REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 2 of 2009

ANTONY MUSITA ..... 1ST APPELLANT
KABANSORA MILLERS LIMITED ..... 2ND APPELLANT

VERSUS

PURITY GATAKAA ERASTUS & JAMES NYAGA *(Suing as the legal representatives and administrators of the estate of)*
DOUGLAS MIRITI BUNDI ..... 1ST RESPONDENT
EDWARD MURITHI MBOGORI ..... 2ND RESPONDENT
REAL MADRID SAFARIS (K) LTD ..... 3RD RESPONDENT

(Being an appeal from the judgment and decree of the Hon. Mr. Kiarie W, Kiarie Senior Principal Magistrate in Meru Chief Magistrate Court Civil Case No. 510 of 2007 delivered on 5th December 2008)

JUDGMENT

The plaintiff who is now the first respondent in this appeal sued the appellant the 2nd respondent and the 3rd respondent in the lower court. In that case, the plaintiff was seeking damages in respect of the accident where Douglas Miriti Bundi received fatal injuries. The first defendant in the lower court who is now the 2nd respondent is Edward Miriti Mbogori (Edward). The 2nd defendant in the lower court, now the 3rd respondent in this appeal is Real Madrid Safari's K (Ltd). The plaintiff pleaded that Real Madrid was vicarious liable for the negligence of Edward. The 3rd defendant in the lower court who is now the first appellant is Antony Musita (Antony). The 4th defendant in the lower court and now the 2nd appellant is Kabasora Millers Ltd. The plaintiff pleaded that Kabasora was vicariously liable for the negligence of Antony. On the 3rd January 2007 at 9pm, Edward was the driver of motor vehicle KAW 852H and Antony was the driver of motor vehicle registration No. KAQ 100P. A collision occurred between the two vehicles leading to the death of Douglas Miriti Bundi deceased. The lower court in its judgment found that the driver of KAQ Antony was 90% liable for the accident while the driver of KAW Edward was 10% liable. This appeal relates to that finding. The appellant's appeal, looking at the grounds in the memorandum of appeal, only relates to the lower court's finding on liability. The appellant's first ground of appeal is that the lower court erred in finding Antony 90% liable for the accident *"when no proper case of negligence had been pleaded against the 3rd defendant (Antony) in the plaint or proved at the trial"*. The appellant in their submissions reproduced paragraph 7 of the plaint to prove that the first respondent, that is the plaintiff in the lower court had not pleaded negligence on the part of Antony. The reproduced paragraph is in the following terms:-

"On or about the 3rd day of January 2007 at about 9.00pm the deceased was lawfully traveling a lot the Mwea-Embu road and Nyagati area in motor vehicle registration number KAW 852H Toyota Matatu driven by the first defendant so negligently, carelessly and dangerously driven managed and controlled the same whereon it hit and smashed into motor vehicle registration number KAQ 100P a Mitsubishi Canter in consequence caused the deceased several fatal injuries."

The appellant submitted that the parties are bound by their pleadings and that therefore the lower court should not have found Antony to be liable in negligence when negligence had not been pleaded against him. The plaint on paragraph 7 is entitled, "*Particulars of negligence of the third defendant (Antony)"* Thereafter the plaint proceeded to enumerate particulars of Antony's negligence which included allegation that Antony drove KAQ at high speed thereby colliding with KAW. Further that Antony failed to slow down or to swerve or in any way avoid the accident. It is therefore clear that although the plaintiff did not lay the basis of those particulars of negligence, by first pleading that Antony was negligent, the plaintiff did however enumerate the particulars of Antony's negligence. Further, going through the evidence tendered in the lower court, it becomes clear that the parties brought forward before the court the issue of deciding who was negligent between Edward and Antony. On that basis, the lower court was quite right to have considered the liability of Antony. By making that finding, on the issue of negligence of Antony and Edward, which was brought before court by the parties, the lower court was in tandem with the statement made by the Court of Appeal in the case **Maroa Wambura Gatimwa Vs. Sabina Nyanokwe Gatimwa & 5 others** Civil Appeal No. 331 of 2003. The Court of Appeal said thus:-

"It has nevertheless been held by this court, that the court may base its decision on an unpleaded issue, but only if in the course of the trial the issue has been left for the decision of the Court. It will be left for the decision of the court if evidence on it is led and submissions made by counsel – see Vyas Industries Vs. Diocese of Meru [1982] KLR 114."

