REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL SUIT NO.49 OF 2004

TRANSAFRICA PORTWAYS LTD.....PLAINTIFF

=VERSUS=

POSTAL CORPORATION OF KENYA.....DEFENDANT

J U D G E M E N T

The plaintiff by a plaint dated 23.12.2004, lodged this claim, seeking mainly, special loss as particularized in paragraph 4 of the said plaint. The plaintiff also asked for costs.

The facts leading to the claim are as follows in summary. On the 13.11.2003 the plaintiff's truck registration number UAE 279B, with its trailer registration No. UAE 328B was being driven along Mumias-Busia road by one Abbas Rashid. As it descended on the left side of the road towards Nambale Town at an estimated speed of 80 K.P.H, two other motor vehicles were being driven towards Mumias from Busia. One f the two motor vehicles is said to have been a matatu whose identification was never obtained while the second one was a Kenya Postal Corporation van registration No. KAN 235U being driven uphill by one Stanley Nyangau.

It is in evidence that the postal van was attempting to overtake the unidentified matatu and was said to have been being driven in the middle of the road and therefore partly on the path of the plaintiff's truck. It is the plaintiff's case that because the postal van was unable to pick sufficient speed uphill to overtake the matatu, but remained along the path of the truck, it obstructed the latter and became the cause of the accident that followed.

The plaintiff through its witnesses described the accident as follows that when the truck driver saw that he was going to crush head-on with the postal van, he swerved his truck to the left which caused to the postal van to the truck on the body. That the resulting, impact made the driver of the truck lose control of the truck and land on the right side of the road as one faced Busia. That in smashing into the plaintiff's truck, the postal van was completely wrecked while killing its driver and another occupant. On the other hand the driver of the truck is said to have been smashed by heavy steel coils which were being carried by the truck. The turn boy of the truck saved himself by jumping off the truck when he saw the truck was about to overturn.

The accident was reported to Busia Police Station whose investigation recommended an inquest, particularly because the likely person who might be prosecuted in a traffic case had died in the accident.

An inquest into the cause of the accident and into the cause of the three deaths that resulted from it, was held at the Principal Magistrate's Court Busia in Inquest No.8 of 2004. The court's finding was that the Defendant, the Postal Corporation of Kenya's driver, Stanley Nyang'au, deceased, was wholly blamable for the accident. The proceedings and Ruling of the inquest was produced in evidence by the plaintiff as exhibit No. 22.

On being served with the plaintiff's plaint, the defendant filed a defence and a counter claim on 9.3.2005 with the consent of the parties granted to it on1.3.2005. Thereafter the plaintiff filed a reply to the defence and a defence to the Counter-claim on 13.4.2005.

In its defence the defendant denied that its driver was careless or negligent or that such negligence and/or carelessness was the cause of the alleged accident. In particular, it denied that its driver

a) Drove at the centre of the road thus causing a risk to an accident or

b) Attempted to overtake another motor vehicle, i.e. a matatu along a hilly road without sufficient power to bypass the matatu or avoid crashing into the plaintiff's truck which was approaching from the hill on the opposite side or

c) Drove at excessive speed or

d) Failed to exercise due care and attention or

e) Attempted to overtake on a dangerous spot or

f) Failed to apply brakes or maneuvers capable of avoiding the accident or

g) Drove into the truck.

The defendant as well denied the plaintiff's particulars of special damages claimed by the plaintiff in paragraph 4 (a)-(f) of the plaint and put the plaintiff to strict proof. The defendant also averred that the accident and the damage, was wholly caused by or contributed to by the plaintiff's driver's negligence

and carelessness and/or recklessness. It gave the particulars of the plaintiff's negligence and carelessness or recklessness, inter alia, as:-

1) Driving at excessive speed in the circumstances.

2) Failing to slow down, swerve, stop or in any other way apply reasonable manuvres to avoid the accident.

3) Driving in a zig-zag manner.

4) Losing control of the truck while driving down-hill.

The Defendant also relied on the principle of Res Ipsa Loquitor.

