



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 521 OF 2007

**COMMERCIAL TRANSPORTERS
LIMITED.....PLAINTIFF**

VERSUS

**REGISTERED TRUSTEES OF THE CATHOLIC ARCHDIOCESE OF
MOMBASA.....DEFENDANT**

JUDGMENT

1. By a re-amended plaint dated 10th February, 2008, the Plaintiff averred that on 13th July, 2004 while the Plaintiff's driver was lawfully driving its vehicle registration number KAG 099J along Mombasa - Nairobi Highway, it collided with the Defendant's Motor Vehicle Registration Number KAP 044M. The Defendant was sued as the registered owner of KAP 044M. The Plaintiff claimed that the accident occurred as a result of the Defendant's driver's negligence which were particularised as follows:-

- a. Driving too fast and/or at an excessive speed in the circumstances.
- b. Driving on the wrong side of the road.
- c. Driving onto the path of traffic moving on the said road in the opposite direction.
- d. Colliding into the Plaintiff's said vehicle registration number KAG 099J.
- e. Failing to exercise or to maintain any or any sufficient or adequate control of the Defendant's said motor vehicle.
- f. Failing to keep any or any proper lookout or to have any or any sufficient regard for other traffic on the said road.
- g. Failing to comply with the indications of traffic signs.
- h. Failing to apply his brakes in time or at all or to steer or control the Defendant's said motor vehicle so as to avoid the said collision.
- i. Failing to observe and comply with the Traffic Act and the Highway Code.

2. The Plaintiff therefore claimed loss of its motor vehicle as follows:-

Pre-accident value	KShs. 1,900,000/=
Less salvage value	KShs. 120,000/=
	<u>KShs. 1,780,000/=</u>
Assessment fees	KShs. 12,000/=
Investigation fees	KShs. 16,000/=

party therefore in the event of any accident, the Plaintiff was to repair the vehicle by itself. He stated that the vehicle's right hand front was damaged. That he got a quotation on the value of the parts from a shop on Jogoo Road. He stated that Simba Colt Motors are the dealers in Mitsubishi vehicles. That according to regulations, a quotation cannot be gotten from the dealer where the vehicle is over 10 years. He denied having gotten a quotation from the dealer. On being re-examined, PW3 stated that the dealer's prices are on the higher side and that the figures he suggested were on the lower side.

9. Hiram Gitari Kuguru (PW4) who is an accident investigator at Fact Finders Investigators and Assessors confirmed that he prepared the report dated 13th September, 2005. That he conducted investigations on the subject accident. That he interviewed the driver, turn boy and an eyewitness whose statements are in his report. That from his investigations he made conclusions that motor vehicle KAP 044M was overtaking another motor vehicle when a trailer KAG 099J was oncoming. That as a result thereof KAP 044M crushed into KAG 099J and the driver of KAP 044M died on the spot. On cross-examination, PW4 stated that he received his instructions to investigate from the Plaintiff. He confirmed that the eye witness, one Mohamoud Shee Bwana does not work for the Plaintiff. That the witness was travelling in a different vehicle. He however stated that the witness admitted to having been entrusted with handling any matter on behalf of Commercial Transporters Management, the Plaintiff herein. PW4 admitted that he did not witness the accident but got information from the police, the driver, the turn boy and Mohamoud Shee. He stated that he visited the scene of the accident a year after the accident and found skid marks. He however admitted that he did not give a disclaimer in his report that the scene of the accident could have been interfered with. He stated that the spilled oil was still present and that there was no information to the contrary. He stated that the diagram at page 31 of the report was his own sketch based on his analysis on the accident guided by the witnesses that he interviewed. He stated that he did not see the sketch map from the police investigators so he had nothing to compare. That after the impact, KAP 044M stalled on its correct lane but off the road facing Mombasa. That the point of impact was on the path of KAG 099J. He stated that the accident occurred when KAP 044M was overtaking and getting back onto its lane and after the impact it veered off and went ahead and never got into contact with any other vehicle. He stated that the eye witness did not give him the particulars of the vehicle that was being overtaken. he stated that he did not know what was in the ob report. That the debris that was found on the scene belonged to the accident motor vehicle. he denied having gotten the view of the investigating officer on the accident.