The Court of Appeal also in the case **Dhanji Ramji Vs. Rambhai & Company** [1970] EA 515 made a similar finding as can be seen from the portion of the decision of Law J.A. as follows:-

"I consider the failure to plead facts justifying the application of S. 40(1) of the Partnership Act was an irregularity, and a serious irregularity, but one which is not fatal to the judgment pronounced in this case, because it was cured by the cause of events taken at the trial, which as it proceeded was fought out on a basis which shifted from the pleaded cause of action of actual membership to the unpleaded cause of action of apparent membership, a shift which did not in my view cause prejudice to the appellant as he had obviously come prepared to meet that unpleaded cause of action and was largely responsible for making that unpleaded cause of action an issue in the suit."

And in the same case, Duffus P. had this to say:-

"The respondent would, in all probability, have pleaded the benefit of the provisions of S. 40 (1) in reply if the appellant had, as he should in my opinion have done, properly pleaded that he had retired form the partnership on 1st January, 1967, in his defence. I entirely agree with Law J.A. that at the trial the applicability of S. 40 (1) had become one of the issues in the case as there was undoubtedly sufficient evidence to justify the trial judge's findings."

That case was quoted with approval by the Court of Appeal in a recent decision in the case of **Transworld Safaris (K) Limited Vs. Robin Makori Ratemo** Civil Appeal No. 78 of 2005 where the Court of Appeal stated that a court can determine issues not necessarily in pleadings for the purpose of determining the matter. In making that finding, the court in that case had this to say:-

"Generally speaking, pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the court. In this respect, a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties."

It therefore follows that one needs to consider the evidence that was tendered in the lower court to know whether the learned magistrate was

right in considering the liability of Antony. PW1 was a police officer. When she came to court, she informed the court that the investigating officer of the accident in question had been transferred. PW1 brought with her the police file when she gave evidence. She stated in evidence that the file concerned an accident that occurred on 3rd February 2007. The accident concerned vehicle KAQ 100P, KAP 602B, KAW 852H and an ox cart. PW1 proceeded to state in chief that 9 people who were passengers in motor vehicle KAW 852H died on the spot whilst 6 were injured following the accident. This witness confirmed that among the death was Douglas Miriti Bundi. The witness referred to a sketch plan showing vehicle KAQ and KAW which were on the left lane from Nairobi to Embu. This witness however conceded that the sketch plan did not give details where each vehicle was coming from or going to. Later, the investigating officer's report of this accident was produced by consent as an exhibit. In order to appreciate the totality of the evidence, I reproduce part of it as follows:-

"The accused Edward Muriithi Mbogori was driving a motor vehicle registration number KAW 852H Toyota matatu from Nairobi heading to Meru on 3rd January 2007. When he reached Nyagati area along Makutano – Embu road, he found a motor vehicle registration number KAP 602B Toyota Corolla having hit a donkey cart. Both the donkey cart and the Toyota Corolla were traveling in the same direction (Mwea – Embu direction.) The matatu (KAW 852) was also traveling in the same direction (Mwea – Embu direction), when the driver of the matatu reached the scene where the Toyota Corolla saloon had hit the donkey cart. When the driver of the matatu reached the scene of the accident (the Toyota Salon and the donkey cart) he tried to avoid hitting the saloon car from behind by diverting to the right lane (when one faces Embu direction. On the right lane, there was another oncoming vehicle registration number KAQ 100P Mitsubishi Lorry. The matatu collided head-on with the lorry."

The sketch plan was also produced in evidence before court. What is interesting is that it does not reflect vehicle KAQ at all. KAW in that plan is shown to be on the left side facing Embu from Nairobi and there is in front of it on that plan vehicle KAP. The sketch plan contradicts the investigation report. The appellants in their submissions submitted that the learned magistrate erred in failing to consider those two documents. In my view, the contradictions between the two documents are so serious rendering them of no use to the court. One should also consider that the investigating officer made her investigation report making serious allegations and yet she was not an eye witness to the accident. Those submissions therefore of the appellant are rejected. PW3 was an eye witness. He was on the material date traveling together with Bundi, deceased, in motor vehicle KAW. KAW was a matatu. He saw Bundi, deceased, in the vehicle. He was seated behind him. Bundi, deceased, greeted him when he boarded the vehicle. He knew Bundi to be a teacher and deputy headmaster at Kimachia Day Secondary School. As they were traveling, and after passing Kimbimbi Market near Nyagati Village they were involved in an accident. This witness was seated on the 2nd seat at the rear cabin next to the door. He then stated in evidence:-

"I had seen a big vehicle coming from Embu heading towards Nairobi from Embu. Its lights were on and our vehicle's lights were on. The oncoming vehicle was a lorry and was occupying the whole road. We shouted for our driver to stop out (sic). He did not. He instead went on slowly as he swerved off the road but the lorry's caught the body of our vehicle tearing it off. The collision occurred on our lane which is the left lane as one faces Embu from Nairobi."