Finally, the defendant also filed a counter-claim effectively seeking the value of the wholly damaged postal van and costs.

Both parties called witnesses to support their own claims and defend claims against each. The plaintiff's case as I understand it from the evidence and as submitted by Mr. Ashioya who represented it, is that it has proved its claim through the evidence of its four witnesses.

The first plaintiff's witness was Kennedy Lumbuku who gave evidence as PW1. He was an employee of the plaintiff as an operations manager. He was on his duty, following the company truck UAE 279B/UAE 328B, at a distance of about 100 metres. He saw the truck swerve to the left as it faced Busia. The swerve avoided a head-on collision but led to the defendant's van hitting the truck on the right side. That this forced the truck to lose control and land on the right side of the road as one faces Busia. It was PW1's further evidence that the impact of the smash of the defendant's van, rendered the van a complete wreck, killing the van's driver and two passengers in the van, instantly.

The further evidence of PW1, shows that the truck became a write-off. The truck was towed to Busia police station pending investigations. Later it was again towed to Kampala, Uganda where it was later to be valued and assessed.

PW1 testified that he was a witness who witnessed how the accident occurred. He blamed the driver of the defendant's van as the one whose conduct led to the accident, in that the said driver unsuccessfully attempted to overtake a matatu which was infront of him, thus disregarding the closely approaching truck belonging to the plaintiff. The plaintiffs accordingly got satisfied that he had proved sufficient aspects of carelessness and negligence on the part of and against the defendant.

PW2, George Mathu testified that he assessed the truck and its trailer. He found their pre-accident value to be kshs5,750,000/= and kshs1,620,000/=. He found their salvage value as kshs350,000/= and kshs250,000/=.

PW3 was Aggrey Wakasiaka, a Court Executive Officer who produced the inquest court file No.8 of 2004 as exhibit 22. The file carried the proceedings and findings plus the recommendations of the court that conducted the inquest.

On the other side of the coin, the defendant called four witnesses. The first one DW1, Mathew Tanui Paul stated that he was an employee of the Postal Corporation of Kenya, defendant as a Supplies Officer, but now acting as the Corporation's motor vehicles officer. He said that motor vehicle van registration No KAN 235U belonged to the Corporation, defendant. That it met an accident in November, 2003 and became a write-off. That its pre accident value was kssh615,000/=. That under a then existing insurance cover, the Corporation was paid the said value, less 15,000/= excess.

DW1 concluded his evidence by stating that the van appeared to have been hit on the rear. The defendant claimed the value of the van which was kshs630,000/=.

DW2 was Edward Namanga Ndubi. He worked as a boda-boda operator who was near the scene of accident. He heard the noise of the collision and went to the scene. He found the accident had occurred and the truck, the van and a PSV Nissan were all in a ditch on the left side of the road as one faces Mumias. It had rained and apparently the road was a little slippery. He saw two people trapped in the postal van. They were dead.

DW3 was Inspector Philomena Wambua presently of Busia Police Station. She produced the Busia Police investigation file of the accident's as exhibit D5. She testified that from the sketch plan drawn by the investigators who visited the scene of accident, the accident probable point of impact was on the left side of the road as one faces Mumias. The investigation file contained inter alia a statement of one David Wakoli, the only person who survived the accident, being a conductor in the plaintiff's truck. He had jumped out just before the truck overturned.

DW4, Praxides Okemasis, lived near the scene of this accident. When she heard a noise of collision of motor vehicle, she ran there. She saw the postal van in a ditch on the left side as one faces Mumias. The truck, with its trailer was in the ditch on the same side but 50 metres behind. Two people were trapped inside the van and were pulled out, although they were seriously injured. In the truck one person was still trapped and apparently dead. She remained there until the police came. She had seen one person ran away from the scene. She was present when two bodies of the people who were in the van and the truck were collected by the police.

Each party made submissions in writing. Both agree that the accident concerning motor vehicles registration Nos UAE 279B/UAE 328B and KAN 235U, took place along Busia-Mumias road, at the alleged spot. They agree that the truck was driving to Busia and was driving down-hill when the accident occurred. They also agree that the Postal van was being driven uphill. They agree finally that when the accident between the two motor vehicles occurred, the vehicles fell into a ditch on the left side of the road.

