REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 300 OF 2010

(Being an appeal from the Judgment of the Chief Magistrate, Mrs Wilbroda Juma

delivered on the 5th day of November 2010

in

Nakuru Chief Magistrate's Civil Case No. 1081 of 2005)

MULTIPLE HAULIERS LIMITED.....APPELLANT

VERSUS

RAHAB MUTHONI KIMANI.....RESPONDENT

JUDGMENT

1. This appeal was brought by Multiple Hauliers Limited the Appellant herein against the Judgment of the Chief Magistrate, Mrs Wilbroda Juma delivered on the 5th November, 2010 in Nakuru Chief Magistrate's Court No. 1081 of 2005.

The Respondent Rahab Muthoni Kimani sued the Appellant for special damages arising from an accident involving her motor vehicle Registration No. KAP 397M Toyota Hiace that was being used for a matatu business and the Appellant's motor vehicle registration No. KAJ 135D/ZB 9835 along the Nakuru-Eldoret road. The Respondent's motor vehicle was extensively damaged and declared a write off while the Appellants vehicle was damaged and repaired at a cost of shs. 1,147,555.50 including assessors' fees of shs. 8,700/=. This amount forms the appellant's counterclaim as stated in its amended defence and counterclaim against the Respondent.

2. The Respondent on her part blamed the Appellant's driver in negligence for causing the accident and claimed the value of her motor vehicle Registration No. KAP 397M, assessors fees and Police Abstract at shs. 655,100/=. She further raised a claim for loss of user of the vehicle at shs. 2,000/= per day and urged the court to award the same from the date of accident upto time of payment in full.

3. The trial magistrate heard the case fully and entered judgment for the Plaintiff *(now Respondent)* at 100% on liability against the Defendant *(now Appellant)* and awarded Kshs. 655,000/= in special damages as value of the vehicle together with assessment charges and shs. 600,000/= being award for loss of earnings. This is the Judgment that the Appellant has appealed from.

4. The grounds upon which the Appellant relies are as appears on the face of the record that: –

(1) The Learned trial magistrate erred both in law and in fact by holding the Appellant wholly liable for the accident subject matter hereof contrary to the evidence on record.

(2) The Learned trial magistrate erred both in law and in fact by making a finding in favour of the Respondent just because of the number of witnesses the Respondent called to give evidence.

(3) The Learned trial magistrate erred both in law and in fact by failing to consider the evidence of the Police Officer who was unable to determine the point of impact.

(4) The Learned trial magistrate erred both in law and in fact by disregarding the evidence adduced on behalf of the Appellant.

(5) The Learned trial magistrate erred both in law and in fact by awarding the Respondent shs. 600,000.00 on account of lost earnings even after awarding the Respondent shs. 650,000.00 as the value of the vehicle.

The Appellant urged this court to set aside the lower court judgment.

5. In arriving at the Judgment appealed from, the trial court no doubt considered the evidence tendered by all the seven plaintiff's witnesses and the two defence witnesses, and in his own words was satisfied that the Respondent had proved her case against the Appellant on a balance of probability, that the Appellant failed to prove its counter claim, dismissed it, and awarded the Respondent a sum of shs. 1,255,000/= plus costs of the suit and interest.

6. As a first appellate court, this court is under a duty to re-evaluate the evidence tendered in the trial court and come up with its own findings and conclusions as held in the case **Selle –vs- Associated Motor Boat Co. Ltd (1968) E.A. 123.**

7. **The Respondent's case**

Seven witnesses were called by the Respondent among them the conductor of the Respondent's vehicle Registration No. KAP 397M, the driver having died during the said accident.

Sammy Murage Wanjohi (PW6) testified that the Nissan vehicle was travelling from Eldoret to Nairobi when after passing Timboroa, ahead he saw a combine harvester coming from Eldoret direction, and behind it he saw a lorry that was very fast, and that the lorry was overtaking the combine harvester, that it started flashing and the Nissan stopped as it could not swerve to the left where there was a metal barrier and a dam, it was steep and there was a bend. As a result the lorry tried to move back to its side *(lane)* but hit the Nissan on its driver's side. He later found himself lying at the road side and that the Nissan had turned and was facing Eldoret direction where it had come from. He further testified that the lorry had overturned on the left side of the road facing Eldoret direction.

All the other six witnesses for the Respondent *(Plaintiff)* testified that the Nissan vehicle was travelling towards Nakuru, that coming from the opposite direction was a trailer *(lorry)* that was at high speed and trying to overtake a combine harvester that was ahead of it, that the Nissan flashed and stopped as it could not move out of the way as there was a dam, and it was steep. The lorry then hit the Nissan and it went back to its lane and the Nissan turned to face Nakuru direction where it had come from. All stated that they were eye witnesses and saw what happened and that they had not been coached.