The witness continued to say that the lorry that collided with the matatu he was traveling in was registration number KAQ. He then stated:-

"I blame the lorry (KAP) for the accident which had come to our lane where the collision occurred."

On being cross examined, this witness reiterated that the collision occurred on the left lane as one faces Embu from Nairobi which was the correct lane for KAW to be on. He then stated that KAW was climbing a hill and was not at high speed. That the driver of KAW slowed down and tried to swerve off the road but was too late and the collision occurred. He was further cross examined by counsel for the appellant and he stated that he did not see a small car at the scene. In his defence Antony, the driver of KAQ stated that he was going down hill after having left a flat portion of the road. As he traveled, he saw a black object on the road. He put his full light on and saw that it

was an ox cart. He deemed his lights and did not see any other vehicle either ahead or behind. However, as he neared the ox cart, he saw lights of an on coming vehicle. In order to understand the evidence of this witness, its important to quote his evidence verbatim.

"I was going downhill after coming from a flat portion then I saw a black object on the road. I put on full lights and I saw it was an ox cart. I was placed (sic) my lights to deem. There was no vehicle ahead or behind. As I neared the ox cart, I saw lights of an on coming vehicle. Then, a small vehicle hit the ox cart as I neared it and I slowed down and swerved to the left. I then saw a matatu that was behind a small car come overtaking the small car and hit my vehicle on the driver's side and I got trapped inside the vehicle……. The accident occurred on the left lane as one faces Nairobi from Embu."

From that evidence, it is not clear where the ox cart was. It is not clear whether it was on the lane where KAQ was or it was on the lane where KAW was. On being cross examined, Antony stated:-

"The ox cart was on the lane for vehicles coming from Nairobi direction. I saw it first at about 20 metres ahead and there was no need for me to go below 60 KMPH."

The evidence was recorded by S.M. Kibunja, S.P.M. By the time the judgment was due, that magistrate had been transferred from Meru Chief Magistrate's Court. The responsibility of writing the judgment fell on the shoulders of K.W. Kiarie S.P.M. The learned magistrate in his judgment had this to say:-

"The version of the 3rd defendant (Antony) is not plausible for the following reasons:

i) If he was going downhill, and was able to see the ox cart which had no lights, then he ought to have seen the small car he talked of and the matatu.
ii) If he swerved to avoid the ox cart, then the accident was not on the left lane as one heads to Nairobi.
iii) The evidence of PW3 is that there was no small car but an ox cart.
iv) Since the lorry was going downhill and the matatu was going uphill, its clear that the matatu could not be over speeding and the lorry driver must have miscalculated his distance with the matatu before deciding to overtake the ox cart.

From the foregoing, I hold the 3rd defendant 90% liable for the accident. The forth defendant is therefore vicariously liable to that extent.

The evidence of PW3 is that they shouted for their driver to stop. Stopping would not have saved the situation but would have aggravated it However, had the matatu driver swerved at this juncture he would have minimized the effect of the collision. I therefore hold the driver of KAW 823H 10% liable."

As stated before, the appellant faulted the judgment of the lower court on the basis that it was not supported by the evidence adduced before court. When one considers the evidence submitted before court as I have reproduced it before, the finding of the learned magistrate cannot be faulted. That finding in my view, is well supported by the evidence. The evidence shows that KAQ was traveling down the hill. KAW was coming up the hill on the opposite side. The collision, according to the independent witness, PW3, occurred on the lane of KAW. It therefore does clearly seem that KAQ moved from its lane to the lane of KAW because as it will be recalled, PW3 stated that he could see that the oncoming vehicle was occupying the whole road. The evidence of PW3 is very clear and was unshaken by cross examination. I cannot find any reason to disturb the finding of the lower court on liability. I support the finding. This appeal therefore is hereby dismissed with costs being awarded to the respondents.

Dated and delivered at Meru this 4th day of June 2010.

MARY KASANGO

JUDGE