REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 190 OF 2007

ZAKAYO MAINA WAWERU……APPELLANT

VERSUS

NAKU MODERN FEEDS LIMITED……1ST RESPONDENT

JOSEPH NJUGUNA……2ND RESPONDENT

(An Appeal from the Judgment/Decree of Hon. T. Matheka, Senior Resident Magistrate, in Nakuru C.M.C.C.No.255 of 2002 dated 1st October, 2007)

JUDGMENT

On 12th January, 2004, there was a road accident involving three motor vehicles along Nakuru-Eldoret road in which the appellant's car registration No.KAQ 012C was hit from the rear by a *matatu* registration No. KZC 644 that in turn had been hit from the rear by a lorry No. KAL 912H belonging to the 1st respondent and driven by 2nd respondent at the time of the accident.

The appellant's car was being driven by his wife, P.W.3, Esther Wambui Maina. The appellant's motor vehicle was insured by Apollo Insurance Company Limited which at the time of the accident had merged with APA Insurance Company Limited.

After the accident, the appellant, in consultation with the insurance company elected to have his car repaired by Bhogal's Auto World. After inspection and estimates, P.W.1 James Macharia Kimani, the Credit Controller with Boghal's Auto World issued an invoice in the sum of Kshs.258,977/= to the insurance company. Samson Musembi from the insurance company confirmed that the insurance company issued a cheque in settlement of the repair charges as invoiced.

The appellant subsequently brought an action in negligence against the respondents for special damages in the sum of Kshs.289,581/= and costs of the suit.

At the trial, the questions that fell for determination, given the foregoing facts were whether:

i) the respondents were liable in negligence for the accident;

ii) whether the appellant was entitled to be paid the damages claimed, the repair costs having been settled by the insurance company.

Although not categorically stated, the learned trial magistrate appeared to have blamed the respondents for the accident. Being a first appeal, this court is enjoined to evaluate a fresh the evidence in order to

arrive at its own independent conclusion.

The eye witnesses were unanimous that it had rained and the road was wet. The appellant's wife who was driving was suddenly banged from behind by a *matatu.* The *matatu* in turn had been hit by the respondent's lorry. D.W.1, Godfrey Njenga, who was a turn boy in the lorry and who was the only witness who saw the accident occur gave an account of the accident thus:

"We hit the Nissan, it moved forward. If we had not hit the Nissan, it would not have hit the other motor vehicle. The Nissan applied emergency brakes. Our driver would not have expected it. Our lorry skidded before hitting the Nissan. Our driver did not keep a safe distance. The accident would not have occurred had we not hit the matatu from behind."

From the eye witness, the *matatu* which was travelling in the same direction as the lorry applied sudden brakes causing the lorry behind it to ram onto it thereby pushing it to hit the appellant's vehicle. The witness who was called by the respondents admitted that the driver (2nd respondent) of the lorry did not keep safe distance. I find from that evidence that indeed the cause of the accident was the close proximity the 2nd respondent kept from the vehicle ahead. That amounted to negligence bearing in mind that the road was wet following rainfall. The 1st respondent was as a result vicariously liable to the appellant for the damage to his motor vehicle. The next question is whether the appellant was entitled to seek damages from the respondents in respect of that liability.

It is common ground that a sum of Kshs.258,977/= constituting part of the claim in this action was paid to Bhogal's Auto World by Apollo/APA Insurance Company Limited following an assessment by Kenya Loss Assessors and Surveyors Limited. The appellant's motor vehicle was satisfactorily repaired, the appellant was satisfied and collected it.

Although this action was brought by the appellant stating in the plaint that:

"……. as a result of the matters aforesaid, the plaintiff has suffered loss and damages."

in his testimony before the court below, he said as follows:

"I did not pay the repair charges. This case concerns me. I am the policy holder. It is not me who is to be paid. It is the insurance trying to recover what they lost."

The appellant's wife also reiterated that:

"My prayer to this court is an order for reimbursement to our insurers by the defendant. Our motor vehicle was hit from behind and repairs paid for by the insurance company."

It is plain therefore that the appellant was satisfied after the repairs and only brought this action on behalf and for the benefit of his insurer. There is no such procedure in our insurance laws or civil procedure

The English doctrine of subrogation that applies in this country only obligates the insurer to compensate the insured and once it does, it (the insurer) can institute proceedings, in the name of the insured, against the party that caused the loss. This allows the insurer to recoup the loss suffered by the insured. The rationale behind the doctrine and why it is considered a *naturale* in indemnity contracts is to uphold the principle that a person can only be compensated once in respect of a single incident which has diminished his or her estate.

This is the rule against unjust enrichment; the rule against the insured making a profit of his loss as was aptly articulated by the Court of Appeal in **Madison Insurance Company Limited** V. **Kinara t/a Kisii Physiotherapy Clinic**, 2004 1KLR 709 at 713:

"…….that the party whose property is being insured pays premium not with the intention of making any profit out of the transaction but rather with intention that were the items assured be

destroyed, stolen or damaged, the other party offering the policy would replace the stolen or destroyed item or pay the reasonable charges for its repair."

I believe I have said enough on this point, except only to add that the claim being one of special damages the appellant did not provide and could not have provided loss as the loss fell on the insurance company that settled the repair costs. Even payments to Kenya Loss Assessors and Surveying Limited were made by the insurance company.

In the result, this appeal must fail and is accordingly dismissed with costs.

Dated, Signed and Delivered at Nakuru this 20th day of July, 2012.

W. OUKO
JUDGE