REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL 36 OF 2007

MAHADHI TRANSPORTERS LTD .....APPELLANT

VERSUS

PHILIP NG'ANG'A MWAURA ……..RESPONDENT

JUDGEMENT

1. This appeal emanates from Kilifi Civil Case No. 618 of 2006 and has been brought against the decision of the Resident Magistrate delivered on 6th September 2007.

2. The suit in the Lower Court was a running down matter pitting the present respondent against the appellant. The respondent brought an action for negligence seeking damages in respect of injuries he allegedly sustained on 24th September, 2006, following a collision between two vehicles, KAV 561D in which he was a passenger and on the other part KJJ 764ZA 4480 owned by the appellant and driven at the time by its driver, servant or agent. The particulars of negligence were pleaded in the plaint. Although the appellant had denied all material averments of the plaint in its statement of defence, during the hearing it appeared that the occurrence of the collision was not disputed save that each driver attempted to lay blame on the other for the accident. In resolving the matter the trial court relied on the admitted conviction of the defendant's driver, for careless driving in a traffic case brought against him in connection with the accident.

3. The appellant complains in the memorandum of appeal that the damages awarded are excessive; that liability ought not to have been found at 100% against the appellant, that the trial court failed to consider the appellant's evidence instead relying only on the respondent's evidence.

4. I have looked at the evidence adduced in the Lower Court with a view to appraising the same afresh. The drivers of the accident vehicles, PW3 and the DW1 accused each other of overtaking or moving outside the correct lanes thereby causing the collision. Having set out their evidence, the trial magistrate concluded, correctly in my view, that in the circumstances of the case the issue of liability was settled by the fact that DW1 was found at fault, charged, tried, convicted and fined for careless driving. No appeal had been preferred against the said conviction. While the appellant was entitled to

plead contributory negligence notwithstanding, such a plea must be supported by evidence. In this case however there was no material in the defence evidence to justify apportionment of liability between the two drivers. Indeed the statement of DW1 was vague as to the actual occurrence of the collision. He said he heard “a bumpy sound” (sic) DW2 spoke hearing a “loud voice”.(sic)

5. On the question of quantum, I note that while the respondents made submissions in support of the general damages, the appellants did not and it is too late for them to do so at this stage. Besides, there is no evidence that the trial court acted on wrong principles, and neither is the award so excessive as to lead to the conclusion that the court took into consideration in relevant considerations or failed to consider relevant matters (**See ZABLON W. MARIGA V MORRIS WAMBUA MUSILA CIV. APPEAL. NO. 66 OF 1982).**

I do not agree that the sum awarded in general damages was excessive in light of the injuries proved.

The appellant’s appeal has no merit and is dismissed with costs.

Delivered and signed at Malindi this **29th** day of May, 2012 in the presence of Mr. Shujaa holding brief for Mr. Njoroge for Respondent. Appellant absent.

C. W. MEOLI

JUDGE