REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 92 OF 2009

ANN WANJIRU WAIGWA…….…….....…….....1ST APPELLANT
DAVID KINYUA MURIUKI.....2ND APPELLANT

VERSUS

JOSEPH KIRAGU KIBARUA…….....…….....RESPONDENT

(Being appeal against the judgment of L. Mbugua, Ag. Principal Magistrate, in Karatina Senior Resident Magistrate's Civil Case No. 153 of 2005 delivered on 29th April 2009)

JUDGMENT

On 2nd August 2002, a road traffic accident occurred along Karatina-Nyeri road involving motor vehicles registration No. KAP 257E and KAJ 060D. As a result of the accident, motor vehicle registration No. KAJ 060D was extensively damaged. **Joseph Kiragu Kibarua**, the Respondent herein, being the registered owner of motor vehicle registration No. KAJ 060D sued for damages: Ann Wanjiru Waigwa, David Kinyua Muriuki and Nyeri Motor Services Ltd being the 1st, 2nd Appellants herein and the registered owner of motor vehicle registration No. KAP 267E respectively. The suit was filed at Karatina Senior Resident Magistrate's Court by the amended plaint dated 20th October 2006 whereof the respondent prayed for judgment in the following terms:

(a) Ksh.525,300/=.
(b) Costs of the suit.
(c) Interest at court rates on (a) and (b) above.

The case was heard and concluded on 29th April 2009. The trial Resident Magistrate held the Appellants 80% liable for the accident. The action being a material damages claim, the trial court entered judgment in favour of the appellants and against the respondent in the sum of Ksh.419,500/= plus costs. The Appellants being dissatisfied preferred this Appeal.

On appeal, the Appellants put forward the following grounds of appeal in their Memorandum of Appeal:

1. ***The learned Magistrate erred in fact and law with respect to her finding on liability in view of the defence evidence on record.***
2. ***The learned Magistrate misdirected herself in law and fact in finding that the pre-accident value of the subject motor vehicle was Kshs.400,000.00.***
3. ***The learned Magistrate misdirected herself in law and fact by failing to take into account the salvage value of the respondent's motor vehicle and subsequently failing to deduct the said***

value from the appropriate pre-accident value of the subject motor vehicle.

4. ***The learned Magistrate misdirected herself in law in finding that the respondent was entitled to towing charges of Kshs.19,500 when the same was not proved.***
5. ***The learned Magistrate erred in law and fact for failing to take into account relevant factors with respect to liability and in the assessment of damages with the consequence that the resultant award was erroneous.***

Before considering the merit or otherwise of the appeal, let me set out in brief the case that was before the trial court. By a plaint dated 1st August 2005 which was later amended on 26th October 2006, the respondent sued the Appellants for a sum of Ksh.525,300/= being the pre-accident value of the motor vehicle registration No. KAD 060D, legal fees, excess premium, breakdown charges, motor vehicle assessors fees, unutilized insurance cover and expenses in **Traffic Case No. Nyeri C.M. No. 2091 of 2002** in which the respondent had been tried and acquitted for the offence of careless driving. The Appellants filed a defence denying the respondent's claim. The respondent (Plaintiff) tendered the evidence of three witnesses in support of his case. The Respondent (P.W.1) told the trial magistrate that he bought motor vehicle registration No. KAJ 060D in 1999. The aforesaid motor vehicle was manufactured in 1991. P.W. 1 stated that the motor vehicle was used as a public service vehicle. On the date of the accident, P.W.1, stated the vehicle was driven by one Michael Kibarua, his servant who was later tried and acquitted for the offence of reckless driving vide **Nyeri C.M.C. Tr. Case No. 2091 of 2002**. **Michael Kibarua** (P.W.2), the driver of KAJ 060D confirmed to the trial court that he was tried and acquitted for the offence of reckless driving vide Nyeri C.M.C. Traffic Case No 2091 of 2002. He stated that he had 18 passengers on board when the accident occurred. He stated that motor vehicle registration No. KAP 267E which was ahead of him on the road. P.W. 2 claimed he indicated before overtaking the vehicle. Just as he was overtaking, KAP 267E started driving towards Kiganjo direction and hence his vehicle collided with it on the front side. P.W. 2 said he lost control of KAJ 060D which went to the ditch thus injuring its passengers. John Maingi (P.W.3), a motor vehicle valuer presented to the trial court, a valuation report indicating the KAJ 060D pre-accident value was Ksh.430,000/=. P.W. 3 further gave the salvage value of the vehicle as Ksh.30,000/=. P.W. 2 blamed the driver of motor vehicle No. KAP 267E for the accident because he was of the view that the driver had seen him overtaking.

