REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 36 of 2002

UNGA LIMITED…….....…….……1ST APPELLANT

JOASH OWIDI…….....…….2ND APPELLANT

VERSUS

JAMES NJUGUNA NJOROGE…….....……..RESPONDENT

JUDGMENT

The respondent, James Njuguna Njoroge filed suit against the appellants Unga Limited and Joash Owidi seeking to be paid special damages of Kshs 134,800/= being the cost of repair of his motor vehicle registration number KAC 687B (*hereinafter referred to as the respondent's motor vehicle*) which he alleges was damaged when the 2nd appellant carelessly drove motor vehicle number KAD 814R (*hereinafter referred to as the appellant's motor vehicle*) that he caused it to collide with the respondent's motor vehicle. The respondent further claimed to be paid general damages for loss of user of the said motor vehicle from the time it was involved in the accident to the time it was repaired. The respondent averred that the said collision took place on the 11th of February 1995 along Eldoret-Nakuru road.

When the appellants were served with the plaint, they entered appearance and filed a defence. In their defence, they denied that their motor vehicle was involved in any accident with the respondent's motor vehicle on the particular day. They further averred that if the said accident took place, then it was solely caused by the negligence of the respondent's motor vehicle. They therefore disclaimed liability and urged the court to dismiss the respondent's suit. The case was heard by the resident magistrate's court and in its judgment found the appellants solely liable for the said accident. The appellants were held to be 100% liable. The damages payable to the respondent were assessed at Kshs 134,000/= special damages and Kshs 54,000/= being loss of user. The total award made in favour of the respondent was Kshs 188,800/=. The appellants were aggrieved by the said decision of the trial magistrate and have appealed to this court.

In their petition of appeal, the appellants have 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 not analysed the evidence properly and thus entered judgment in favour of the respondent in the circumstances where the respondent had not established his case to the required standard. They were aggrieved that the respondent had not established that infact the appellants' motor vehicle was involved in the accident with the respondent's motor vehicle. They faulted the trial magistrate for reaching the decision in favour of the respondent without taking into consideration the evidence adduced by the appellants. They were aggrieved that the trial magistrate had found that the respondent had proved his claim for costs of repairs whereas there was conflicting evidence as to when the said repairs were carried

out. They faulted the trial magistrate for finding that the respondent had proved the special damages pleaded whereas the respondent had not adduced any evidence to prove the said special damages. The appellants were finally aggrieved that the respondent had put into consideration wrong principles of the law in arriving at the said decision.

At the hearing of the appeal, Mr Kagucia, Learned Counsel for the appellants amplified the grounds of appeal. He submitted that the respondent had not proved that indeed the appellants' motor vehicle was involved in the accident with his motor vehicle. He submitted that the driver of the appellants' motor vehicle was arrested three days after the alleged accident after the respondent made a report to the police. He submitted that there was no proof that infact a collision took place between the two motor vehicles on the material day as the accident allegedly took place at 7.00 p.m. but a report was made to the police at 2.30 a.m. It was his submission that the possibility that the respondent's motor vehicle was hit by another motor vehicle could not be ruled out. He argued that the trial magistrate had not considered the evidence of the appellants' driver who had testified that he was not involved in any accident on the material day.

He further submitted that the respondent had not established the special damages pleaded that the said motor vehicle was repaired after the accident. He submitted that the receipts which were produced showed that the repairs of the respondent's motor vehicle were undertaken a year after the accident took place. He submitted that the respondent had not proved the claim for the sum of Kshs 124,700/= as he adduced conflicting evidence as to the circumstances of the said repairs. He further submitted that the respondent had not proved the claim for Kshs 10,000/= and Kshs 54,000/= which was awarded as loss of user. He argued that the respondent had relied on invoices instead of receipts to establish his case. Furthermore, the said receipts did not specify that they related to the respondent's motor vehicle. He submitted that the respondent had not established that he had lost any income during the period that the motor vehicle was repaired. It was the appellants' further submission that taking into account the totality of the evidence adduced, the respondent had not proved his case to the required standard of proof. He relied on the decision of **Kantilal Khimji & Anor –vs- Joseph Mutunga Wambua & Anor CA Civil Appeal No. 135 of 1988 (***unreported***).**

Mr. Ikua, Learned Counsel for the respondent opposed the appeal. He submitted that the respondent had proved on a balance of probabilities that the appellants motor vehicle carelessly collided with the respondent's motor vehicle. He submitted that the respondent had called two witnesses who testified as to the circumstances of the accident which took place at night. After the accident, the appellants' driver did not stop and drove off from the scene of the accident. He submitted that the respondent's driver reported the accident to the police on the same night. He submitted that the respondent had established that the appellants' motor vehicle was at the scene of the accident when the accident is said to have occurred. He therefore submitted that the trial court was right in finding the appellants solely liable for the said accident.

On the issue of the assessment of damages, Mr. Ikua submitted that the respondent had proved that his motor vehicle was damaged in the said accident and was repaired. He submitted that the respondent had produced an assessor's report which established the nature of damage that the respondent's motor vehicle had sustained. He further submitted that the respondent had produced receipts which established the respondent's claim that he used his own money to repair the said motor vehicle. He submitted that the respondent's motor vehicle was in the garage for a period of one month as it was being repaired. The receipts for the said repairs were however issued later. He submitted that the appeal filed by the appellants lacked merit as the trial magistrate properly found in favour of the appellant. He urged this court to dismiss the appeal.

