REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO.105 OF 2010

LEWA WILDLIFE CONSERVANCY……..……APPELLANT

-VS-

GEOFERRY GATOBU JAPHETH…….RESPONDENT

JUDGMENT

The Appeal

[1] The Respondent filed suit against the Appellant in the trial court for damages for injuries sustained in an accident which occurred on 27th April 2007. The trial court heard the suit and found the Appellant 100% liable and awarded him Kshs 897,080 as damages. The Appellant was dissatisfied with the said judgment and filed this appeal. The Memorandum of Appeal carries the following significant grounds of appeal:

1. **That the learned trial magistrate erred in law and fact in failing to take into account relevant matters and taking into account irrelevant aspects of evidence in relation to the negligence of the plaintiff's driver leading to an erroneous holding that6 the defendant was 100% to blame.**
2. **That the learned trial magistrate misapprehended the totality of the evidence in support of the appellant's defence and erred in law and fact in drawing erroneous inferences in relation to the presence of the defendant's/appellant's motor vehicle in the opposite lane and thus arriving at the conclusion that the Appellant's driver was wholly to blame for the occurrence of the accident.**
3. **That the learned trial magistrate erred in law and fact in disregarding and not taking into account relevant parts of evidence taken at the scene of accident and finally holding the defendant wholly to blame for the accident.**
4. **That the learned trial magistrate erred in law and fact in falling to take into account relevant factors in evaluating the evidence on record on liability and in effect failed to find that the Respondent's driver was guilty of contributory negligence.**
5. **That the learned trial magistrate erred in law and fact in making an assessment of damages for loss of user of Kshs 540,000 which was not supported by the evidence in record, the legal principles governing award of special damages and the general course of proceedings in the matter, leading to a wrong exercise of discretion in the circumstances.**
6. **That the learned trial magistrate erred in law and in failing to take into account the appellant's submissions and the authorities cited therein on the sum awardable in special damages thereby arriving at an erroneous and an excessive award of damages.**

[2] The appeal was canvassed by way of written submissions following the directions of the court to that effect which were given on 17th June 2015 upon agreement of parties. It was submitted for the Appellants inter alia that the trial magistrate erred in finding the Appellants liable when indeed he had not

taken into consideration the relevant aspects of evidence by Appellant's witnesses. The Appellant further contended that the trial magistrate's conclusion that that the Appellant was wholly liable because his vehicle was on the wrong side was an error as the Respondent did not prove on a balance of probabilities that indeed it was the Appellant who was on the wrong. The Appellant found support on this proposition in the case of **Postal Corporation of Kenya & Another vs. Dickens Munayi (2014) eKLR** guided by the authority of **Nderitu vs. Ropkoi & Another (2004) eKLR** where the Court of Appeal held that where two motorists failed to exercise reasonable degree of skill and care on the road, they are to be held equally liable for the accident. Accordingly, the Appellant submitted that he should not have been held 100% liable.

[3] The Appellant also submitted on special damages; that it must be specifically proved and since there was no proof of the amount claimed, the court should not have made an award for special damages. It was further submitted that the Respondent pleaded Kshs 27,000 as towing charges but produced 2 different receipts one for Kshs 17,000 and another for Kshs 15,000. He asserted, therefore, that the trial magistrate should not have awarded the said amount of Kshs 27,000 but only Kshs 17,000 that was admitted in evidence. Consequently the Appellant contended that the award of liability and special damages was inordinately high and should be disturbed. The Appellant urged the court to set aside the award of Ksh 897,080 and substitute the same with Kshs 674,680 and share liability between the Respondent and Appellant equally.

The Appeal was opposed

[4] The Respondent opposed the appeal and submitted that his claim was solid, factual and straightforward, for it is one for compensation for material damage occasioned to his Nissan Matatu in a road accident. He said that his said vehicle was written off following the accident. It was submitted that the offending motor vehicle was owned and insured by the Appellant and its driver was blamed by police because of swerving from his side to the matatus legal and correct lane, thus, blocking and causing the collision. The Respondent claimed that the offending driver was charged in a traffic court with careless driving, convicted and sentenced in MERU CM TR CASE NO 1748 of 2005- which conviction and sentence were never appealed from. It was, therefore, the submission of the Respondent that, the said conviction and sentence was conclusive evidence of his guilt and hence formed a certain, unbreakable, unquestionable, unchallengeable and undoubted claim in a civil court on a balance of probability. It was submitted that the trial magistrate clearly understood the applicable law, the facts of the case before her, issues for trial; the authorities cited and indeed framed the issues for determination quite well. He submitted that value of his motor vehicle was reasonable and that the same was supported by an expert's report. He contended that the Appellant did not challenge the findings in the report or seek a second opinion.