The Appellants (defendants), tendered the evidence of four (4) witnesses in support of their defence. David Kinyua Muriuki (D.W.1) the driver of KAP 267E, told the trial magistrate that on the material day, he drove aforesaid motor vehicle and upon reaching the junction towards Nanyuki, he indicated his intention to turn to the Nanyuki direction. He claimed the driver of KAJ 060D who drove at high speed hit his motor vehicle before he could turn. D.W. 1 claimed the vehicle was hit at a continuous yellow line. As a result of the impact, KAJ 060D rolled and landed into a ditch. Julius Wambugu Kingori (D.W.2), a passenger in KAJ 060D told the trial court that KAJ 060D was driven at high speed before colliding with KAP 267E. D.W. 2 stated he saw KAP 267E stop at Marua junction indicating it wanted to turn to Kiganjo direction. D.W. 2 was able to produce proceedings showing he had successful sued the respondent for damages for the injuries he sustained vide **Nyeri C.M.C.C. No. 476 of 2003**. Simon Kamau Waweru (D.W. 3), a motor vehicle assessor tendered evidence showing the pre-accident value of KAJ 060D to be Ksh.250,000 and the salvage at Ksh.40,000/=.

Having given in brief the case that was before the trial court, let me now address my mind to the appeal. When this appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal determined by written submissions. In the first ground of appeal, it is alleged that the trial magistrate erred in fact and in law on her findings on liability in view of the defence evidence on record. According to the Appellant, the evidence of D.W. 1 and D.W. 2 were consistent hence more believable. It is argued that the trial magistrate should have paid more attention to the independent evidence of D.W. 2 who had no interest in the outcome of the suit. On the other hand the Respondent is of the view that the trial magistrate thoroughly analysed the evidence of both sides before arriving at decision. I have on my part re-considered the recorded evidence.

There is no dispute that the Respondent's driver (P.W.2) was tried and acquitted for the offence of reckless driving. The 2nd Appellant was on the other hand convicted on his own plea of guilty for the offence of driving a motor vehicle without a Public Service Vehicle licence. The learned trial magistrate

stated in her judgment that the acquittal of P.W. 2 did not absolve him from blame neither did the conviction of D.W. 1 imply that he was to blame for the accident. I have already stated that the trial magistrate found the Appellants 80% liable while the respondent was found to be 20% liable for the accident. The learned trial magistrate apportioned blame on liability as aforestated upon the consideration of the evidence on record. She found that P.W.2's view was not hindered in any way hence he ought to have kept a proper look out in view of the fact that the motor vehicle turning right was ahead of him and he could see it. She then found the 2nd Defendant (2nd appellant) to be 80% liable. After a careful reconsideration of the evidence, I have come to the conclusion that the learned trial magistrate fell into error when apportioning liability. It is quite clear that the Respondent's driver should shoulder greater responsibility as the cause of the accident. There is no doubt that the Respondent's driver was behind that of the Appellants. It can also be inferred from the circumstances of the case that the Respondent's driver was at high speed. The Respondent's motor vehicle i.e. (KAJ 060D) rolled upon impact upon hitting that of the Appellants (i.e. KAP 267E). The Respondent's driver attempted to overtake a stationary motor vehicle which had indicated to turn to the Kiganjo direction. The evidence on record further shows that the accident occurred on a continuous yellow line. It would appear the Respondent's driver was in such a hurry that he ended up breaching traffic rules barring drivers from overtaking from a continuous yellow lane. Of course the Appellants' driver cannot be said to be blameless. He was supposed to be on the look out of motor vehicles coming behind him before turning in a junction like the one in this case. It was not enough for him to simply indicate. Had the Appellants' driver been very keen he would have stopped to allow the driver behind him who was in high speed to pass before joining the Nanyuki junction. His action could have avoided the accident. On this account I would find the Appellants' driver 40% liable and that of the Respondent to be 60% liable. The appeal as against liability is allowed hence the order on apportionment of liability is set aside and is substituted as suggested above. For the avoidance of doubt, the Respondent (Plaintiff) shall be 60% liable while the Appellants shall be 40% liable for the accident.

