REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 82 OF 2006

NICHOLAS MUNYOKI MASYA.....APPELLANT

VERSUS

JOEL NGEI KITEME…….....RESPONDENT

(Being an appeal from the original judgment of Mwingi Senior Magistrate Court Civil Suit No. 148 of 2003 by Hon. J.K. Ng'ang'ar on 11/9/2006)

JUDGMENT

1. The respondent herein filed a plaint in the Lower Court whereby he averred that on the **6th September, 2003** he parked his motor-vehicle registration number KAH 018S by the roadside at a designated parking slot at **Ndalani Trading Centre** along **Thika –Garissa** road when the appellant negligently drove his motor-vehicle registration number KAP 297T crashing into it.

2. He claimed special damages in the sum of **Kshs.** 140,000/=; loss of user of the accident motor-vehicle from the date of the accident at a rate of **Kshs. 5000/=** per day; the assessor's fees, K**shs. 10,000/=** and costs and interest.

3. The appellant filed a defence and counterclaim. He admitted the occurrence of the accident but denied negligence. He attributed negligence to the respondent for not parking at a designated area. He thus pleaded that he suffered loss and damage. He prayed for special damages in the sum of **Kshs. 334,992/=** being repair costs in the sum of **Kshs. 329,092/=** and the assessors fees Kshs. **5900/=;** interest and costs.

4. The case having been heard the learned trial magistrate reached a finding in favour of the plaintiff. The defence and counter-claim were dismissed. Judgment was entered for the plaintiff in the sum of **Kshs. 140,000/=** being the value of the vehicle less **10%** contribution; the assessors fee of **Kshs. 10,000/=** with costs and interest; then costs. The claim for loss of user was dismissed.

5. The appellant was dissatisfied with the judgment, therefore appealed on grounds that:-

i. The learned magistrate erred in awarding general and special damages of **Kshs. 140,000/=** which was excessive and unjustified in the circumstances;

ii. No basis for the award was given;

iii. Holding that the appellant was 90% liable for the accident was erroneous.

iv. Failure to allow the counter-claim was erroneous.

v. Evidence on record showed that the respondent was the one liable as no negligence was proved on the part of the appellant.

6. This being a first Appellate Court, it is my duty to subject the evidence tendered in the Lower Court to fresh and exhaustive evaluation to reach my own conclusion bearing in mind the fact that I did not see or hear witnesses.***(See Peter Versus Sunday Post (1958) EA 424*** *at* ***page 429).***

7. According to evidence adduced, PW1, **Joel, Ngei Kiteme,** the respondent stated that he bought his motor-vehicle registration Number. KAH 018S from **Mid Oil, Nairobi,** in **2001.** He produced the log-book to the motor-vehicle in evidence and transfer forms duly filled. According to him he parked the vehicle beside the road. It was stationary when the appellant who was in control of his motor-vehicle moved at a high speed and in a zigzag manner and hit his motor-vehicle damaging its bonnet. The vehicle split into three (3) parts. He used the motor-vehicle for carrying out business including hiring it out, consequently he incurred losses.

8. PW2, **Martha Kanini,** the wife to the respondent who was in the motor-vehicle stated that as PW1 assisted a lady they had carried to alight at the bus stage, the vehicle came at a high speed and hit their motor-vehicle damaging it extensively. She was injured. PW3, **Inspector Timothy Murangiri** who was in custody of the traffic file stated that the appellant was blamed for the accident and charged with the offence of careless driving. An inspection carried out showed that both motor-vehicles had pre-accident defects that could not have caused the accident. The respondent's motor-vehicle was declared unroad-worthy.

9. PW4, **Daniel Ngovi** a motor-vehicle engineer assessed the value of damage caused on the respondent's motor-vehicle which was **Kshs. 380,722/=** and found the pre-accident value to be **Kshs. 170,000/=.**

10. In his defence the appellant stated that as he drove on his lane he saw an object. It was a vehicle coming from the other lane to the left lane. He flashed his lights but the driver did not respond, hence the collision on the left side. His vehicle was damaged. He was blamed for the accident and charged in court but acquitted under **Section 210** of the **Criminal Procedure Code.** He blamed the respondent for the accident for having stopped where he did instead of stopping at another designated bus stage prior to reaching the scene of the accident. DW2, **Ruth Nzilani** a wife to the appellant who was in the motor-vehicle saw an object which the appellant could not avoid hence the collision on the roadside at a stage. She stated that the respondent's car had no lights hence was not visible. On cross-examination, she however stated that parking lights were on.

11. DW3, **Jerald Wangithe** an investigator retained by the appellant's insurer investigated the case and found that the accident occurred at bus stage. He opined that it appeared the respondent's motor-vehicle was in motion and had left his correct lane when the accident occurred.

12. The appellant's motor-vehicle was examined and assessed by **DW4, Gideon Muchira** who concluded that the cost of repair would be **Kshs. 400,000/=** but reasonable sum for repair would be **Kshs. 329,092/=.**

13. It has been submitted that there was no proof of ownership of the motor-vehicle therefore it was erroneous on the part of the trial magistrate to reach a finding that the respondent was entitled to the sum awarded.

14. It is pleaded in **paragraph 3** of the plaint that the plaintiff is the owner of the motor-vehicle registration number KAH 018S. The averment was disputed. In his evidence the respondent stated that he purchased the motor vehicle from **Mid Oil, Nairobi.** They passed the log-book of the motor-vehicle to him with duly filled and signed transfer forms. He stated that he had not raised funds to pay for the transfer transaction.

