REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 223 OF 2011

JAMES MACHARIA NJANE …………………..................................APPELLANT

-V E R S U S-

ROSE KIRIMI ZACHARIA ……..……..…............................. 1ST RESPONDENT

MARY MUTHONI KAMAU ……………………….....………2ND RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court Civil Suit No. 717 of 2000 and 718 of 2000 dated 17th October 2011 delivered by Hon. T. Gesora (SRM).

JUDGMENT

1. Although the two Respondents filed separate suits before the Magistrate's Court, being **Mombasa CMCC Case Nos. 717** and **718 of 2000**, the two cases were heard together by consent of the parties. The resultant judgment of 17th October 2011 is the subject of this Appeal.

2. Both Respondents pleaded in the lower Court that they were on 26th May 1999 travelling as fare paying passengers in the Appellant's motor vehicle registration No. KNN 934. They were travelling on Mombasa – Malindi Road when the Appellant negligently drove the said motor vehicle causing an accident where they were both injured. The lower Court by its considered judgment of 17th October 201 found the Appellant 100% liable for that accident and awarded 1st Respondent Kshs. 124,600/- and the 2nd Respondent Kshs. 204,600/-.

3. I need to begin by stating that the typed proceedings in the Record of Appeal, filed by the Appellant herein, does not show that the 2nd Respondent testified in the lower Court. In my perusal of her lower Court file being **Mombasa CMCC No. 717 of 2000** I was unable to confirm whether she testified because the handwritten proceedings of that file are in such tattered state, and it does seems that some pages are missing. I cannot confirm one way or the other if the 2nd Respondent testified. I do however note that the typed proceedings in the Record of Appeal show that on 7th February 2011 Learned Counsels for the parties stated that they had a consent which was adopted by the Court as an order of the Court. The consent was in the following terms-

> **"…. that the proceedings and judgment herein be applied in 717 of 2000."**

The file **No. 717 of 2000** was the 2nd Respondent's file.

4. When I perused Appellant's Learned Counsel's submissions before the Mombasa Chief Magistrate's Court I find that Appellant's Counsel did not allude to the failure of 2nd Respondent to adduce evidence in support of her case. Even the Learned Trial Magistrate did not mention in his considered judgment any failure of 2nd Respondent in that regard. I will therefore proceed on the basis that 2nd Respondent did adduce evidence in the lower Court.

5. In my determination of this Appeal I will be guided by the decision in the case **SELLE & ANOTHER –Vs- ASSOCIATED MOTOR BOAT COMPANY AND ANOTHER [1968]E.A. 123** where the Court stated-

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put, they are that this Court must consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account to particular circumstances or probabilities materially to estimate or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

6. The evidence of the Appellant and the Respondent was that they were traveling in Appellant's motor vehicle, and near Shanzu the vehicle collided with Kenya Bus brake-down vehicle. According to the two Respondents they had hired Appellant's taxi to take them to Kwa Hola.

7. Respondent's evidence was that Appellant was driving at high speed. Appellant and his witness who also was in the vehicle denied that the Appellant drove at high speed. Appellant's witness namely Mwema Maluzi Katu said in evidence-

> **"When we got a place called Guragura we found a broken down KBS. There was a brakedown and the brakedown lit is headlights. It was dark. The driver Macharia (Appellant) got mixed up an accident occurred we got under the breakdown, we were injured by broken glasses."**

He blamed the vehicle which had its head lights on for that accident. Appellant said-

> **"It was 10.00pm when we came near the lorry the driver suddenly put on powerful lights and the glare confused me as I was driving and I rammed into the lorry."**

Appellant stated that the lorry that put on its headlight was registration number KAJ 154N.

8. The typed proceedings show that Appellant on 30th June 2004 was granted leave to issue Third Party Notice to M/s Kenya Bus Service Mombasa, Ltd (**under receivership**). Although the Third Party Notice was filed on 12th January 2005, I could find no evidence in the lower Court file, or in the Record of Appeal proving that Kenya Bus Services were served with that Notice. What is evident is that Appellant's Learned Counsel was happy to proceed with the trial before the lower Court without involving the Kenya Bus Services.

9. That being so the Ground of Appeal No. 6, that the Learned Trial Magistrate failed to find the 3rd party liable miserably fails. The trial Court could not find a party liable, when that party was not a party in the proceedings.

10. Ground No. 1 of Appeal. Appellant contended that the Trial Magistrate failed to consider his evidence.

11. The Trial Magistrate in his judgment sufficiently referred to Appellant and his witness evidence and then proceeded to find that Appellant was to blame for the accident. In that finding Trial Magistrate stated in his judgment-

> **"His (Appellant's) confusion and inability to take evasive action can only mean that he was driving too fast under the circumstances. If he had been more careful then he definitely would have been able to control it."**

12. I find the Magistrate, contrary to what is stated in that 1st Ground considered defence evidence and made a finding that Appellant was negligent. I do therefore reject Ground No. 1 of Appellant's Appeal.

13. Ground No. 2, Appellant stated that the trial Court erred for finding him 100% liable for the accident.

14. It need to be stated that Respondents led evidence, and it was not controverted, that Appellant was charged with the offence of Careless Driving where Appellant was fined Kshs. 2,000/- on his own plea of guilt. Appellant's said conviction on his own plea of guilt is, in the absence of any other party being sued in the lower Court, conclusive evidence that he was solely to blame for the accident. That is certainly the import of the Court of Appeal decision in the case **ROBINSON –Vs- OLUOCH (1971)EA** where it was stated-

> **"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 Section 47A 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 caused or contributed to the accident."**

15. Appellant owed the Respondents a duty of care and that duty was owed whether or not Respondents were fare paying. It mattered not that Respondents could not prove they were, at the material time fare paying passengers. Appellant owed a general duty of care to all persons generally to ensure that his driving does not injure them. For that reason Ground No. 4 is rejected.

16. In Ground No. 3 Appellant faults the trial Court for awarding special damages to Respondent which he stated were not specifically proved.

17. Appellant failed to attach all the relevant documents to his Record of Appeal. I did however find in the lower Court file that Respondents had submitted receipts as proof of their claim for special damages. Ground No. 3 is therefore rejected.

18. Ground No. 5 Appellant for first time in the proceedings of the cases faults the Learned Magistrate for awarding judgment to 2nd Respondent without the 2nd Respondent giving evidence on her injuries.

19. As I stated above the original handwritten proceedings in the 2nd Respondent's lower Court's file, are in such tattered state that I cannot confirm whether 2nd Respondent testified in the lower Court. It does however seem as stated before that the parties and the Learned Trial Magistrate proceeded as though she had testified. Appellant himself through his written submissions at the conclusion of that trial did not allude to such failure. Accordingly I will reject that Ground of Appeal.

20. Having considered the evidence adduced and the trial Court's judgment

I find no basis of interfering with the lower Court's judgment. Accordingly the judgment of this Court is that this Appeal is dismissed with costs to the Respondents.

DATED and DELIVERED at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE