



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
Civil Appeal 50 of 2009

ALI ABDI HUSSEIN.....PLAINTIFF

VERSUS

PETER NJUGUNA.....RESPONDENT

JUDGMENT

1. This appeal emanates from the judgment of the Resident Magistrate sitting at Kilifi awarding the sum of shs. 449,500/- to the plaintiff(Respondent) against the defendant(appellant). The case involved a material damage claim arising from a road traffic accident which occurred on 1st November, 2008 and involving the plaintiff's vehicle registration number KAZ 342Z and the defendants Scania Lorry KAP 695Z and trailer ZC 2039.

2. Through their memorandum of appeal and submissions the appellants attack the lower court's finding on the twin issues of liability and quantum.

It is the appellant's contention that based on the evidence tendered, the court ought to have made a finding that liability be apportioned as there was "no concrete evidence to determine who (was) to blame between the two drivers"... (see **Civil Appeal No. 218 of 1998 JIMNAH MUNENE MACHARIA VS JOHN KAMAU ERERA**).

3. Secondly, the appellant take issue with the award of shs. 63,000/- as damages for loss of user which was not specifically pleaded among the specials in the plaint. To this latter submission, the respondents referred to paragraph 6 of the plaint and the evidence of receipts marked Exh. 1 and 7. They argued that the suggestion that liability ought to have been apportioned was not supported by the evidence tendered in the Lower Court.

4. This appeal turns on two questions namely, whether loss of user is a special damage that should be pleaded specifically and secondly, whether the finding of 100% liability against the defendant was warranted. The answer to the first issue is found in the case of **WAWERU VS NDIYA KLR 1985 page 236** where Court of Appeal stated:

"Damages for loss of user of the use of a vehicle can be claimed as special damages and not general damages and the loss suffered should be proved strictly. The respondent in his plaint had claimed the damages as general damages and had set out no particular loss."

5. The respondent's evidence in purported proof of loss of user was of no avail as no special claim for shs. 63,000/= for loss of user was inserted in paragraph 6 or anywhere else in the body of the plaint. The 7th ground of appeal must therefore succeed.

6. On the issue of liability, the record of the plaintiff's evidence is clear. The defendant's vehicle left its

side of the road, veered into the path of the plaintiff's vehicle and hit the plaintiff's vehicle before proceeding to overturn. The defendant's driver pleaded guilty and was fined. He did not attend the court to testify. The investigating officer PW3 described during cross-examination the extent of the encroachment by the defendant's vehicle. It cannot therefore be that the plaintiff's vehicle was in the middle of the road after the accident as he said in his evidence in chief if the measurements are believed?

7. For his part DW1 claimed that the plaintiff's vehicle left its side of the road. In these circumstances, I think that liability ought to have been apportioned in a ratio of 90:10 – in favor of the plaintiff.

8. I do set aside the judgment and decree of the Lower Court and substitute therefor judgment in the following terms;

Liability apportioned at 90:10% in favor of the plaintiff

Total damages awarded less kshs. 63,000/= is shs. 386,500/= which yields the sum of shs. 347,850/= on application of the apportioned liability ratio. The costs of the appeal and the suit in the Lower Court are apportioned in equal measure.

Judgment is accordingly entered.

Delivered and signed at Malindi this 25th day of **July, 2012** in the presence of: Mr. Shujaa for Mr. Mwangi for the respondent. Ms Oyugi holding brief for Ajigo for appellant. Court clerk - Evans

C. W. Meoli
JUDGE