DHANJALALA BROTHERS LIMITED …….APPELLANT
VERSUS
FREDRICK M. G. DZOMBO ……RESPONDENT

(The Appellant being aggrieved by the judgment of Hon. Mushelle SPM delivered on 7th March, 2000 in CMCC No.4095 of 2000 now appeals against the whole of said judgment.)

JUDGMENT

The Appellant filed an Appeal after dissatisfaction of the whole judgment and decree delivered by Honoruable Mushellulle SPM in C.M.C.C. No.4095 of 2000 on 7th March 2000. The Applicant listed five (5) grounds *inter alia:*

"1. The Learned Magistrate erred in law and fact in holding that the Defendant is wholly to be blamed.

2. The Learned Magistrate erred in law and fact in failing to hold that the Plaintiff totally failed to prove the claim.

3. The Learned Magistrate erred in law and in fact in awarding claims which were not proved at all.

4. The Learned Magistrate erred in law and in fact in failing to take into account and consider adequately the Appellant's/Defendants case.

5. The Learned Magistrate erred in law and in fact in failing to hold that the Plaintiff and his witnesses' testimony were contradictory."

I have looked at the Record of Appeal dated 20th May 2010 and the written submissions of the Appellant dated 27th October 2010 and the Respondent's written submissions dated 4th November 2010.

In my mind the first issue in this Appeal is whether the Learned Magistrate erred in law and in fact in holding that the Appellant/Defendant was wholly to be blamed. The Learned Magistrate held in the judgment against which this Appeal is lodged that the Appellant was Responsible for the accident.

The Learned Magistrate also held that Plaintiff/Respondent proved his case having pleaded that the accident was caused by negligence on the part of the Appellant. The evidence was that the Appellant's driver was charged and convicted for careless driving vide Traffic Case No.10649/07. Counsel for the Appellant admits this in his written submission which makes primarily this evidence uncontroverted.

Despite that, the counsel for the Appellant criticized the Magistrate for holding the Defendant Appellant was 100% liable. He further submitted that the evidence given by the witnesses were contradictory and therefore, could not entitle the Respondent to an award of 100% liability against the Appellant. The learned Counsel cited in his submission several decided cases to support his argument.

The Appeal is vigorously opposed. The Counsel for the Respondent filed written submission in which he submits inter alia that the Magistrate was right in holding that the Appellant was 100% liable for the accident and the Appellant cannot wriggle out the fact that the Appellant's driver was convicted on careless driving.

The learned counsel cited the case of **David Kiplagat Sang –Vs- Richard Kipkoech Langat & Another [2006] eKLR** in which the court held that as per **Section 47A of the Evidence Act** where a person is convicted on a traffic offence related to an accident on a charge of careless driving when a civil case is filed he cannot deny that he was careless in his driving.

In my considered view, having been convicted in the traffic case, the Appellant cannot be heard to say that he as not careless in the civil case.

As regards to damages, the Respondent's claim was for loss of use and special damages which have been proven through documentation.

After considering the rival submission by the Learned Counsels representing the parties, the Appellant was not able to convince the court to set aside or interfere with the finding and holding of the lower court.

The offshoot of the above is that the Appeal is dismissed with costs to the Respondent.

DATED AND SIGNED AT NAIROBI ON THIS 6TH .DAY OFAUGUST.2012.

M.K. IBRAHIM

JUDGE

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DATED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF AUGUST 2012.

J.W MWERA

JUDGE

Delivered in the presence of: