REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 1 OF 2004

COSMAS OKOTH…….....……...……..1ST APPELLANT

B.O.G. MASENO HIGH SCHOOL…….....…..…..2ND APPELLANT

VERSUS

CHARLES NAUMI WAMUTU.....RESPONDENT

JUDGMENT

The respondent in this case filed suit against the appellants seeking to be paid special damages on account of an accident which occurred on the 16th of June 2002 involving the respondent's lorry registration number KAE 516Q and the appellants' bus registration number KAA 627V. The said accident occurred along Nakuru-Nairobi road. The respondent claimed that the said accident was solely caused by the negligence of the 1st appellant who had driven the said bus in such a careless and negligent manner that he caused the same to collide with the respondent's lorry as a result of which the said lorry was damaged and required extensive repairs to restore it to its pre-accident condition. The respondent claimed the sum of Kshs 1,338,582/= as special damages.

When the appellants were served with the plaint, they filed a defence. They denied that they were the authors of the said accident. They instead blamed the respondent's driver for causing the said accident. They stated in their defence that the said accident was solely caused by the negligence of the respondent's driver. The appellants filed a counter claim against the respondent claiming the sum of Kshs 150,000/= which they alleged was the cost which they had incurred when the said bus was repaired after the accident in question. After a full trial, the trial magistrate entered judgment for the respondent as prayed in his plaint. He found the appellants to be 100% liable for the said accident. He entered judgment for the respondent for the sum of Kshs 1,338,582/=. He dismissed the counter-claim filed by the appellants. The respondent was awarded the costs of the suit.

Being aggrieved by the said decision, the appellants filed an appeal to this court. In their Memorandum of Appeal the appellants raised eight grounds of appeal challenging the decision of the trial magistrate in finding in favour of the respondent. They were aggrieved that the trial magistrate had found the appellants solely liable for the said accident in the absence of independent evidence which could have led the said court to the said decision. They were aggrieved that the trial magistrate had made his decision on quantum after relying on the written submissions filed by the respondent's counsel in the absence of any evidence adduced to support the said submissions. They further faulted the trial magistrate for applying the wrong principles of the law in arriving at the said decision in favour of the respondent. They were aggrieved that their defence had not been considered by the trial magistrate before he arrived at the said decision in favour of the respondent. They further contended that the trial magistrate had erred in law in awarding damages to the respondent which in their view was excessive and lacked any basis in law.

At the hearing of the appeal, I heard the submissions made by Mr Obwayo, Learned Counsel for the appellants and Mr Mburu, Learned Counsel for the respondent. Mr Obwayo submitted that the respondent and the appellants called one witness each to testify as regard the circumstances under which the said accident took place. He submitted that the driver of the respondent's lorry testified and blamed the driver of the appellants' bus for causing the accident. On the other hand, the driver of the appellants bus testified blaming the driver of the respondent's lorry for causing the accident. In his view, this was contradictory evidence which required an independent witness to be called to testify and unravel the contradiction. Neither the respondent nor the appellants called an independent witness to support their respective evidence. The police abstract report which was produced in evidence did not indicate who was to blame for the accident. At the time of the trial, the traffic accident in issue here was still pending under investigation.

Mr Obwayo further submitted that the trial magistrate had applied the wrong principles of the law when he awarded the respondent loss of income when the respondent had not specifically pleaded for it in his pleadings. He submitted that the basis upon which the said loss of income was calculated was wrong in law. He argued that the trial magistrate had not considered the fact that the respondent ought to have mitigated his loss and not wait for the court to award him damages. In the premises therefore he submitted that the court should not have awarded the sum of Kshs 750,000/= as loss of income. He further took issue with the fact that the written submissions filed by the respondent included matters which had not been addressed during the trial and which the trial magistrate relied on as a basis of his judgment. Learned Counsel for the appellants did not have any objection to the respondent being awarded the material damages which he had proved during the trial. He urged this court to allow the appeal with costs.