PW7 was a Police Officer from the Eldama Ravine Police Station. He stated he was not the Investigating Officer but had the Police file on the said accident. He confirmed from the records that the lorry was travelling towards Eldoret while the Nissan matatu was heading to Nakuru. He also confirmed that at the scene there was a corner and a bend, and that the lorry was overtaking a slow moving combine harvester, and that the impact was on the right side of the road facing Eldoret. He however stated that in

the sketch plan the impact point was shown. He told the court that the investigations showed that the driver of the lorry was to blame, but that in the police abstract, no indication as to which driver would be charged was left blank.

The entire prosecution case as tendered by all the witnesses was that the Appellant's lorry was being driven at a very high speed and was trying to overtake a combine harvester whose registration number was not given when it hit the Nissan matatu, that was on its lane and caused damage on its right side where upon it turned to face Eldoret direction where it had come from, and that the driver and two other passengers died on the spot.

8. **The Appellant's Case**

The Appellant denied in its amended defence that its lorry was to blame for the accident and instead blamed the driver of the Nissan matatu for the accident, and raised a counterclaim for shs. 1,147,555.10 being repair charges as assessed by Integrated assessors whose report was produced in court as exhibit.

DW2, Raymond Musembi Nyamai was the driver of the lorry. According to his testimony, the accident occurred on the right side of the road as one faces Eldoret, that there was a dam the road was narrow and pot holed. He stated that there was no vehicle infront of him, but there was a corner and a bridge. It was his testimony that the Nissan came from Eldoret direction at a high speed and hit the truck on the right lamp and tyre causing a tyre burst. He denied there being a combine harvester that he was alleged to have been overtaking.

In cross-examination he denied that the accident was at the left side of the road, and that he was driving at 60 kph that it was the Nissan that was over speeding and hit his lorry, it stopped on the left side, while the Nissan stopped on the right, on its proper lane after it hit the lorry. On cross-examination, he stated that he had not been charged for any offence although the investigating officer had recommended that he should be charged. He however stated that he would have been charged with the other driver. Later, he was arrested while in court and charged under Traffic Case No. 118 of 2010 for the offence of causing death by dangerous driving in Eldama Ravine Court which case is pending determination.

Evaluation of evidence

9. After analyzing the above defence evidence, the trial court formed the opinion that the driver of the lorry was wholly to blame for the accident and did not adequately challenge the respondent witnesses evidence and doubted the causation of the accident by potholes on the road and thus held that the Appellant had failed to prove that the Respondent's driver was responsible for the accident and therefore liable for the repair costs of the lorry as stated in the counter-claim.

10. I have carefully considered the evidence on record by both the Appellant's witnesses and the Respondent's witnesses, and the written submissions by both counsel for the Appellant and the Respondent.

11. In his submissions, the Appellant's counsel submitted that the two parties took completely opposing positions on how the accident occurred. The Appellant's driver blamed the Nissan's driver and stated that in an effort to avoid potholes, the Nissan moved from its lane and hit the lorry on its right front tyre causing a tyre burst. In the whole scenario, no witness including the conductor of the Nissan and the Investigating Officer mentioned a tyre burst to the lorry. It is only the driver of the lorry who alluded to a tyre burst. It was also stated that the lorry *(the Appellant's vehicle)* was moving down hill and in an attempt to overtake a slow moving combine harvester moved out of its lane and hit the Nissan that was moving uphill while it had flashed to the lorry and stopped. It was not explained why the lorry could not take any evasive action to avoid hitting the Nissan or the Nissan hitting the lorry that could not move to the left side as there was a barrier and a dam. This driver's evidence cannot be taken seriously. He was charged for the offence of causing death by dangerous driving.

12. It is also worth to note that it was only the driver of the lorry who alleged that there was no combine

harvester in front of it that he was trying to overtake. All seven Respondent witnesses alluded to there having been such a vehicle though again, no registration number of the said vehicle was taken by anyone, including the Police Officer who investigated the accident. The Police Officer who produced the Police Abstract and the police file was of no help. The sketch plan did not show where the point of impact was.

It is not in doubt that the Nissan vehicle was moving towards Eldoret while the lorry was coming from Eldoret towards Nakuru direction. The final resting positions of the two vehicles after the accident, and as stated by the trial magistrate and the witnesses were that each stopped at their right lanes after the accident.

13. In its totality, evidence on liability though a little cloudy, tends to weigh heavily against the Appellant. He must take the bigger share of blame.

In the case **Farah vs. Lento Agencies (2006) 1 KLR 123**, the Court of Appeal held that where there is no *"concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."*

In their pleadings in the trial court, both parties blamed each other for the cause of the accident. The evidence on record puts more blame on the lorry driver.

