was *Res judicata* **PMCC No. 186 of 2002** where the four Defendants were found 100% jointly and severally liable. According to the Respondent's counsel, the Appellants ought to seek indemnity from the 3rd and 4th Defendants. On the question of limitation of time, the Respondent's position is that they sought extension of time which was not challenged during the trial before the lower court.
14. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings – *See* **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**
15. The Respondent was a passenger and no negligence has been attributed to him. The quantum of damages remains unchallenged.
16. On the question of liability, it came out from the Respondent's evidence that the two vehicles were competing for the passengers at the bus stage. It does not come out clearly which vehicle played exactly which role and thereby led to the accident. What is abundantly clear is that the matatu was ahead and the bus was behind.
17. The driver of the bus was charged and convicted for causing death by dangerous driving. What are the consequences of the said conviction?
18. As stated by the Court in **Dilip Asal v Herma Muge & Another [2001] e KLR**:-

"The mere fact that Omukoba was convicted of the charge of dangerous driving does not bar the appellant from raising the issue of contributory negligence. That is now old hat since 1971 when the case of Robson v Oluoch [1971] EA 376 was decided. In that case, the Court of Appeal for East Africa said at page 378, letters B to D:

> **"The respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving in relation to the accident, was negligent. But that is a very different matter from saying, as** Mr Sharma **would have us say, that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory**

negligence on the part of another person in subsequent civil proceedings. That is not what S. 47A **[of the** Evidence Act**] states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident, that the plaintiff, or any other person, was also guilty of negligence which cause or contributed to the accident…"**

19. From the evidence on record, it is clear both vehicles failed to exercise the degree of care and skill expected of a person driving a motor vehicle on a public highway. I therefore apportion liability on a 50:50 basis. See for example **Anne Wambui Ndiritu –v Joseph Kiprono Ropkoi & Another [2004] e KLR** where it was stated as follows:-

> **"In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50."**

20. The trial magistrate erred when he failed to apportion liability and brought in issues of test suit, **Res judicata** and indemnity. There is no evidence of a test suit. The question of liability was therefore not R*es judicata*.
21. On the question of limitation of time, it is clear that same arose in the pleadings. According to the Respondent's case, the suit was filed pursuant to the leave of the court granted on 17/8/2004. The said leave of the court was produced by the 1st Respondent when he testified. The same remained unchallenged. The ground of appeal therefore has no merit.
22. As stated by the Court of Appeal in **Tana and Athi Rivers Development Authority v Joseph Mbindyo & 3 Others [2013] e KLR:-**

> **In Oruta, it was held that the issue of challenge to the granting of leave to file suit out of time, can only arise at the trial. Gachuhi, J.A. in the leading judgment of this Court in Oruta, stated as follows:-**
>
> **"It will be up to the Judge presiding at the trial to decide the issue of limitation as one fo the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act particularly where leave to file an action against the defendant has been granted *exparte*."**

23. After evaluating the evidence on record, I correct the judgment of the lower court to read 50% liability on the Appellants' part. Each party to bear own costs of this appeal.

……

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 24th day of February 2015.

……

B. THURANIRA JADEN

JUDGE