The issues arising for resolution are:-

a) Who was to blame for the accident.

b) Who is entitled to damages, what kind of damages and the quantum of damages.

c) Does this court have jurisdiction to freshly and independently consider and resolve the issue of facts beyond the findings of the lower court in the Inquest case No.8 of 2004.

d) What is the status of the Counter-claim by the Defendant in this case?

e) Costs in the main claim and in the Counter-claim.

I have carefully perused the record of pleadings, evidence and the written submissions by the advocates representing the two sides.

The first issue is whether or not the facts as presented by the plaintiff are correct or not. The plaintiff's submission is that this court is bound by the ruling of the lower court in Inquest case No.8 of 2004. In the Inquest the lower court ruled that the driver of the van belonging to the defendant was to blame and therefore was negligent. The court concluded that had the driver survived the accident, he could have been charged with a traffic offence in negligence or recklessness. The plaintiff produced the proceedings and ruling of the inquest and argued that since no appeal was preferred from the ruling, this court should consider itself bound by it on the issue of liability.

I have carefully considered that point. In my view and finding, the purpose of any inquest is to establish who in the face of available evidence should be investigated in a relevant criminal charge concerning any death of any person, resulting. Such charge might be murder or manslaughter or death by dangerous or reckless driving. The evidence produced in an inquest might be sufficient or insufficient to prove any of the possible charges which might be preferred. The purpose of an inquest accordingly is to recommend who, if at all, should be investigated and charged in a relevant subsequent criminal charge.

It is therefore, my view and finding that findings of an inquest are not only inclusive but amount only to recommendations as to which person should possibly be investigated in a subsequent criminal charge as aforestated. The case of **Chemwolo & another vs Kubende** [1986] KLR being a Civil Appeal in the Court of Appeal, was cited and discussed by both parties herein. In the High Curt the appellant had been found guilty and convicted of a traffic offence. One of the issues that arose during the appeal was whether a conviction in a traffic case was conclusive evidence of carelessness and of liability in a subsequent civil case in which the same accused became the defendant. The Appeal Court stated as follows at page 498:-

"Now, it was correct for the learned Judge to refer to Mr. Chemwolo's conviction because Section 47A of the Evidence Act (Cap 80) declares that where a final judgement of a competent court in criminal proceedings has declared any person to be guilty of a criminal offence, after the expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. It follows that in the civil proceedings which are contemplated, Mr. Chemwolo's conviction will be conclusive evidence that he was guilty of carelessness…."

It is therefore clear that a conviction in a criminal case by a competent court makes the judgement receivable in a civil claim as a conclusive finding of carelessness or negligence as against the person who was so convicted. That is to say, as I understand the Court of Appeal statement to say, that the conviction of the defendant on carelessness or negligence conclusively determines the issue of general liability against him in civil proceedings against him that follows the criminal conviction after the time of appeal has expired.

It will be observed, however, that while the said conviction in a criminal case conclusively determines the

general overall position of liability against the convicted person in civil proceedings, the same does not preclude the convicted person from raising the issue of contributory negligence against the plaintiff who most probably would have been the complainant in the criminal case. In the cited case of Chemwolo & another v Kubende (supra) at page 498, the Court of Appeal stated the issue thus:-

"With respect, it was not for the learned judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well-known that both parties to an accident might have driven carelessly and each could be convicted to careless driving for their respective types of carelessness….. ….It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of proceedings in the traffic case."

Turning now to the case before me, the proceedings in the inquest case were not in my view, a conclusive trial such as those found in a traffic or criminal case. Indeed I have earlier herein already assessed inquest proceedings to be merely recommendatory and not amounting to a conclusive trial. I accordingly hold that the proceeding and ruling in Busia Inquest Case No.8 of 2004 could not and should not preclude this court from receiving evidence that might show that the plaintiff's driver also drove carelessly. Even were the defendant's van driver to survive the accident and be found guilty in a traffic charge following the accident, this court would have no reason to deny him a right to raise the partial defence of contributory negligence.

