**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 126 OF 2009**

**AGROLINE HAULIERS LTD ……..……. APPELLANT**

**-VERSUS-**
**HELLEN MORAA OHURU …….. RESPONDENT**

**JUDGMENT**

***(Being an appeal from the Judgment and Decree of Hon. D. Kemei - Senior Resident Magistrate Rongo in SRMCCC No. 61 of 2007 delivered on 16th June, 2009)***

The respondent then as the plaintiff sued the appellant, then as the defendant in the Senior Resident Magistrate's court at Rongo for general damages and special damages in respect of injuries she sustained as well as cost of repairs and loss of profits following a road traffic accident involving motor vehicle registration numbers KAW 697R and KAV 473B. Apparently the respondent was the registered owner of motor vehicle registration number KAW 697R whereas the appellant was the registered owner of the other motor vehicle which was a tractor. The respondent's case was that on the 10th March, 2007 she was aboard her said motor vehicle KAW 697 Toyota Hiace which was a matatu, travelling from Migori towards Kisii town when a collision involving the two vehicles occurred at Kanga area. It was her evidence that her matatu was hit by a tractor registration which as already stated belonged to the appellant. She sustained injuries in the process on the face and nose for which she sought treatment at Kisii district hospital and was later examined by **Dr. Ajuoga** and prepared a medical report. In the report he formed the opinion that the injuries were soft tissue in nature with no permanent disability. She paid him kshs. 5,000/= for the service.

Her matatu was extensively damaged as a result of the accident. She took it for assessment of damage by a Maka Automative works and Assessors. They assessed the damage at kshs. 151,612. She eventually met the cost of those repairs. She further claimed loss of income from the matatu at the rate of kshs. 4,500/= per day for 18 days that her matatu was out of business undergoing repairs. The lost income as a result came to kshs. 81,000/=.

She produced in evidence the treatment notes, medical report, police abstract, loss assessment report, receipts of purchase of spares, sale agreement, PSV daily worksheet as exhibits.

She blamed the appellants tractor's driver for the accident for ***"…failing to exercise or to maintain any or any sufficient or adequate control of the said motor tractor…".***

As expected the appellant denied each and every allegation made against it in the plaint including ownership of the tractor, the accident, negligence and the particulars attributed to it, injuries sustained by

the respondent and damages pleaded. It averred instead that the accident was actually caused by the negligence of the respondent's driver and gave the particulars thereof.

Its case was that it owned the tractor and trailer 2137492 and its driver was descending a hill along Migori-kisii highway when the respondent's matatu hit its trailer and landed onto a ditch. The appellant's driver, **Andrew Adongo Owiti** in his testimony wholly blamed the driver of the matatu for the accident for over-speeding and encroaching into his lane.

Having considered both the evidence of the respondent and the appellant as well as the submissions tendered by respective parties to the suit, the learned magistrate found the appellant liable for the accident to the extent of 80%. Otherwise the respondent was to blame for the accident to the tune of 20%. Thereafter the learned magistrate proceeded to award the respondent kshs. 151,612/=for material damage claim, kshs. 54,000/= for loss of income and kshs. 100,000/= as general damages for pain, suffering and loss of amenities less 20% contributory negligence bringing the sum total to kshs. 244,489.60/=. The appellant was aggrieved by the judgment and decree. Hence he lodged this appeal on 7 grounds to with:

***"1. The learned trial magistrate erred in law and infact when he held that the respondent had proved negligence against the appellant to the extent of 80% and in apportioning liability on the basis of 80% contribution against the appellant.***

***2. The learned trial magistrate erred in law and in fact when he disregarded the evidence of the appellant's witnesses at the trial.***

***3. The learned trial magistrate erred in law and infact when he failed to appreciate the fact that it was the respondent's motor vehicle that collided with the appellant's trailer which was being pulled.***

***4. The learned trial magistrate erred in law when he held that the respondent had proved loss of use of the motor vehicle at the rate of kshs. 3,000/= for 18 days which amount had not been pleaded nor proved at the trial.***

***5. The learned trial magistrate erred in law and infact when he awarded Kshs. 100,000/= as general damages for pain and suffering to the respondent which amount is manifestly high and excessive in the circumstances thereby constituting an erroneous estimate of the alleged damage suffered.***

***6. The learned magistrate in the premises erred when he decided the case against the weight of evidence led at the trial.***

***7. The learned trial magistrate erred in law when he held that the respondent had proved her claim for kshs.151,612/= against the appellant and in awarding the same against the appellant in the circumstances".***

When the appeal came up for directions before me on 6th October, 2010, parties agreed to canvass it by way of written submissions. The same were subsequently filed and I have carefully read and considered them alongside cited authorities. It is not in dispute that an accident occurred on the night of 10th March, 2007 involving the two motor vehicles. It is also common ground that as a result of the accident the respondent's matatu was extensively damaged and herself sustained injuries. Therefore the twin issues for determination before the trial magistrate and indeed in this appeal was/is liability and quantum.