DETERMINATION

[5] I have carefully considered the evidence and the rival submissions by the parties. This being a first appeal the court is obligated to analyze and reassess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify. See **Selle vs. Associated Motor Boat Company (1968) EA 123.**

[6] From the circumstances of this case and the way the grounds of appeal are tailored portend two issues, namely:

1. **Whether the learned trial magistrate erred in law and fact in finding the appellant to be 100% liable for the accident; and**
2. **Whether the award of Kshs. 897,080 is inordinately high.**

[7] From the record and the evidence as was captured by the trial magistrate, it is not in dispute that an accident occurred on 27th April 2007 involving two motor vehicles; KAT 051T and KAP 289V belonging to the Appellant and the Respondent, respectively. It is also not in dispute that the Respondent's motor vehicle was completely written off. But, the first point of contention is liability. The Appellant is

convinced that none of the drivers showed a reasonable degree of skill and care in this accident and therefore, both should have been held liable for the accident. On that basis, the Appellant faulted the trial magistrate's finding of 100% liability on his driver. The Respondent supported the finding and said it was in order and was backed by evidence. What does the evidence say?

[8] The Respondent's witnesses PW2; PC Julius Mwenda No 59176 testified that he was the investigating officer of the accident herein. He said that he visited the scene and established that the driver of M/V KAT 051E had pulled from his correct lane into the lane for oncoming vehicles, thus blocking the vehicles and as a result the accident herein ensued. He established that M/V KAP 289V was on its correct side of the road. PW2 concluded that the driver of M/V KAT 051E was careless and he charged him with the offence of careless driving in Traffic Case No 1748 of 2005. He was found guilty and was fined Kshs. 5000 or in default to serve 3 three month's imprisonment. He also produced inspection reports to show that both vehicles did not have any pre-accident defects. He said that, to his knowledge, the conviction and sentence was not appealed from. The court visited the scene and PW2 demonstrated his findings and the sketch plan he had drawn by showing the exact positions of each vehicle as he found them and point of impact. He stated during cross-examination that the vehicle had not been moved from their respective positions at the time he arrived at the scene. PW4, the driver of M/V KAP 289V corroborated the evidence of PW2 in all material respects. He, however, added that KAT 051E had its full lights on when it abruptly swerved to his lane. Both denied the presence of an ox cart on the road at the time of the accident. PW4 was categorical that he was not at high speed and that he did not cause the accident.

[9] The Appellant's witnesses, DW1 and DW2 testified. DW1 stated that he was a passenger seated behind. He just heard a collision as he could not see ahead because the vehicle had a cover. He said their driver was not at high speed but he quickly stated that he was not a driver. DW1 was also clear that when he got out of the vehicle he did not see any other car or bicycle or ox cart. The only person who insisted on the presence of an ox cart at the scene of the accident was DW2, a passenger in KAT 051E. He also talked of their driver being blinded by the lights of the oncoming vehicle. The evidence by the Respondents witnesses was very clear that the driver of KAT 051E abruptly and without warning swerved from his side of the road into the correct path of driver of KAP 289V. The evidence was not controverted at all by that of DW1 and DW2. Indeed, the evidence of these two witnesses contradicted each other in material respect, namely the alleged presence of an ox cart at the scene at the time of the accident. DW1 was categorical that when he came out of the vehicle he did not see any other car or bicycle or ox cart at the scene. He said that he was not injured in the accident. There is nothing to show he was not aware of what he saw. He said that their driver tried to overtake the ox cart but the other vehicle had already arrived. From his story, the other vehicle was just nearby and a reasonable driver would have not attempted to overtake when another vehicle is oncoming and he was seeing it. If the driver was blinded by the lights, he ought to have slowed down completely and the accident would have been avoided. I ask these questions because the evidence of DW2 was purely unreliable and untenable. Indeed, I fall short of saying that it was conjured up, especially on the presence of an ox cart at the scene at the time of the accident. Again, the testimony of DW2 about the driver being blinded by the lights of the other vehicle is not useful at all as only the driver can attest to that. From the evidence available, the driver of KAT 051E was wholly to blame for the accident. He was even charged with the offence of careless driving, convicted and sentenced for it. No appeal has been filed on that conviction and sentence and as those proceedings were produced as evidence, they are conclusive on liability. The trial magistrate dealt with the evidence on liability in a superb manner and correctly held the driver of the Appellant and the Appellant to be vicariously liable at 100%. For completeness of record this is what the learned trial magistrate had to say, *inter alia* that:-

> **"it is not in disputed the accident point of impact was on the right lane facing Meru from Isiolo. The defence have alleged vide contradictory evidence of DW2 to that of DW1 there was an ox cart on the defendant lane facing Meru which the defendants driver had not seen earlier as the plaintiffs motor vehicle headlights blinded him on the other hand DW2 says their driver was attempting to overtake the ox cart when he met the plaintiff motor vehicle oncoming. Really the ox cart theory is a paradox that is stranded in contradictions. If at all the defendant's driver had not seen ox cart as**

> **he was blinded then the question I must ask is which ox cart was he overtaking? DW1, the plaintiffs' driver and even police officer who visited the scene all maintained there was no ox cart. Given the highlighted inconsistencies in DW2's evidence I find I cannot place any reliance on his testimony and I disregard the alleged presence of an ox cart which brings me to the question then what was the driver of motor vehicle registration number KAT 051T doing on the plaintiffs lane. There is also a matter of the plaintiffs' motor vehicle having not dimmed its lights. This is the evidence of DW2 who was a passenger not driver. I am not persuaded he is well, placed to adduce evidence of this nature as it is only the driver (unfortunately deceased) who can state for a fact if the plaintiffs were dimmed or not and most importantly if they were not dimmed they effected his ability to see ahead but even presuming the plaintiffs lights were not dimmed could this in absence of the ox cart be the reason the defendants driver left his lane? I am not persuaded so. This being the case counsel for the defendant has maintained under "common law of negligence it is not connotative of negligence for a driver to desert from his lane when there is reasonable explanation". The explanation given here failed the acid test of reasonability and I find the driver of motor vehicle registration KAT 051T being the defendants driver had he been at a reasonable speed would have been able to stop on his rightful lane. The fact that he went to the opposite lane is a clear indication he was not in control of his motor vehicle and was negligent. He had absolutely no business thereof to be on the right lane facing Meru and by being on the wrong lane the collision with motor vehicle registration KAP 289V occurred which essentially means the defendants driver was to blame for the occurrence of the accident and I hold the defendant 100% vicariously liable for the negligence of its employee."**

[10] In the instant case the learned magistrate carefully examined and analyzed the evidence on record and gave clear and detailed reasons as to why she found the Appellant's driver 100%. There is absolutely nothing to suggest that the circumstances surrounding the accident were obscure as to hold both drivers equally responsible for the accident. It was clear from the evidence that the Appellant's driver was wholly to blame for the accident. fall back on to the . The circumstances in the case of **Postal Corporation of Kenya & Another vs. Dickens Munayi (2014) eKLR** guided by the authority of **Nderitu vs. Ropkoi & Another (2004) eKLR** were different. In the instance case, only the driver of the Appellant exercised no reasonable degree of skill and care on the road; he was reckless and careless. Consequently I do hold and find that the trial magistrate was correct in in finding the Appellant's driver solely at fault. I dismiss the grounds in relation to that point and uphold the decision of the trial court on liability. I now move on to the other issues.

Was the Award of Kshs 897,080 Inordinately High?