10. Mr. Wananda learned counsel for the Plaintiff expressed the difficulty in tracing the driver of the Plaintiff and therefore closed the Plaintiff's case. On the other hand, Mr. Waweru learned counsel for the Defendant dispensed with bringing any witness in defence. Both parties advocates signed a consent allowing the defendant to produce its bundle and list of documents filed on 24th June, 2011 and 11th August 2010 without calling heir makers. The documents included a report by Investpot Insurance Investigators dated 13th June, 2005 and Vision Motor Consultants Ltd report dated 27th July 2004. Parties agreed to have the documents in the Defendant's list and bundle of documents filed on 11th August, 2010 and 24th June, 2011 and the expert witness report dated 27th July, 2004 admitted in evidence.

11. According to the report by. by Investpot Insurance Investigators dated 13th June, 2005, the police investigations sketch(which was never produced) but which they had seen showed the point of impact to have been on the left side lane towards Mombasa, which was the defendant's driver's lane. In addition, that the accident point of impact was about 3 meters from the edge of the left lane which was the correct path of the defendant's motor vehicle out of the width of the road measuring 7 meters. Further, that gauge marks created before both vehicles veered off the road indicated that the plaintiff's vehicle had encroached the path of the defendant's vehicle. The investigator therefore concluded that it must have been the plaintiff's driver who was trying to overtake another vehicle when he collided with the defendant's vehicle. The investigators were guided by Mr Mohamoud of Voi.

12. The assessment report by Vision Motor Consultants Ltd show that that the debris were at 0.3 meters from the centre line in the lane of the defendants motor vehicle and tyre marks on the road were for the plaintiff's truck and that the evidence on the ground showed that the two vehicles collided at the corners not head on collision. In their view, the truck was in high momentum and lost control encroached onto the

defendant's driver's lane and hit it at the right hand front corner penetrating up to the door pillar (see diagrams 2 and 3) and that the plaintiff's driver's statement on how the accident occurred was not consistent with the damages on the two motor vehicles.

13. The defendant also produced a report by Integrated Motor Assessors dated 11th November, 2010 which reconciled the various reports produced by the plaintiff and defendant, concluding that the accident occurred on the lane of the defendant's motor vehicle hence the plaintiff's vehicle encroached on the defendant's driver's lane. Further, that the driver and Mr Mohamoud's statements were contradictory particularly on what kind of vehicle the deceased was allegedly trying to overtake when he encountered the defendant's truck with one saying a semi trailer and another a canter.

14. The parties' advocates filed and exchanged written submissions. It was the Plaintiff's submission that the accident occurred as a result of the Defendant's deceased driver's negligent handling of KAP 044M i.e. carelessly trying to overtake another motor vehicle when it was not safe to do so. That the investigator reached the said finding after considering the evidence by the Plaintiff's driver, Michael Nganga Muoro and Mohamoud Shee Bwana; that KAG 099J was being driven at 45KP/H since it was carrying 12 tonnes of wire goods for nails and steel. That there was an approaching lorry but before KAG 099J and the said lorry could pass each other, KAP 044M suddenly emerged from behind the approaching lorry. That KAG 099J slowed down and swerved to the left to allow KAP 044M to abandon its overtaking but the driver of KAP 044M assuming that he could complete overtaking accelerated and the two collided. That the investigator was emphatic that from the marks on the tarmac, the impact was on the Plaintiff's lane. It was submitted that the Defendant's report dated 13th June, 2005 (Invespot Insurance Investigators) confirmed that the information therein is what the Plaintiff's driver told the Police. That the doctrine of *res ipsa loquitur* applied in the Plaintiff's favour. It was further submitted on behalf of the plaintiff that the report by the defendant's expert dated 13th June, 2005 contains hearsay since it is stated therein that the Plaintiff's driver's presence for interview was not secured. That in view thereof, the report is insufficient material since there is no allegation that the Plaintiff refused to produce the driver for interview. That the report acknowledges the Plaintiff's driver's consistency in his statement to the police and the Plaintiff's investigator and the Defendant should not have ignored that statement.

15. The Plaintiff urged the court to be guided by the Court of Appeal decision in **Hussein Omar Farah v. Lento Agencies, Civil Appeal No. 34 of 2005 Nairobi** on liability in the event it finds difficulty in determining liability. The Plaintiff quoted an excerpt there from the Court of Appeal decision in **Hussein Omar Farah v Lento Agencies Civil Appeal 34 of 2005[2006] eKLR** that:

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

16. On the other hand, the Defendant's counsel submitted that all the eye witnesses referred to by PW3 were employees of the Plaintiff and not independent witnesses thereby his evidence is hypothetical hearsay. It was further submitted that PW2 had nothing to shed light on since he was not the investigating officer. That in the absence of direct evidence on the occurrence of the accident and witnesses on liability, the Plaintiff's case ought to fail.

17. On quantum it was submitted that PW3, the motor vehicle assessor failed to establish the reason behind writing off the claim. That he did not produce any report bearing competitive prices in the market nor quotations from the dealers of KAG 099J. That Factfinders investigation report does not mention reference to the police sketch map to support their inference that the Defendant's driver was to blame for the accident. That their report was directed by the Plaintiff and is therefore biased towards the Plaintiff. It was argued that the doctrine of *res ipsa loquitur* cannot apply in this case since the Defendant's driver was in its rightful lane during the accident and cannot be presumed to have been negligent. That it is the Plaintiff's driver who left his lane and encroached on the Defendant's lane causing the accident. That during examination in chief, PW3 testified that repair costs of KAG 099J went beyond 50 % and that it

was uneconomical to repair but he did not produce any quotations to corroborate that testimony.

18. It was submitted that the report by Invespot Insurance Investigators proved that the Plaintiff's driver was negligent since the point of impact was on the left lane facing Mombasa (Defendant's driver's correct lane) as evidenced by debris found at the scene and gauge marks created by KAG 099J. It was submitted that an inference could be drawn from the report by Integrated Motor Assessors that if it is true that KAG 099J was turned towards the left to avoid collision as alleged, then the impact could have been in the direction from the right hand side to the left hand side of KAG 099J whereby the impact on the body of KAG 099J would have been twisted towards its right side. But that it could be seen that the impact was taken straight via the right side. That from the report by Vision Motor Consultants Limited, KAG 099J having been on a higher momentum, lost control when cruising and encroached into KAP 044M's lane hitting it at the right hand front corner penetrating up to the door pillar. That in the process, the right hand front wheel of KAG 099J as damaged created resistance to motion at the right hand side. The left hand side wheel having no resistance to the motion lost control. That the force of the mass of the KAP 044M then made it move to the left hand side throwing KAG 099J to the right hand side. The Defendant cited **Civil Appeal No. 102 of 2005, Sally Kibii (Cornelius K. Chepsoi) v. Dr. Francis Ogaro** wherein **Azangalala J. quoted his finding in Kenital (K) Ltd v. Charles Mutua Mulu & Other (Eldoret HCCA 103 of 2001)** (unreported) where he held that failure of the police to determine from the scene of the accident which motor vehicle was to be blamed and the absence of an eye witness evidence diminishes the Appellant's chance to prove a case for negligence against the Defendant. It was further submitted that in all adversarial systems like ours, a party undermines his case drastically by not calling or failing to call witnesses. In the same case the Judge found that res ipsa loquitur to his understanding applies where the subject matter is entirely under control of one party and something happens while under control of that party, which would not in the ordinary course of things happen without negligence. The Defendant further cited **Bikwatirizo v. Railway Corporation (1971) E.A. 82** where it was held that to successfully apply the doctrine of res ipsa loquitur, there must be prove of facts that are consistent with negligence on the part of the Defendant as against any other case. The said case involved a collision of two vehicles. The court questioned what facts had been proved by the Plaintiff to enable it presume negligence on the part of the Defendant and held the view that the Plaintiff had to prove facts which gave rise to res ipsa loquitur. It was further found that the Defendant is only enjoined to rebut the presumption of res ipsa loquitur after the Plaintiff has established a prima facie case by relying on the facts of the case.

19. The parties herein filed agreed issues on 12th August, 2008 to which this court therefore determines this case as follows:-

- a. whether the plaintiff was the registered owner of motor vehicle KAG 099J;
2. whether the defendant was the registered owner of motor vehicle KAP 044M- the issue of ownership of the accident motor vehicles
3. the occurrence of the accident was denied in the statement of defence but no submissions to the same were tendered by the Defendant.

20. The Plaintiff produced copies of records which ascertained and resolved the issue of ownership of the two motor vehicles. The copies of records from the Registrar of Motor Vehicles revealed that the Defendant was the registered owner of KAP 044M and the same was not controverted in evidence. The plaintiff also proved that it owned motor vehicle KAG 099J.

21. On the issue of the occurrence of the accident, I find that the police abstract and extract of Occurrence Book from Voi Traffic Base produced confirmed that the accident occurred involving the collision of the two motor vehicles on the material date, time and place mentioned in the pleadings by the plaintiff.