As regards liability the first issue that the learned magistrate grappled with and which is raised in this appeal was the appellant's contention that the respondent failed to prove that the tractor belonged to the appellant and relied on the case of **Thuranira Karaari –vs- Agnes Ncheche C.A No. 192 of 1996 (UR)** in which the Court of Appeal held that ownership of a motor vehicle must be proved by a logbook and or an official search certificate. To my mind however, this was non-issue as in its own evidence, it admitted the ownership of the tractor. Indeed the respondent's failure to produce the search of motor vehicle certificate was remedied by the appellant when it sent its transport manager and driver who confirmed in their testimony that indeed the tractor and trailer belonged to it. Again and as correctly observed by the

learned magistrate, the insurance policy cover produced by the appellant's transport manager left no doubt at all in this court's mind that the vehicle covered by the policy belonged to the appellant and that vehicle was the tractor. Besides the police abstract was also tendered in evidence and categorically showed that the appellant owned the vehicle. Finally, **P.C Samuel Odongo**, the investigating officer was categorical in his evidence that the tractor was owned by the appellant.

What were the circumstances of the accident? It emerged from the evidence that the accident occurred at night, around about 7.30p.m. The drivers of the two vehicles blamed each other for the accident. For the plaintiff it was his case that the appellant's driver drove the tractor and trailer without the lights on. The appellant's driver conceded this much in cross examination. He stated that the lights were working but were not on then save for the reflectors. Even PW1 **P.C Samuel Odongo** confirmed that fact. He established through his investigations that the tractor was travelling without lights on in the night.

The case for the appellant was that the matatu was being driven at a high speed on the material night and it slid on mud which was on the tarmac. It was rainy and the road was wet and the matatu lost control and hit his trailer No. ZB7402. Just like the learned magistrate I do not belief the story of the appellant. How could its driver have determined that the matatu was being driven at a high speed when he had no lights on and it was at night? Howe did he know that the road had mud on the tarmac at night. How did he know it was slippery? To my mind, the appellant's driver was merely advancing these theories merely to escape liability. I have no doubt in my mind that by driving a tractor with a trailer at night and with no lights on is the height of recklessness.

Indeed the impact was between the respondent's vehicle and the tractor trailer ZB7492. The respondent and the investigating officer **PC Samuel Odongo** confirmed that the tractor driver did not stop at the scene after the accident. The tractor driver claimed his reason was to avoid thuggery. However that reason did not sell with the trial court. Neither do I buy it. It is not unheard of in this area for tractors to be unleashed on roads when they are extremely in poor condition mechanically. Indeed defective tractors are allowed to roam these roads unbated and with abandon. The conduct of the driver of the tractor after the accident can only confirm that he was driving a defective tractor with no lights on. He did not fear thuggery in the area. He feared that his defective tractor would be exposed. I also agree with trial court's conclusion that this was a case of hit and run. The trial court, despite the foregoing went on to hold that the respondent was also to blame for the accident. I do not see the basis for such finding. The trial magistrate thought that the matatu driver should have noticed the tractor in time so as to avoid the same. How could he have done so when the tractor had no lights on? In the premises apportioning blame to the respondent's driver at a ratio of 20% was wholly unjustified. However, since there is no cross-appeal on that aspect of the matter, I will leave the issue at that.

On the question of quantum, the respondent sought compensation for costs she incurred in effecting repairs to her matatu and loss of income as well as for the injuries sustained. No doubt her vehicle was extensively damaged if the assessor's report tendered in evidence is anything to go by. The cost of repairs were put at kshs. 151,612/=. However the respondent claimed to have spent kshs. 243,000/= on repairs and produced receipts to the effect. A party is ordinarily bound by his pleadings more so in a claim for special damages where the law insists that such claim be pleaded with particularity and specifically proved. The learned magistrate was therefore right in allowing only the amount pleaded in the plaint amounting to kshs. 151,612/=, which had been specifically pleaded and proved by the production of receipts.

The respondent also produced daily PSV worksheets confirming the daily income she used to receive from her matatu. The amount pleaded was kshs. 4,500/= per day for 18 days which comes to kshs. 81,000/=. However the learned magistrate brought down the daily figure to kshs. 3,000/=. for 18 days therefore the loss of income came to kshs. 54,000/= and rightly so in my view. Those worksheets did not take into account the daily expenses involved in running the matatu such as fuel, repairs, crew allowances parking fees etc. There may also be occasions when the matatu for one reason or another may not be operational or traffic may be low so that it ends up not doing the usual trips.