Mr Mburu Learned Counsel for the respondent opposed the appeal. He submitted that the respondent had established on a balance of probabilities that it was the 1st appellant who caused the accident when he negligently drove the bus that he caused the same to collide with the respondent's lorry. He submitted that the trial magistrate had reached the proper decision on liability after he had assessed the demeanour of the witnesses. He further submitted that the appellants having conceded the issue of material damage this court should not disturb the same. On the issue of loss of income he submitted that the trial magistrate had made a proper award after evaluating the evidence of the witnesses and particularly the evidence of the respondent. He further submitted that the written submissions which were filed were based on the evidence which had been adduced in court. He urged this court to dismiss the appeal as it had, in his view, no merit at all. He prayed this court to award the respondent costs of the appeal.

I have carefully read the record of appeal in this appeal. I have also considered the submissions made before me by the parties to this appeal. This being a first appeal this court is mandated to consider this appeal by way of re-hearing the case. This court is required to reconsider and to re-evaluate the evidence adduced by the witnesses before the trial magistrate and reach its own independent decision whether or not to uphold the decision reached by the trial magistrate. In reaching its decision this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified. In **Jabane –vs- Olenja [1986] KLR 661** at page 664 Hancox JA stated as follows:

"***I accept this proposition, so far as it goes, and that this court does have the power to examine and re-evaluate the evidence and the findings of facts of the trial court in order to determine whether the conclusion reached on the evidence should stand –*** *See Peters –vs- Sunday Post [1958]E.A. 424.* ***More recently, however, this court has held that it will not likely differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did –*** *See* ***in particular*** *Ephantus Mwangi –vs- Duncan Mwangi Wambugu (1982 – 88)1KAR 278* ***and*** *Mwana Sokoni –vs- Kenya Bus Services (1982-88)1KAR 870."*

In this case both drivers of the motor vehicles who were involved in the accident testified. They each blamed the other for causing the accident. No independent witness was called by either the appellants or the respondent to shed more light as to the circumstances of the accident. The trial magistrate in his judgment did not give any reasons why he believed the testimony of the driver of the respondent's motor

vehicle and disbelieved the evidence of the driver of the 2nd appellant's bus. It is clear that, on re-evaluating the evidence of both drivers, that none of the two drivers gave evidence which on evaluation would have exonerated him from blame for causing the accident. The trial magistrate did not state in his judgment the basis of his disbelief of the 2nd appellant's drivers evidence. Neither did he state that he had assessed the demeanour of the two witnesses and reached a conclusion finding the respondent's drivers testimony to be believable.

In the absence of such a finding this court has to re-evaluate the evidence and reach its own independent determination whether or not the trial magistrate was right in reaching a determination that it was the 2nd appellant's driver who was wholly to blame for the accident. As stated by the Court of Appeal in the **Jabane Case** (*referred to herein above*), the evidence adduced on the issue of liability by the parties to this suit does not support the finding reached by the trial magistrate finding the appellant to be solely liable for the said accident. In the circumstances of this case and having carefully evaluated the evidence adduced by both the respondent's driver and the appellants driver, this court cannot assume that the trial court had properly reached its decision after seeing and assessing the demeanour of the witnesses. This court cannot on the face of the evidence adduced, reach a definite determination on who between the respondent's driver and the appellant's driver caused the accident. In the circumstances of this case therefore, I will apportion liability equally. The respondent shall bear 50% liability for the accident. Similarly the appellants shall bear 50% liability. In reaching this determination I have applied the principle set down by the Court of Appeal in the **Beckley** case (*See* **Beckley Stewart Ltd., David Cottle and Jean Susan Cottle –vs- Lewis Kimani Waiyaki (1982-88)1 KAR 1118**).

In his plaint, the respondent prayed to be paid special damages as follows:

(a) Cost of repairs of motor vehicle

Registration number KAE 516Q Kshs 733,798

(b) Towing charges Kshs 30,000

(c) Recovery charges Kshs 20,000

(d) Assessors fees Kshs 10,000

(e) Legal fees Kshs 5,000

(f) Loss of business (user) Kshs 539,582

Total Kshs 1,338,582

During the trial, the respondent adduced evidence and produced documents which proved the repairs that he had undertaken on the lorry as a result of the said accident. He produced receipts which showed that he had paid a total sum of Kshs 733,798/= for the replacement parts and the labour to restore the said motor vehicle to its pre-accident condition. The said receipts were produced by consent of the parties. In this appeal, Mr Obwayo Learned Counsel for the appellants conceded that the respondent's claim under this head was merited and had been proved by the said receipts. I will therefore award the respondent the sum of Kshs 733,798/= being the costs of repairs subject to contribution pursuant to this court's finding on liability.