In the case of **Almalgamated Saw Mills Ltd –vs- Stephen Muturinguru HCCA No. 75 of 2005,** the court made a finding that –

> ***"Revising the more important issue of causation, it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and the injury. The Plaintiff must adduce evidence from which, on a balance of probability a connection between the two may be drawn…"***

14. In the present case, the Respondent/Plaintiff had a duty to prove that the accident was caused by the Defendant's/Appellant's driver on a balance of probability. The Appellant too had a similar duty to prove that the damage to its lorry as stated in its counterclaim was as a direct result of the negligence of the Respondent's negligence and thus liable to satisfy the same on a balance of probability.

15. The evidence on record, and as stated earlier, is not full prove that either party was wholly to blame. In my own assessment I find that both drivers were under a duty to each other and other road users and that they, at different levels, were to blame. In particular, I find the Appellant's driver overly negligent in attempting to overtake on a continuous yellow line when it was not safe to do so and in failing to take any evasive action to avoid hitting the Respondent's Nissan vehicle, which had stopped, and could not move out of the lane as there was constraint by a dam and a road barrier on its lane.

The Nissan vehicle, property of the Respondent was extensively damaged and was written off. This clearly points to the fact that the lorry must have been driving at a very high speed downhill. The lorry too sustained damages.

16. In its amended Statement of Defence, the Defendant/Appellant pleaded contributory negligence against the Respondent's driver, in my view this is a matter where negligence ought to have been apportioned based on the evidence tendered. The evidence tendered places the bigger share of blame upon the Appellant's driver. I need not repeat myself on this, but suffice to state that, taking all the circumstances in perspective, I find that the Appellant was to blame to the extent of 90% and the Respondent 10% contributory negligence.

17. Having so decided the next task is to interrogate the special and general damages awarded to the Respondent by the trial court.

In awarding to the Respondent a sum of shs. 655,000/= the trial court was guided by the Assessment

report produced by PW5, Wellington Odhiambo Otieno who described himself as a motor vehicle assessor. He assessed motor vehicle registration No. KAP 397M and declared it unrepairable and a write off with a salvage value of shs. 30,000/=.

18. The Respondent had pleaded for loss of use of the same vehicle at the rate of shs. 2,000/= per day. I must state here that as observed by the trial magistrate in her Judgment, it is true that the Respondent lost her source of income. However, when a vehicle is written off, the insured value of the vehicle is paid to the insured, and this in my view gives back to the insured the loss/compensation in terms of the special damages. The amount awarded by the trial court of shs. 655,000/= after deducting the salvage value of shs. 30,000/= as per the assessment report. This cannot be faulted. I uphold the same.

19. In his Judgment, the trial court proceeded to award what was termed a further award of loss of earnings at shs. 600,000/= as reasonable compensation. This award has been attacked by the Appellant in its ground No. 5 of appeal. In their submissions, the Respondent and the Appellant did not comment of this award.

20. The Respondent's vehicle was written off during the accident. She was handsomely compensated by her insurer. There was no basis either in law or fact upon which the trial court proceeded to award the award of shs. 600,000/=. This would in effect be double compensation to the Respondent. Having said so, the award of shs. 600,000/= must be set aside.

The sum of shs. 655,000/= awarded shall, in view of my finding on liability, be reduced by 10% to make a sum of shs. 589,500/= which shall attract interest from the date of filing of the suit in the trial court.

21. Likewise, the Appellant's counter-claim must succeed to the extent of 10% against the Respondent, that is shs. 114,755/=. It was the Appellant's evidence produced by its assessor DW3 Joseph Mirecho Nderitu that he assessed motor vehicle registration No. KAJ 135D, a Mercedez Lorry with trailer KAJ 135D. He assessed damage on the truck only, and he produced a repair estimate of shs. 1,138,855/50. He stated that the truck was not a written off and was repaired. He produced the assessment report and receipts for repairs and payment. A satisfaction note to confirm repairs were satisfactory undertaken. The amount having been specifically pleaded and strictly proved is allowed.

22. This court shall allow a sum of shs. 114,755/= being 10% of the counterclaim against the Respondent. This sum shall too attract interest at court rates from the date of filing of the counterclaim in the trial court.

In conclusion, the appeal succeeds in part and the trial court's judgment is set aside and substituted as above.

The Appellant is condemned to pay 90% of costs both for the primary suit and this appeal.

Dated, signed and delivered at Nakuru this 13th day of March, 2015

JANET MULWA

JUDGE

Judgment read and signed in open court in the presence of:

No appearance for Appellant

Njuguna holding brief Enoda for Respondent

Omondi - Court clerk