The second ground of appeal is to the effect that the learned trial magistrate erred in law and fact when she fixed for pre-accident value of motor vehicle registration No. KAJ 060D at Ksh.400,000/=. I have already stated hereinabove that the Respondent's claim was that of material damage. Both the Appellants and the Respondent presented the evidence of a motor vehicle assessor or valuer. Mr. John Maingi, produced a valuation report indicating the value of KAJ 060D to be Ksh.430,000/=. The salvage value was set at Ksh.30,000/=. The Appellants on the other hand summoned the evidence of Simon Waweru who gave the pre-accident value at Ksh.250,000. He stated that the salvage value at Ksh.40,000/=. The learned trial magistrate stated that the value attached to the salvage by the valuers to be inordinately low. It is alleged that the learned erred when she failed to consider the salvage value and for taking into account the valuation of John Maingi (P.W. 3) and by failing to refer to that of Simon Waweru (D.W. 3). The Respondent is of the view that the trial Magistrate considered the valuation reports of the two experts before fixing her own value. I have examined the judgment of the trial Magistrate and it is clear that the learned Magistrate ably considered the valuation reports of the two witnesses i.e. P.W. 3 and D.W. 3. It is also apparent that she took into account the salvage value of the motor vehicle. At page 6 of her judgment L. Mbugua, learned Ag. Principal magistrate stated as follows:

"I am inclined to take the valuation of D.W. 3 as the true reflection of the value of the vehicle as Ksh.400,000/=.

I find no merit in ground 2. In ground 3, it is alleged that the trial Magistrate failed to take into account the salvage value. The evidence on record clearly shows that the learned Ag. Principal Magistrate took into account the valuation report of D.W. 3. The aforesaid witnesses had fixed for pre-accident value of KAJ 060D at Ksh.430,000/=. The witness further gave the salvage value of the aforesaid motor vehicle as Ksh.30,000/=. The learned Ag. Principal Magistrate appears to have deducted the salvage value to arrive at Ksh.400,000/=. For this reason I find ground 3 to be without merit.

In ground 4 it is alleged that the learned Magistrate erred by awarding Ksh.19,500/= as towing charges whereas the same was not proved. The record shows that the respondent pleaded as a special damage the aforesaid sum as towing charges. It is apparent from the record that the respondent did not prove this claim. The trial Magistrate stated that though the other claims were not proved, she believed that the vehicle was towed at a cost. She proceeded to award the Respondent Ksh.19,500/= on this head. it

is trite law that special damages must be specifically pleaded and proved. In the case before the trial court, the Respondent pleaded to be paid Ksh.19,500/= as the amount he incurred in towing motor vehicle registration No. KAJ 060D. He however, failed to tender any evidence to establish the claim. It was therefore erroneous for the learned Ag. Principal Magistrate to award the Respondent the amount yet he had failed to discharge the burden of proof imposed upon him. The ward cannot therefore stand. It must be set aside.

The last ground of appeal is to the effect that the learned trial Magistrate failed to take into account the relevant factors in determining liability and assessment of damages. I have carefully looked at the manner in which the trial Ag. Principal magistrate determined the twin issues and I am convinced she considered the relevant factors hence she cannot be faulted.

In the end the appeal is allowed to the extent stated hereinabove. For the avoidance of doubt, the judgment of the learned Ag. Principal magistrate delivered on 29th April 2009, is set aside and is substituted with the following:

(i) The Respondent (Plaintiff) is found to be 60% liable for the accident. The Appellants (defendants) to should 40% contribution.
(ii) The Respondent (Plaintiff) is awarded **Ksh.400,000/= less 60% i.e. 400,000-240,000 = 160,000/=.**
(iii) Costs of the suit and the Appeal based on Ksh.160,000/= is given to the respondent.

Dated and delivered at Nyeri this 23rd day of September 2011.

J. K. SERGON
JUDGE

In open court in the presence of Wachira holding brief Karingithi for the Respondent. No appearance for Rachier for the Appellant.