I am aware of the fact that the principle discussed and the pronouncement made in Chemwolo case arose in relation to principles of exercising court's discretion to set aside ex parte judgement. I am however, satisfied that the pronouncements have assisted this court in assessing the status and legal effect of rulings in inquest cases as well as judgements in traffic cases vis a vis, subsequent civil proceedings.

The second issue which I wish to consider is the status of the defendant's Counter-claim in these proceedings. The plaintiff submitted that the counter-claim was struck out and has not been reinstated. The defendant persisted that this court should consider it as part of this case.

I have perused the record. I find that the defendant's Counter-claim which sought for the value of the van which is shown as Kshs630,000/=, was struck out on 19.10.2006 upon the reason that it lacked a supporting verifying affidavit as per the requirements of Order VII, rule 1(1) and Order VII, rule 1(2) of the Civil Procedure Rules. I do not find any subsequent order of this court, nor did the defendant point to any, reinstating the said Counter-claim. This curt has therefore, no reason to consider it as the defendant purported to urge.

I now turn to the evidence recorded in this suit. The first issue I wish to consider is whether the accident occurred in the manner testified by the plaintiff's witnesses and as urged by the plaintiff. PW1, Kennedy Munialo Lumbuku testified that he was at the material time following the plaintiff's truck and trailer registration number UAE 279/UAE 328B. He said he was at a distance of 100 metres. He then stated at (typed) page 19:-

"It is correct I could not have seen beyond the prime mover (truck). I heard a lot of hooting and brakes first and that is when I realized that something was wrong."

The above piece of evidence, suggests that the witness only realized that the truck had just been involved in an accident. Clearly he did not actually see the accident take place. In other words, he did not see the motor vehicle collide but witnessed how they had already fallen into a ditch.

PW1 also claimed that he saw the postal van trying to overtake a matatu in front of it while the truck which he was following, drove down the slope at a speed of about 80 KPH. If that were to be accepted as the truth, then several other logical conclusions would arise.

First, there is the undenied evidence on record that it had just rained or was raining at the material time. The plaintiff's truck was carrying five steel coils each weighing 7 tons. What would happen if the truck driver saw or sensed danger from the situation described above by PW1? Probably he would apply emergency breaks to slow down his speed of 80 KPH. With the heavy load which the truck was carrying, it is logical to conclude that it was likely that the truck would possibly lose control and leave the road, either to the driver's left or right. If to the left, the truck would likely fall off the road to the left of the road; if to the right, the truck would cross the road and fall to the right side of the road as one faces Busia.

The PW1's evidence however, initially described what happed as follows on page 17 (typed).

"I confirm that the collision was face to face. The point of impact was on the left side of the road as you face Busia direction……..The van landed on the right side as you face Busia 5 metres off the road. The mover (truck) also lost control and landed about 10 metres off the road……."

Up to that point PW1 gave the impression that the truck fell on the left side of the road as one faces Busia, while the van fell on the right side. However his further evidence under cross-examination, was to the contrary. He stated on page 18 (typed):-

"My statement (to police) says that the collision was on the right side as one faces Busia direction……It was raining then. If the trailer was speeding down hill, the driver must have taken a big risk. The truck's speed is what caused the motor vehicles to be pushed off the road after the accident."

Finally, the same witness (page 21) stated as follows:-

"**The point of impact was in the middle of the road. The motor vehicles rested on the right side as one faces Busia."**

The conclusion this court arrives at, is that there is sufficient evidence that the truck fell on the right side of the road as one faces Busia. To do so it must have crossed the road to that side. There is also sufficient evidence that PW1 did not actually see the accident happen. He was too far behind and only heard a collision noise before witnessing the motor vehicles lying in the ditch on the right side of the road. Further more PW1's admission that he could not see beyond the truck ahead and only heard hooting and breaks screech, makes him a totally unreliable witness as to what actually occurred. The situation is worsened by PW1's conflicting version as to what really happened. Indeed if he did not exactly see the vehicles collide, all his evidence to that end is mainly conjecture or guess work.

