REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 259 of 2002

ESTHER ADHIAMBO ALOO …….....…… APPELLANT

VERSUS

KIPLANGAT ARAP MISOI ……...…….. 1ST RESPONDENT

LOCHAB BROS LIMITED ….…….…. 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Senior Resident Magistrate at Milimani Commercial Courts, Nairobi, Mrs. N.O. Owino dated 23rd May 2002 in Civil Case No. 10173 of 1999)

JUDGMENT

By a Plaint dated 24th October, 1999 the Appellant (Plaintiff in the Lower Court) claimed special damages of Kshs.135,056/= from the Respondents arising out of a motor vehicle accident on 6th December, 1997 at Mago Trading Centre, along Kapsabet/Cherakali Road.

The Lower Court found that the Appellant had not proved her claim on a balance of probability and disallowed the same. Aggrieved by that decision, the Appellant filed this appeal on 13 fairly long grounds of appeal, which I do not find necessary to reproduce here. Essentially, the issue at this appeal turned on **liability**.

This being a first appeal, it is my duty to assess and re evaluate the evidence before the Lower Court, bearing in mind that this Court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before her and that she has not acted on wrong principles in reaching her conclusion. Now, having warned myself of that, let me examine the relevant evidence before the Lower Court.

The learned Magistrate was right in observing that her decision depended on accepting the evidence of either PW1 or DW1 – which were clearly contradictory. This is what she stated in her Judgment about the Plaintiff's evidence:

"***The Plaintiff told the court that on 6/12/1997 he was driving a motor vehicle registration number KZD 042 FROM NAIROBI to Cherakali. It was on Kapsabet/Charakali road. A lorry registration***

number KSN 439 came from the opposite direction. It had covered the whole road. It was driving quite fast. It hit his car. He was injured and became unconscious. He was taken to Mukumu hospital for treatment."

And, this is what she stated about the Defendant's evidence:

"***DW1 was the driver of motor vehicle KSN 439 on the fateful day. His evidence is that he saw the plaintiff's motor vehicle coming. He went off the road and parked on its left side. There was smoke coming from one of the plaintiff's tyres. The motor vehicles hit his motor vehicle at the right rear side."***

Now, in the face of this contradictory evidence, all she had to do was to look at the Police file, where a sketch drawn by the Police immediately after the accident was found. Instead, the Magistrate observed that:

"***The police report in the file produced as an exhibit does not assist the court to see when (sic) between DW1 and DW2 was to blame for the accident."***

Having looked at the sketch plan produced from the Police file, I find the learned Magistrate's observation incomprehensible. That sketch plan says it all – it shows the point of impact, which was in the lane in which the Appellant was driving his motor vehicle. This clearly means that the Respondent's motor vehicle was **not** parked on its side of the road at the time of the impact. Secondly, and equally importantly, the damage to the Appellant's motor vehicle being on the right front is clearly consistent with the point of impact. This accident **did not**, and could not have taken place when the Respondent's motor vehicle was "**parked**" on its side of the road. All the evidence is to the contrary, and I agree with the submissions of Mr. Mwangi, Counsel for the Appellant, that the learned Magistrate erred in her decision. It is quite possible that the Magistrate was influenced greatly in her Ruling by the fact that the Plaintiff (Appellant) did not tender evidence herself, but allowed her husband, who was the driver to do so. This is what she observed in her Judgment:

"***It is clear that the plaintiff has not tendered her evidence to proof (sic) her case. It's difficult to have the plaintiff's case proved without the plaintiff tendering evidence."***

Clearly, she was wrong. The Appellant was not the driver and would have had nothing useful to say to the Court, and her absence ought not have made any difference.

Accordingly, I allow this Appeal, reverse the decision of the Lower Court; and enter Judgment for the Appellant in the Lower Court as per the claim in the Plaint. The Appellant shall also have costs as prayed in both Courts.

Dated and delivered at Nairobi this 3rd day of April, 2008

ALNASHIR VISRAM

JUDGE