With regard to general damages for pain, suffering and loss of amenities, the respondent according to **Dr.**

**Ajuoga** sustained what are commonly referred to as soft tissue injuries with no permanent disability. In his submissions on quantum, the respondent had asked for kshs. 150,000/= whereas the appellant counter offered kshs. 20,000/=. The authorities cited to the magistrate by the parties in support of their respective positions were not helpful as most of them were decided several years ago while in others the injuries sustained were much more serious. The learned magistrate also rightly adverted to the incident of inflation. He ended up awarding the respondent kshs. 100,000/=. I do not think that he can be faulted for the award. It was within the accepted range of awards for soft tissue injuries at the time. The other pleaded sums of kshs. 5,000/= and kshs. 500/= in respect of medical report and search fees were not awarded as same were not specifically proved. The trial magistrate was right in this regard. In the end the total sum awarded to the respondent less 20% contribution was kshs. 244,489.60 plus costs and interest.

As a result of the foregoing I am satisfied after subjecting the evidence tendered before the trial court to fresh and exhaustive evaluation as required of me as a first appellate court that it is plain that the learned magistrate properly and correctly evaluated, analyzed, appreciated and considered the evidence in totality before arriving at his decision. I cannot take the invitation by the appellant to interfere with the judgment and decree of the learned magistrate as nothing has been brought to my attention that would remotely suggest that in arriving at his decision, the learned magistrate had misdirected himself in law, had misapprehended the facts, save perhaps on the issue of contributory negligence, had taken into account considerations of which he should not have taken account of, or failed to take into account considerations of which he should have taken, or his decision, albeit discretionary, was plainly wrong. See generally **The Francois Veljeux (1984) KLR 1**.

In his submissions, the appellant has stated that it had pleaded negligence on a without prejudice basis at paragraph 7 of the statement of defence. However no reply to the same was ever filed to deny the particulars of the respondent's negligence as envisaged in formally Order VI Rule 9 now Order 2 Rule II of the Civil Procedure Rules 2010 and therefore the respondent was deemed to have admitted then. It support of that proposition the appellant sought to rely on the following authorities:-

**a. Unga Maize Millers Limited –vs- James Munene Kamau High Court Civil Appeal No. 16 of 2001 at Eldoret 5th July, 2005 Jeane Gacheche.**

**b. Mount Elgon Hardware –vs- United Millers Ltd Kisumu Court of Appeal Civil Appeal No. 19 of 1996.**

**c. Jivanji –vs- Sanyo Electrical Company Limited Court of Appeal at Nairobi Civil Appeal No. 225 of 2001 (2000) 1 EA 98.**

It was the appellant's submission therefore that in view of the foregoing it was clear that the respondent was wholly liable for the accident however that submission does not advance the appellant's case any further. The respondent had no business filing a reply to the defence when the alleged negligence and the particulars thereof were attributed to her driver of the matatu and not herself. She was thus a stranger to the averments. They did not therefore require her reply.

The appellant also decries the fact that the respondent pleaded kshs. 151,612/= for the costs of repairs but the receipts in proof therefore had no adhesive stamp duty as envisaged by sections 5 and 19 of the **Stamp Duty Act** and as such they are inadmissible in evidence. Again the assessment/valuation report which was produced reflected miscellaneous expenses of kshs. 4,000/= with no support in evidence. This may well be the case. However, the appellant did not object to their production during the trial. Nor did it advert to the issue in its written submissions for the learned magistrate to ponder over. It is now raising it for the very first time in this appeal and from the bar. That is not permissible.

Then there is the question as to whether the respondent has benefited twice and/or unjustly enriched herself from double compensation, from her insurers and this claim. Of course the general objective in tortuous claims is ***restitution in integrum.*** The victim of the tort should be restored as far as money can do as to as nearly be the same position as he would have been had the tort not been committed. However there is no evidence that her insurers, Invesco, compensated her for the material damage to her matatu. If

anything there is evidence that the insurance she took out over the matatu was third party only which does not cover damage to the motor vehicle. Again this matter was never raised and canvassed before the trial magistrate. It cannot be raised now.

The upshot of all the foregoing is that this appeal lacks merit and is accordingly dismissed with costs to the respondent.

**Judgment dated, signed** and **delivered** at Kisii this 31st day of March, 2011.

**ASIKE-MAKHANDIA**
**JUDGE**