



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Appeal 328 of 2004

MARUBENI CORPORATION. APPELLANT

VERSUS

MOHAMED NUR HUSSEIN. RESPONDENT

***(From the judgment and orders of C Meoli (Mrs.), Senior Principal Magistrate in Milimani CMCC
NO. 10479 of 2003)***

J U D G M E N T

The Appellant in a plaint dated 25th October, 1995, claimed a total sum of Ksh.856,700/- being the pre-accident value of its damaged motor vehicle plus other relevant incidentals therein specified. It alleged negligence on the part of the Respondent stating that the Appellant's motor vehicle registration Number KAA 028X, collided with the Respondent's motor vehicle registration Number UPA 193 with its trailer No. UPA 191.

The Appellant pleaded that the 1st Respondent who was driving from an unmarked road in to Jogoo road failed to stop and give way to the Appellant's driver then lawfully driving along Jogoo Road. The Appellant accordingly held the Respondent responsible for the collision that occurred and the damage that resulted from the collision.

In the joint defence filed by the Respondents they both admitted that the collision between the two motor vehicles occurred. They, however, denied that they were negligent or that their negligence led to the collision. They instead blamed the Appellant for the accident wholly or partly.

During the hearing, the Plaintiff/Appellant called three witnesses who testified. The Respondent/Defendant similarly called one witness.

One of the main issues that the trial court found necessary to determine is whether the defendant's motor vehicle hit the Plaintiff's motor vehicle and if so, whether it was a head-on collision or a crash-on from the side. Alternatively, whether the Plaintiff's motor vehicle rammed into one side of the Defendant's track as the latter crossed the main road along which the Plaintiff's driver drove.

The honourable trial magistrate came to the conclusion that the Plaintiff rammed into the crossing truck of the Defendants. She also found that the Defendant's driver, who was crossing the main Jogoo road from a feeder road, was required to stop at the junction towards the Jogoo Road before crossing. The magistrate blamed both drivers for not seeing the headlights of the other at the night time before the moment of the collision. That admission made the trial magistrate conclude that both drivers lacked proper look-out.

Furthermore, using the same ground the trial court found the Appellant's driver not truthful in stating that he was hit from the right side contrary to the evidence indicating that he actually rammed into the crossing trailer of the Defendant. The honourable trial magistrate being further boosted by the evidence of the motor vehicle assessor, who had testified in support of the Appellant, came to the conclusion that the Appellant's motor vehicle was not hit from the side of the defendant's vehicle but had rammed itself into the Defendants truck and trailer. The result was that the honourable trial magistrate found that the Plaintiff/Appellant, had failed to prove its case on the balance of probability and dismissed it. He failed to assess damages in case the appeal succeeded. The Appellant, who got aggrieved, appealed to this court giving the following as grounds of appeal.

1) That the honourable magistrate finding was erroneous in-law and facts to who was negligent or caused the accident.

2) That the honorable magistrate erred on assessment of the burden of proof.

3) That the trial court should have assessed the possible damages in case the appeal succeeds.

This court has perused the record of pleadings, the evidence from both sides and the findings of the trial court. It finds that the accident is not denied. It finds as well that the Appellant's driver was driving towards town along Jogoo road which in the circumstances of the case was the main road. This court also finds as did the trial court, that the accident occurred at 9 p.m. in the night. Furthermore, it was not denied by the Respondents that their truck with a trailer, was approaching the main Jogoo road from a minor or feeder road at a junction where the driver of the truck was required to stop and ascertain that the main Jogoo road was clear before crossing towards Lunga Lunga road.

There is evidence from the Defendant's driver, DW I, that he had stopped and looked at both left and right before joining the main Jogoo road and that he only saw headlights of a vehicle approaching from a far. And yet no sooner had he started crossing the main road than he immediately heard a bang of another car, ramming into his truck between the trailer and the mover.

I have considered the Defendant's driver's explanation above and compared it with that of the Appellant's driver that he was hit from the right side by the crossing truck of the Defendant. I find that both drivers never said the truth as to the manner of actual collision. In my view and finding, the Appellant's driver is the one who rammed into the crossing truck. The evidence of the motor vehicle assessor confirmed that the impact on the Plaintiff's motor vehicle was from the bonnet backwards. Since there was no evidence of head-on-collision, the only other possible explanation for such impact is that the Appellant's driver rammed into the crossing truck-trailer. The Appellant's driver's evidence on the point does not therefore sustain itself.

On the other hand, the Defendant's driver's explanation, that he stopped at the junction before crossing the main Jogoo road and ascertained that no vehicle drove closely from city centre and from Donholm side before he started crossing, does not add up. Nor can his claim that all he saw were headlights from a far before he started to cross

the Jogoo road. If what he alleged was true, then there is no way the Appellant's motor vehicle could ram into the truck immediately he started crossing the main road. Clearly, he must have crossed without stopping at the junction. Or, he must have quickly checked without due care and attention and must have thought or assumed that the headlights he saw from the left side along the main road, were a far, when indeed, they were very close.

In my view and finding whichever of the two versions above was the correct one, neither is in favour of the Defendant as both confirm lack of due diligence and/or proper care and attention on his part. The driver (PW 2) should not have started to cross the main Jogoo road until he was sure that no motor vehicle was nearing the crossing junction from either side of the said road. That he crossed the said road without first properly ascertaining that there was another motor vehicle lawfully approaching, became his undoing and he was himself alone to blame.

And what part did the Plaintiff's driver play? He was driving from City Centre on the Jogoo Road which in the circumstances of this case, was the main road. While every driver has to be careful while driving on any road, it is not reasonable and manifest to me that the Plaintiff's driver should have expected the Defendant's truck to be suddenly driven across a main road from a minor road. It would on the contrary, be reasonable on his part to expect that those at the junction, intending to cross a main road, would give way until the road is clear and safe to cross. Could the plaintiff's driver have driven in any better manner that could have avoided ramming into the defendant's vehicle which suddenly crossed the main road along which the driver drove? My answer is, No. I see no way he could avoid the collision. It is only unfortunate that his explanation as to how the collision occurred was not true. The correct explanation is that he crashed into the crossing vehicle. However, his lies do not alter the circumstances of the case or change the way the accident happened from the evidence before the court.

I have considered the above facts. An Appellate court would not easily alter a finding of fact of the trial court except where the conclusions reached by the trial court do not add up or are inconsistent with the facts in evidence. In this case the trial court should have interrogated the reason and the consequences of the Defendant's driver crossing a major road at the junction, without first ascertaining that no other motor vehicle was closely approaching. Had the court had done so it would have not reached the wrong conclusions it did.

It is accordingly the view and finding of this court that there was sufficient evidence on record to find that the Respondents or their driver or agents or servants were negligent in this case and that their negligence was the sole cause of the accident, the subject of this case.

The trial magistrate as well erred in not assessing damages in case her judgment is overturned on appeal. This court assesses the damages as follows: -

The sum assured was	Ksh. 1,200,000.00
Less the Salvage which admittedly sold at	Ksh. 600,000.00
Less Policy excess	<u>Ksh. 60,000.00</u>
T O T A L	540,000.00
ADD	
Assessors Fees	1,200.00
Police Abstract	100.00
Towing Charges	<u>5,400.00</u>
TOTAL	546,700.00 =====

This court accordingly finds and awards the Appellant a total sum of Ksh.546,700/- with court-interest from the date of filing of suit at the lower court until full settlement. Costs are to the Appellant on the awarded sum here and at the court below. Orders accordingly.

DATED and delivered at Nairobi this 15th day of May 2012.

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D A ONYANCHA
JUDGE