15. In the case of S***amuel Mukunya Kamunge versus John Mwangi Kamuru - Civil Application Number*** **34** of **2002, *Okwengu, J*** (*as she then was*) stated thus;-

"***It is true that a certificate of search from the Registrar of Motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor-vehicles. That however, is not conclusive proof of actual ownership of the motor-vehicle as Section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often times vehicles change hands but the records are not amended".***

16. Proof required in this case was on a balance of probabilities. Evidence of signed transfer forms which was proof of the motor-vehicle having changed hands that was not disputed is evidence of beneficial ownership on a balance of probabilities. Therefore, the learned trial magistrate did not misdirect himself by holding that the respondent was the owner of the motor-vehicle.

17. As submitted by counsel for the appellant, the respondent's claim was based on negligence that was particularized as follows:-

"i. ***The appellant drove at an excessive speed in the circumstances.***

ii. ***He failed to keep proper look or have any regard to other road users.***

iii. ***He failed to slow down, swerve, brake, stop or take any evasive action to avoid the crash".***

18. In the counterclaim, the appellant also blamed the respondent for negligence and particularized the same as follows:-

"i. ***Parking the motor-vehicle at a place not designated for the same;***

ii. ***Failure to have regard to other road users while parking the motor-vehicle;***

iii. ***Causing and/or substantially contributing to the occurrence of the accident by illegal parking".***

19. The respondent stated in his evidence that he had parked his motor-vehicle at a designated parking area, at a bus stop. A lady he had carried in his motor -vehicle was to alight. He had his lights on. In his testimony the appellant argued that the motor-vehicle was in motion when they collided. However, as correctly found by the learned trial magistrate, it is pleaded in the particulars of negligence attributed to the respondent that the motor-vehicle was not parked at a designated area therefore the respondent had little or no regard to other road users when parking his motor-vehicle.

20. **DW2**, who was in the car with DW1 confirmed that indeed the accident occurred at the bus stage. The respondent having parked the motor-vehicle at a bus stage which was a designated area cannot be faulted for having had no regard to other road users.

21. While driving the motor- vehicle along the road the appellant just like any other road user was expected to keep proper lookout and have regard to other road users. He owed them a duty of care. He stated that he saw an object some 150 meters away. DW2 who was with him also saw an object and the object had its lights on. As a driver, having known the consequences of seeing an object with lights on, he ought to have been prudent enough to either slow down or take an evasive action of avoiding the collision. He did not do anything, he did not even horn. He drove on. The consequence was the collision.

22. It has been argued that the trial magistrate did not lay any foundation in dismissing the counter-claim. He did consider the counter-claim. He found that it was based on grounds that the appellant's motor-vehicle was in motion an argument that he dismissed. I have considered particulars of negligence stated in the pleadings. Evidence adduced falls short of establishing the fact that the parking was illegal. The kind of defence put up by the appellant deviated from what was particularized. Having failed to support the allegations that the trial magistrate could not have been expected to allow a counter-claim that was not supported by any evidence.

23. Consequently, the respondent cannot be said to have substantially contributed to the accident.

24. The trial magistrate has been faulted for reaching the conclusion that the appellant was 90% liable for the subject accident. The Court of Appeal in the case of ***Kimatu Mbuvi t/a Kimatu Mbuvi & Bros versus Augustine Munyao Kioko (2006] eKLR*** stated that ;-

> ***"It is a strong thing for an Appellate Court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses and further that the jurisdiction to review evidence must be exercised with caution that it is not enough that the Appellate Court might itself have come to a different conclusion."***

25. In reaching its decision that the respondent contributed to the negligence though the percentage was minimal, the trial magistrate stated thus;-

> ***"Indeed even if the vehicle would have been from Garissa heading to Mwingi direction then the accident would still have occurred. It is not the point of impact that would change. It means the vehicle would have been smashed from the rear and not the front. It then follows that contribution by the Plaintiff would be very minimal in the long run."***

26. A claimant contributes to negligence when his conduct is careless such that he fails to avoid the consequences of another person's breach of the duty of care.(see ***Charlesworth and Percy on Negligence, twelfth edition at Page 9:1-14).***

27. The respondent parked the motor-vehicle and left its lights on per his testimony. He did not specifically state whether the lights were deemed or if they were full. The appellant said he just saw an object. He was not able to tell if indeed it was a motor-vehicle. This is a suggestion that the respondent's conduct was careless. Therefore having heard them, the trial magistrate formed on opinion as to the ratio of liability.

28. It has been held that an Appellant Court will not ordinarily interfere with the findings of fact by a trial court unless they were based on no evidence at all or a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. (see ***Mwanasokoni versus Kenya Bus Service Ltd[1985 KLR 931***.) In the premise, I see no basis of interfering with the findings of the trial court on that aspect.

29. In reaching its decision, the trial court dismissed the claim for loss of user which was not specifically pleaded or proved. It granted the claim for assessor's fee which was specifically proved and awarded. Special damages on the sum of **Kshs. 140,000/=** was specifically pleaded and proved to the required standard. This was a pre-accident value less salvage. Costs award followed the event.

30. Having re-evaluated evidence on record, I find no merit in the appeal. Accordingly, I dismiss it.

31. Costs of the appeal shall be borne by the Appellant.

32. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **24TH** day of **SEPTEMBER, 2014.**

L.N. MUTENDE

JUDGE