This being a first appeal, this court is mandated to re-evaluate the evidence adduced before the trial court so as to reach its own determination bearing in mind that it neither saw nor heard the witnesses as they testified and therefore is required to make an allowance in that respect. The High Court is not bound to follow the trial court's finding of fact if it appears either that it failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally. (*See* **Selle & Anor –vs- Associated Motor Boat Co. Ltd & Anor [1968]E.A. 123**). The issue for determination by this court on this appeal are twofold; firstly, whether the respondent

proved its case on a balance of probabilities that it was the appellants motor vehicle collided with his motor vehicle and secondly whether the respondent should be awarded any damages.

I have considered the rival submissions which were made before me by the parties to this appeal. I have also re-evaluated the evidence that was adduced by the witnesses before the trial magistrate's court. The appellants and the respondent's evidence contradicted each other. The trial court believed the evidence of PW1 Geoffrey Kariuki Kiburi, the conductor of motor vehicle registration number KAC 687B who testified that the respondent's motor vehicle was hit by the appellants motor vehicle at about 7.00 p.m. near Ngata along the Nakuru-Eldoret road. He testified that the appellants' motor vehicle was travelling from the Eldoret direction and hit their motor vehicle near the railway flyover. He further testified that after the accident, the driver of the appellants' motor vehicle did not stop. He recalled that immediately after the accident he stopped another motor vehicle and instructed it to follow the appellants' motor vehicle. After some distance, they were able to catch up with the appellants' motor vehicle. They saw that the appellants' motor vehicle did not have a ladder which was left at the scene of the accident when it came off the said motor vehicle after the collision. The respondent's driver admitted that his motor vehicle was in the locality at the approximate time when the accident took place but he denied that the said motor vehicle was involved in the accident with the respondent's motor vehicle.

The trial magistrate assessed the demeanour of the two witnesses and reached a decision that the respondent's witness, particularly PW1, was telling the truth. This court did not have the advantage of seeing or hearing the witnesses as they testified. The trial magistrate finding on the demeanour of the witnesses cannot therefore be upset by this court. This court can only set aside a finding of a trial court on matters of fact if it is of the view that the said finding of the trial court does not accord with the evidence adduced before it generally. In the instant case, there is no evidence that the trial magistrate misapprehended the evidence that was adduced before him before arriving at the decision finding the appellants liable. The detailed evidence that was adduced by the respondent was not dented by the evidence that was adduced by the appellants in their defence.

On re-evaluating the evidence, I was particularly impressed by the evidence of PW1 who testified that he had recovered a part of the appellants' lorry which fell from it when it collided with the respondent's motor vehicle. The appellants did not adduce any evidence to controvert this evidence as regard the recovery of the said part of the appellants motor vehicle. The police investigated the case and charged the appellants' driver with the offence of careless driving. The appellants' driver was however acquitted because the complainants did not testify. The police abstract report of the circumstances of the accident was produced in evidence by the respondent. The evidence adduced by the appellants was a mere denial. In the circumstances therefore, having considered the submissions made in this appeal, I am not persuaded that the appellants have established that the trial magistrate was wrong in finding against the appellants on liability. Their appeal against liability is therefore dismissed.

On quantum, the respondent pleaded that as a result of the said accident his motor vehicle was damaged and required repairs to the sum of Kshs 134,800/=. The respondent's motor vehicle was assessed by PW3 Peter Reuben Oremo Odang'a, a qualified motor vehicle accident assessor, who prepared an assessment report which was produced as plaintiff's exhibit No. 2. In the said assessment report he identified the parts of the respondent's motor vehicle that were damaged during the accident. He further identified the cost of the purchase of the said replacement parts and further the costs of repair. In his assessment the total cost of repair of the said motor vehicle would be Kshs 113,324/=. He testified that he was paid the sum of Kshs 10,000/= as assessment fees. The receipt was produced as plaintiff's exhibit No. 4. The respondent produced four receipts being the amount that he paid for the purchase of the parts and the cost of repair. One of the receipts of Kshs 1,500/= was paid to one Sammy Mbugua, a investigator. The receipts which the respondent produced were of Kshs 26,200/=, Kshs 41,000/=, Kshs 18,000/= and Kshs 38,000/=. The said receipts were produced as plaintiff's exhibit No. 3 (a-e).

I have perused the said receipts and I have noted that they are dated about a month after the said accident. They were issued at the approximate period that the respondent testified that the said motor vehicle was being repaired. Having perused the said receipts, I do not therefore agree with the appellants that the respondent had not specifically proved his case to the required standard of proof. I therefore disallow the

appellants appeal challenging the trial magistrate's finding as regard the sum of Kshs 134,800/=. The trial magistrate was correct in finding for the respondent on the issue of the cost of repairs. The said costs of repairs approximated the estimates that were made by the motor vehicle assessor (PW3).

As regard the issue of loss of user PW2 (*the respondent*) testified that he use to earn a sum of Kshs 2,000/= per day from the said motor vehicle. The evidence of the respondent was not controverted by the appellants. When the appellants cross-examined the respondent, they did not challenge his assertion that he earned Kshs 2,000/= per day from the said motor vehicle which the respondent deployed as a public service vehicle. Evidence was led by the respondent which established that the said motor vehicle was in the garage for a period of one month. The amount awarded of Kshs 54,000/= as loss of user was therefore reasonable in the circumstances. I see no reason to interfere with the decision of the trial magistrate.

The upshot of the aforegoing is that the appellants have failed to convince this court that the trial magistrate erred in reaching the decision that he did in favour of the respondent. The appeal lacks merit and it is dismissed with costs to the respondent.

DATED at NAKURU this 29th day of May 2006.

L. KIMARU

JUDGE