In the view of the court therefore PW1's evidence is no better that that of other witness who arrived at the scene of the accident after the event and had to guess as to what actually happened. This leaves the court

in unenviable position from which it has to determine how the accident occurred and who was to blame from the limited evidence on the record.

In his evidence PW1 admits that the truck carried five steel coils weighing in total 35 tons. The truck was traveling at 80 KPH on a wet road since it was raining or had just rained. It does not require a lot of imagination in the normal or natural course of things, to notice that it required only a little application of brakes to destabilize the truck movement.

In this case the truck driver whose truck was heavily loaded, lost control of his vehicle which crossed the road from left to the right before falling into a ditch. Before the accident the truck driver was traveling at 80 KPH. In my view the speed was excessive in the circumstances. It was likely to lead to a loss of control of the truck and a probable accident at any little destabilization of the truck, more so because the road, to the knowledge of the truck driver, was wet and most likely slippery. This in the court's finding is what took place contrary to the conflicting versions that PW1 produced in his evidence which the court hereby rejects.

In the above circumstances, the plaintiff's claim based on the alleged negligent or careless driving of the defendant's driver, has not been proved on the balance of probability. It accordingly fails.

If however I am wrong in my conclusions and that the claim should have succeeded, then I would make the following conclusions and awards:-

Considering PW1's version of facts and even if I have to accept the same, I will nevertheless find that the accident at the minimum, was caused by the contributory negligence of both drivers. While the defendant's driver may possibly have been negligent in attempting to overtake without sufficient speed and input to do so, and although for that reason the defendant's driver, placed the postal van on the plaintiff's truck's path, the truck driver was on the other hand, knowingly overspeeding on a wet slippery road while carrying an easily destabilizing heavy load. In those circumstances the accident can be said to have been caused by both drivers. I would, considering the circumstances distribute liability at 50% each side.

I would in those circumstances, accept the pre-accident value of the truck and trailer at kshs5,400,000/= and kshs1,360,000/= respectively. Assessors report would be kshs15,000/=. Towing charges would be acceptable at kshs200,000/=. Plaintiff's claim of kshs387,250/= being the actual sum paid to Interfreight Ltd, the owner of the 5 steel was not strictly proved, as required. The receipts produced, showing the payment had been paid to Interfreight Ltd's advocates, were at large and not convincing. They indicated a much larger sum paid to the advocates without showing how such a sum was related to the steel coils. This court rejects the item as not properly proved.

There is no doubt that the truck and its trailer, was a commercial vehicle. It would therefore be expected to raise income and this court would have no difficulty in awarding the specific loss in terms of money lost in the 3 months now accepted to be the reasonable period compensable by the courts. However the sum of kshs500,000/= claimed by the plaintiff was not strictly proved as required. The cash flow analysis accounts produced in evidence together with the invoice, ended up belonging to a different truck – UAE 269B instead of the accident vehicle UAE 279B. In the court's view the invoice was intended to mislead the court and is hereby rejected.

The layout of the awards to the plaintiff would accordingly have been as follows :

a) Loss of earnings for 3 months - Nil

b) Market value of the cabin - Kshs5,400,000/=

c) Market value of trailer - 1,360,000/=

d) Motor vehicle assessors report - 15,000/=

e) Money paid to Interfreight Ltd

for coils - Nil

f) Towing charges - 200,000/=

Total - 6,975,000/=

Contributory negligence reduction of 50% 3,487,500/=

Balance - 3,487,500/=

The plaintiff who however claimed for a value estimated at Kshs22,000,000/= but would have succeeded only to the extent of Kshs3,487,500/= aforementioned, would get costs on the above sum but also lose costs on the balance of his lost claim.

Having however, come to the conclusions and findings shown above, I hereby dismiss the plaintiff's claim with costs to the defendant.

Dated and delivered at Busia this 13th day of June 2011

D.A. ONYANCHA

JUDGE.