The other costs being recovery charges, towing charges and assessors fees were similarly proved (*i.e. Kshs 30,000/= + Kshs 20,000/= + Kshs 10,000/=*). I will award the same. As regard what is referred to as legal fees, I have not seen any receipt which was produced by the respondents which showed that he had used legal services at the time of the accident. The claim for the sum of Kshs 5,000/= was not therefore proved. I disallow the same.

The issue that exercised the appellants' and the respondent's counsels' minds was that of loss of user.

The respondents counsel submitted that the respondent had proved that he was entitled to be paid loss of user. On the other hand, the appellants have submitted that the respondent neither pleaded nor specifically proved the loss of user. Having carefully re-evaluated the evidence, I have come to the conclusion that whereas it could be true that the respondent had been contracted to transport cement to Southern Sudan by Leotiki Enterprises Limited and was to be paid the sum of Kshs 125,000/= per trip, no evidence was adduced that the respondent had transported more than one trip of the said cement to Southern Sudan. At the time of the accident the lorry was empty. Presumably it was being driven to Nairobi to collect the cement for transportation to Southern Sudan. Having perused the agreement which was produced as the respondents exhibit No. 14, it is clear that the agreement was between the respondent and Leotiki Enterprises. In his testimony before the trial court, the respondent testified that he owned three other lorries apart from the lorry that was involved in an accident. It is clear that the respondent being a prudent businessman abided by the terms of the agreement and used his other lorries to fulfill the said contract. No evidence was adduced by the respondent that he had failed to fulfil the said contract as a result of the accident that involved the lorry which is the subject of this suit.

From the evidence adduced in court it is clear that the contract was not permanent or long-term. It was a one-off agreement whereby the respondent was required to transport 250 metric tonnes of cement from Nairobi to Southern Sudan. The respondent did not give any testimony in court to support his contention that he had lost business due to the said accident. If the respondent had given evidence to the effect that the lorry which was involved in the accident was the only lorry that he owned, most probably this court would have looked at the respondent's claim for loss of user favourably. In any event, this court would have considered if the respondent had mitigated his loss. In the circumstances of this case and upon re-evaluating the evidence, it is clear that the respondent neither pleaded nor proved that he suffered any loss of user after the said accident. He did not establish that he lost the contract to transport cement from Nairobi to Southern Sudan as a result of the said lorry being disabled for the period which the said motor vehicle was under repair. In the circumstances of this case I will allow the appeal by the appellants on the claim for loss of user. I will set aside the award of loss of user by the trial magistrate and replace it with an order disallowing the said claim of loss of user.

The upshot of the above reasons is that the judgment of the trial magistrate is hereby set aside and substituted by the judgment of this court in the following terms:

(i) On Liability

Liability is apportioned equally between the appellants and the respondents.

(ii) On Quantum

The respondent is awarded the proven special damages as follows:

(a) Cost of repairs Kshs 733,798/=

(b) Towing charges Kshs 30,000/=

(c) Recovery charges Kshs 20,000/=

(d) Assessors fees Kshs 10,000/=

Total Kshs 793,798/=

less 50% contribution Kshs 396,899/=

(e) The Claim for loss of user is disallowed.

(iii) Interest on the said special damages assessed shall be paid from the date of filing suit.

(iv) The counterclaim was not proved. It is hereby dismissed. Since it was not a subject of appeal, there shall be no orders as to costs in respect of the said counterclaim.

(v) The respondent shall have the costs of the suit in the lower court.

(vi) Since the appellants have partially been successful on this appeal, they shall be paid ½ of the costs of appeal.

DATED at NAKURU this 22nd day of February 2006.

L. KIMARU

JUDGE