22. On whether the accident was caused by the negligence of the defendant's driver as particularised in paragraph 5 of the amended plaint or whether it was caused and or contributed to by the plaintiff as claimed by the defendant in its statement of defence at paragraph 4 thereof, it is clear that there was no

evidence adduced by an independent eye witness to the material accident. The reports submitted by both the parties are basically based on the Plaintiff's driver and one a Mr Mohamoud's statements and who were not called to testify and further on the police information. In the Plaintiff's 2nd investigator's report, the investigator is said to have visited the scene over one year after the accident when the scene must have been interfered with for example by the change in weather conditions. I do not think oil spill could have been on the road for a period of over one year just waiting for the investigator to come and identify it to be that oil that spilled from the material motor vehicle following that particular accident, and without the help of an actual police sketch plan or photograph of the accident scene, considering that neither the Plaintiff's driver, Mohamoud nor the investigating officer were in court to corroborate the evidence and that no investigation report was produced by PW2.

23. It is further noteworthy that the credibility of the reports produced by the defendant by consent of both parties was never tested by the Plaintiff through cross examination considering that their makers were not available in court. The evidence therein is thereby fluid. It is therefore difficult to derive and ascertain liability from either of the reports produced by the plaintiff and defendant.

24. Liability can also not even be derived from the police abstract produced in evidence because the remark indicated in the police abstract is that the case was still pending under investigations and even if there were remarks that one of the party's driver was charged with careless driving, which was not the case here, different aspects emerge in civil cases such that the parties to an accident might have driven carelessly and each could be convicted for careless driving. In the instant case, both vehicles were travelling in the opposite direction of each other and it is no wonder that the both vehicles are alleged to have been damaged on their right hand side.

25. Each of the respective parties' investigators gave a favourable report for their instructing client. Whereas the plaintiff's investigators insist that the accident was caused by the defendant's driver trying to overtake another vehicle ahead of him thereby hitting the plaintiff's truck, what this court is unable to decipher is if that was the case then why would the accident occur 3 meters from the edge of the defendant's driver's lane as opposed to the accident occurring on the plaintiff's driver's lane and which report was allegedly obtained from the police sketch plan and which was never controverted by the plaintiff?. On the other hand, the plaintiff's expert reports show that the accident occurred on the plaintiff's driver's lane with the driver insisting in his statement that he kept to the extreme left side of the road, and again that theory seems plausible since there was no independent evidence to rebut it. That being the case that both parties blame one another and there is no independent eye witness in an accident that took place, I find that both parties were to blame for the accident since accidents do not just happen. They are caused

26. From both the defendant and plaintiff's reports produced in court, and the fact that the accident was not a head on collision but that each vehicle hit the other at the right hand side and that each claim the accident occurred on their respective lanes, this court indeed finds that each of the respective drivers could have been attempting to overtake vehicles ahead of them when the accident occurred.

27. Both drivers ought to have exercised due diligence in their driving bearing in mind that they were both in control of lethal machines. In the circumstances it is only fair that liability be shared between the drivers. I find fortification in the Court of Appeal decision in **Farah v. Lento Agencies** (supra) cited by the Plaintiff where the court held that where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally liable. In the circumstances, I apportion liability at the ratio of 50:50 between the drivers of the two vehicles.

28. I have been asked to apply the doctrine of Res ipsa loquitur. This is a rule of evidence affecting the onus of proof. It is based on common sense and its purpose is to enable justice to be done when facts bearing on causation are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant. It is however dependent on the absence of any explanation from any of the party's drivers as to the cause of the accident but if the cause of the accident is proved the doctrine is of little moment. In this case, I am satisfied that in the absence of any eye witness evidence, the court can infer from the circumstances and arrive at a decision as to who was to blame for the accident and

therefore the doctrine of *res ipsa loquitur* is inapplicable. In my most considered view, both parties played an equal role in the causation of the accident as each of their evidence tried to explain how the accident occurred. See section 119 of the Evidence Act. in CA MSA 67 OF 1983 **ABBAY ABUBAKAR and FATUMA ALI V MARAIR FREIGHT AGENCIES** where two vehicles collided and each was blaming the other and the parties relied on the private investigators reports and concluded that the appellants had not proved liability on the part of the respondent since” there was no evidence whatsoever of any actual collision having occurred between the two vehicles and no evidence of any negligence on either of the two cars or of any fact or facts from negligence could be inferred...”