[11] I need not re-invent the wheel. On those awards in the nature of special damages, the test is that they must be specifically pleaded and proved. In respect of quantum of damages generally, circumstances in which an appellate court will interfere with an award of damages by a trial court were clearly laid out in the case of **Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000** by the Court of Appeal as follows:

> **"…in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."**

[12] The learned trial magistrate awarded the Respondent a sum of Kshs 897,080 in damages which she broke down as follows:

a) Value of m/v reg. KAP 289V……..Kshs. 320,000

b) Towing charges……Kshs. 27,000

c) Valuator report……Kshs. 8,500

d) Proceedings……..Kshs. 1380

e) Police abstract…….Kshs. 200

d) Loss of user at Kshs 3,000 per day

for 6 months……..Kshs. 540,000

[13] As I stated earlier, the Respondent's motor vehicle became a total write off after the accident. The Respondent through PW1 Mr. Paul Metho Mbuchu produced an accident assessment report prepared by Automobile Association in Kenya. According to the report it was uneconomical to repair the vehicle. It placed the pre accident value of the vehicle to be Kshs 410,000 and the salvage value to be Kshs. 90,000. Of importance, despite cross-examination of PW1, the Appellant neither challenged the contents of the report nor asked for a second opinion. The Report was professionally prepared and is part of the evidence. The report, therefore, remained entirely uncontroverted and the trial magistrate cannot be faulted for making the award based on the said report. There is nothing on which I should interfere with the award of Kshs. 320,000 as the value of the Respondent's vehicle which was arrived at after deducting the salvage value. The payments made in respect of the valuers report, proceedings and police abstract were specifically pleaded and proved, therefore, they were rightly awarded by the trial magistrate. I so find and hold. Consequently I cannot disturb those awards.

[14] The award on loss of user of the Respondent's motor vehicle in the sum of Kshs 540,000 using the rate of Kshs 3,000 per month for six months seems to have generated much attention and arguments in this appeal. The Appellants contended that the learned trial magistrate had erred in law and fact in making an assessment which was not supported by the evidence. Contrary to the Appellant's assertion there was evidence to support this claim as the Respondent produced receipt books and records which in the opinion of the trial magistrate appeared genuine and authentic. I have indeed perused the said records and they appear authentic. The Respondent had pleaded Kshs 5,000 per day up to when the assessors report was made. The learned trial magistrate however reduced the said amount to Kshs 3,000 which in her opinion was reasonable. The learned magistrate also reduced the period which the Respondent had pleaded, i.e. from the date of the accident to the date when the motor vehicle assessor made his report which would have translated to one year ten months. The learned trial magistrate considered this period to be grossly exaggerated and reduced it to 6 months which in her opinion was reasonable. In assessing loss of user, the magistrate did not apply wrong principles of law; mitigation of loss is an important aspect in such assessments and ordinarily the period for the loss of user is one which is reasonable otherwise parties would just wait without doing anything to mitigate their losses for as long as it takes and reap unjustly from the offending party. Again, the magistrate weighs what is reasonable amount to award for loss of user depending on the evidence tendered and the circumstances of each case. And, in light of the evidence before the trial magistrate, I am satisfied she exercised her discretion judicially and judiciously; the award for loss of user was reasonable. She did not use the wrong approach or apply wrong principles. She did not take into account irrelevant matters or failed to take into account any relevant matter. She took into account all relevant considerations in her awards. I so find and hold. She did not err in law and fact on that issue. I see no basis for disturbing this award. I note that the Appellants in their submissions urged the court to award the Respondent a sum of Kshs 674,680 without stating the basis for this proposal/assessment.

[15] Finally, the award of towing charges is in controversy. The Respondent pleaded Kshs 27,000 as towing charges. From the evidence on record, I am only able to find one receipt that was produced on towing charges; it dated 9th May 2005 and is for Kshs 15,000. Without much ado, I set aside the award of Kshs 27,000 being towing charges and instead award the Respondent a sum of Kshs 15,000 for towing

charges. This was the only amount that was strictly proved on that claim.

The Upshot

[16] The upshot is that save for the award on towing charges for which I have awarded a sum of Kshs. 15,000, all the other grounds of appeal fail and are accordingly dismissed. I award costs of the appeal to the Respondent.

Dated, signed and delivered in court at Meru this 10th day of December 2015

F. GIKONYO

JUDGE

In the presence of:

Muthoni advocate for the respondent

Kaumbi advocate for Cheruiyot advocate for the applicant

F. GIKONYO

JUDGE