REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 193 of 2003

KENYA CAPITAL PARTNERS LTD……..…..APPELLANT

VERSUS

AMINA MOHAMED MWAZUGWA (MRS)…….....RESPONDENT

JUDGMENT

I have before me an appeal by Kenya Capital Partners Limited, the 2nd defendant in the original action, from the judgment and decree of the Senior Principal Magistrate (Hon. Mushelle), in C.M. Civil Case No. 2057 of 2003 **(Amina Mohamed Mwazugwa – v – Gilbert Kea Isika and Kenya Capital Partners Limited).** In that action, the Learned trial Magistrate apportioned liability as between the appellant and the defendants at 20% and 80% respectively and awarded Kshs. 300,000/= general damages and Kshs. 4,100/= special damages to the respondent.

The respondent brought her action in the Lower Court by way of plaint dated 23rd April 1999 in which she pleaded, *inter alia*, that on or about 9th January 1999, she was injured while traveling as a passenger along Mombasa Ukunda road in motor vehicle registration No. KAH 534E owned by and driven by the 1st defendant and/or his driver, servant and/or agent when the said motor vehicle was involved in a collision with motor vehicle registration number KAJ 849L owned by the appellant and driven by its servant and/or agent. The respondent in the plaint blamed both the appellant's driver and the 1st defendant or his driver.

The appellant delivered its defence in which it denied the negligence alleged against its driver/servant/agent and solely blamed the 1st defendant and or alleged substantial contribution by the 1st defendant. At the trial the respondent gave evidence and called one eye witness to the accident one Ngao Ndurya. The respondent in her testimony stated that, the 1st defendant or his driver lost control of the motor vehicle which overturned. The respondent did not blame the appellant's driver. His witness, PW 2, also blamed the 1st defendant or his driver. In his own words:

"**Our vehicle was moving in a zig zag manner after the tyre burst. The saloon was on its correct side of the road. Our driver was to blame for the accident."**

The appellant called one witness, DW 1, Georgias Paul Mwinzila. He testified that the matatu was to blame as it came to their side. On the conclusion of the evidence, the trial Magistrate found that the 1st defendant was to blame more than the 2nd defendant and apportioned liability as already stated. That

decision provoked this appeal. The appellant has put up some ten grounds all of which basically complain that there was no basis for apportioning any liability to the appellant in view of the evidence which was adduced before the Learned trial Magistrate and the fact that a default judgment had been entered against the 1st defendant on a 100% basis.

This is a first appeal. The court is therefore duty bound to reconsider the evidence adduced before the lower court and make its own evaluation and draw its own conclusions. In doing so, the court should bear in mind that it has not had the advantage of the trial court in seeing and hearing the witnesses testify. The court should therefore be slow to disturb findings of fact of the trial court. (See **Peter – v – Sunday Post Limited [1958] EA 424).** I must therefore examine with care whether the findings of facts were not based on evidence adduced before the Learned trial Magistrate or whether there was a misapprehension of the evidence or that the Learned trial Magistrate acted on wrong principles in arriving at those findings of fact.

The primary issue in this appeal is whether there was basis for a finding that the appellant was liable to the extent determined by the Learned trial Magistrate or at all. I have set out above in outline the eye witness accounts of the respondent, her witness and the 2nd defendant's witness. The three were unanimous that the driver of the matatu was to blame. The respondent herself testified that motor vehicle registration number KAH 534E, which she had boarded as a passenger, lost control and overturned. In her entire evidence, the respondent did not mention the appellant's vehicle or its driver. PW 2 the respondent's witness was more detailed. He testified in part as follows:

"**The matatu was moving in high speed. I personally pleaded with the driver to slow….. I repeated to the driver to heed warning on speed…… On reaching Maganyakulo, the driver continued accelerating. On reaching Kombani we came across pot holes. He applied emergency brakes. The two front tyres burst. The vehicle started moving in a zig zag manner. From the opposite direction a saloon car came. I sensed danger. There was a head on collision."**

And in cross examination PW 2 testified as follows:

"**Our vehicle was moving in zig zag manner after the tyres burst. The saloon car was on its correct side of the road. Our driver was to blame for the accident."**

The appellant's witness, Georgias Paul Mwinzila, as expected, blamed the driver of the matatu. He testified that the matatu driver left his side to the side of the vehicle in which the appellant's witness was.

The three witnesses whose evidence I have referred to above were the only witnesses on how the accident occurred. The witnesses were certain that the driver of the appellant's vehicle was not to blame. Indeed the respondent herself blamed the matatu driver exclusively. So, where was the basis for the finding by the Learned trial Magistrate that the appellant was 20% to blame? None whatsoever and the Senior Learned Principal Magistrate did not give any such basis. In the premises and with all due respect to the Learned Senior Principal Magistrate, he did not fully appreciate the weight and bearing of the evidence adduced before him.

With regard to the quantum of damages awarded by the Learned Senior Principal Magistrate of Kshs. 300,000/=, I note that counsel did not address me on the same. However, I am satisfied that that sum cannot be described as so inordinately high or low as to suggest an erroneous estimate of the damages in view of the medical evidence adduced by the plaintiff. I would therefore not have intervened even if I had not found for the appellant.

In the end, this appeal is allowed. The judgment of the Learned Senior Principal Magistrate as against the appellant is set aside and is substituted with an order dismissing the respondent's claim with costs as against the appellant.

Costs of this appeal are awarded to the appellant.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 15TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Nyongesa holding brief for Mege for the Appellant and Mr. Mwakireti holding brief for Mr. Ongere for the Respondent.

F. AZANGALALA

JUDGE

15TH MAY 2009