29. On appeal the appellants faulted the trial judge for failing to find that there was a collision and that each of the drivers was equally at fault. The appellate court held, among others that :

“the trial judge rightly applied to the facts before him the relevant law enunciated by Spry, VP in LAKHAMSHI V AG,[1971] EA 118,120 for such cases which- “ it is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to concluded that one other party was guilty or both parties were guilty of negligence. In many cases as for example, where vehicles collide near the idle of a wide straight road in conditions of good visibility with no courses there is in the absence of any explanation, an irresistible inference of negligence on the part of both driver because if one was negligence in driving over the centre of the road the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between the two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.”

30. In the instant case the road was said to have been straight and in a clear area marked for overtaking on either side. From the photographs the gauge marks were from the right to left side of the plaintiff’s vehicle whereas the defendant’s vehicle was pushed to its extreme left. None of the investigator’s reports were carried out proximate to the date of accident yet each of the parties blame one another for the occurrence of the accident, reliance being placed on evidence of persons who were not called as witnesses. Since each of the two vehicles appear to have strayed marginally over the middle line, thereby causing a collision as none of them took an avoiding action, I find both drivers to have been negligent in equal measure.

31. In the above **ABBAY ABUBAKAR** case, the Court of Appeal was clear that it is the duty of the court to arrive at a finding on the facts, however difficult the circumstances may be, if that is all possible. The Court cannot, as Lord Denning LJ wash its hands of the case and shrink from arriving at a conclusion simply because the evidence is deficient in some respects.(note that in the **ABBAY ABUBAKAR** case there was no issue of conflict of how the accident occurred unlike in the instant case. The Court of Appeal in the **ABBAY ABUBAKAR** case observed that where it is proved by evidence that both parties to the motor accident are to blame and there is no means of making a reasonable distribution, the blame can be apportioned equally on each- relying on **BAKER V MARKET HARBOUR INDUSTRIAL COOPERATIVE SOCIETY LTD (1953)WLR Page 1472**. The court in the **ABBAY ABUBAKAR** case was however categorical-Nyarangi JA that the position must however be different where there is no evidence to establish that any party was negligent. That would be a 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 **LAKHAMSHI V AG – supra** case that “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.”

32. On damages, the Defendant contended that the assessor did not provide a quotation for the parts and

costs of repairs which costs he used in making an inference that repairing KAG 099J was uneconomical. A question therefore arises whether or not reliance can be placed on the assessor's estimates of costs of parts and whether such special damages must be specifically pleaded and strictly proved. Guidance can be found from the Court of Appeal holding in **Hahn v. Singh (1985) KLR 716** where it was stated:-

“...special damages must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves.”

33. And in **Nkuene Dairy Farmers Coop Society Limited & James Kimathi v. Ngacha Ndeiya (2010) eKLR** while dealing with whether an assessor's report was sufficient to prove the value of natural damages, the court had this to say:-

"In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty."

34. The assessor's report gave an approximation of the Pre accident value of the motor vehicle being Kshs 1,900,000. He also gave a description of the cost of each damaged part of the vehicle inclusive of labour and VAT all totalling Kshs 1,373,865 and concluded that it would be uneconomical to repair such a vehicle. There he gave salvage value as Kshs 120,000 only but there was no evidence of the costs with which the salvage was sold. In such circumstances this court is forced to rely on the approximated salvage costs bearing in mind that the extensive damage to the vehicle is not denied but should be reduced by the extra amount for which the wreck could be sold. Thus, this court accepts the pre accident value of the motor vehicle to be Kshs 1,900,000 as pleaded in the re amended placing less salvage value of Kshs 120,000. Total Kshs 1,808,100 .Assessment fees and investigation fees of Kshs. 12,000/= and Kshs. 16,000/= respectively were pleaded and proved by way of receipts. There is however, no receipt for police abstract.

35. The issue of the legal capacity of the defendant to sue and be sued was resolved upon the plaintiff filing a re-amended plaint by incorporating the Registered Trustees of the Catholic Diocese of Mombasa.

36. In the end, I enter judgment for the plaintiff against the defendant as follows:

- a. On liability, I apportion negligence in the ratio of 50:50 between the plaintiff and the defendant
- b. On damages, I award Kshs 1,836,100 reduced by half thus leaving Kshs 918,050
- c. I award the plaintiff half costs of the suit
- d. Interest on b at court rates from date of filing suit until payment in full
- e. I also award it interest on costs at court rates from date of assessment until payment in full.

Dated, signed and delivered in open court at Nairobi this 30th day of November, 2015.

R.E. ABURILI

JUDGE