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

Civil Appeal 427 of 2000

MUGOYA CONSTRUCTION & ENGINEERING LTD …….....……...
APPELLANT

VERSUS

SIMON NZANGI MUTUKU …….....…..…… 1ST
RESPONDENT

NAS GROUP OF COMPANIES …….....…..…… 2ND
RESPONDENT

(An Appeal from the Order and Decree of the Hon. J. R. Karanja, SPM

in Civil Case No. 2665 of 1997 delivered on 7th April, 2000).

JUDGMENT

By a Plaint dated 15th March, 1997, and filed in the lower court on 10th April, 1997, the 1st Respondent (Plaintiff in the lower court) claimed damages from the Appellant and the 2nd Respondent for injuries sustained by him in a motor vehicle accident involving the two vehicles belonging to the Appellant and the 2nd Respondent. He was, at the time of the accident, an employee and lawful passenger in the Appellant's motor vehicle.

The Judgment of the lower court is extremely scanty, and not properly reasoned. However, the pleadings and the record of the evidence before the lower court shows that the accident happened on 27th August, 1996 along the Outer Ring Road, near the Railway Bridge, Nairobi when the Appellant's lorry registration no. KZS 959 collided with the 2nd Respondent's motor vehicle, also a lorry, registration no. KAA 945L.

The lower court, in a brief Judgment, expressed itself as follows on the issue of liability:

"On liability, the evidence adduced by the plaintiff tends to put blame on both drivers of the defendant's vehicles. The Plaintiff stated that both vehicles were moving at excessive speed when they collided while bypassing each other. The first defendant's driver Christopher Alavachi (DW 1) blames the driver of the other vehicle who he said had crossed into his path and retreated to his side after being warned through the flashes of the first defendant's vehicle's headlights. The element of negligence disputed against the defendant's by the plaintiff is basically speed. He was unable to really indicate any other element of negligence attributable to the defendants. The first defendant's driver denied that he was over speeding

and indicated that the second defendant's vehicle had slightly moved to his side of the road at the time the collision occurred. The contention by the first defendant was not effectively rebutted by the plaintiff or at all by the second defendant. It would therefore be safe to hold that the evidence herein does on a balance of probabilities indicate that the main cause of the accident was the second defendant's driver careless manner of driving without proper lookout and consideration for other road users. To that extent the second defendant as opposed to the first defendant is found fully liable for the injuries sustained by the plaintiff."

It is against that Judgment that the Appellant has preferred this appeal, on the following three grounds:

1. THAT the learned trial magistrate erred in fact and in law in failing to consider the submissions made by the Appellant and the 2nd Respondent and in awarding general damages in the sum of Kshs.120,000/= as such an award was so inordinately high as to amount to an entirely erroneous estimate of the damages awardable.

2. THAT the learned trial magistrate erred in fact and in law in totally disregarding the evidence of the 1st Respondent who blamed both the 2nd Respondent's and the Appellant's drivers for the accident giving rise to the suit appealed from, and the learned trial magistrate further erred in failing to assign reasons for his failure to consider the 1st Respondent's evidence.

3. THAT the learned trial magistrate erred in fact and in law in finding the Appellant's driver 100% liable for the accident giving rise to the suit appealed from notwithstanding the fact that he (the magistrate) acknowledged that the said driver was not the sole cause of the accident.

Although the first ground of appeal relates to quantum of damages, Mr Njoroge, Counsel for the Appellant, indicated that the only issue before this court is liability, not quantum.

On the issue of liability, he argued that based on the evidence before the lower court, it was manifestly unfair to hold the Appellant 100% liable for the accident when the 2nd Respondent was equally or more to blame. He submitted that according to the Plaintiff's (1st Respondent) evidence both vehicles were speeding, the Appellant's going uphill while the 2nd Respondent's downhill; that the accident was caused somewhere in the middle of the road; that the Magistrate acknowledged in his Judgment that both vehicles were speeding but went ahead to hold only one 100% liable simply because that one did not call any witness. He argued that that was an error of principle (See ***Uganda Breweries vs Uganda Railway Corporation (2002) 2 EALR 634***. He also cited the cases of ***Lakhamshi vs Attorney General (1971) E A 118*** and ***Simon vs Carlo (1970) E A 284*** where both drivers were held equally to blame in similar circumstances.

Mr Kibuthi, Counsel for the 2nd Respondent, submitted that the Plaintiff had clearly pleaded in his Plaint that it was the Appellant's vehicle that "was so negligently driven"; that the finding of facts in the lower court were based on evidence which could not be interfered with except in special circumstances (See ***Echen Agencies vs Naomi Rimbui Palma (C A 140 of 1998 – Nairobi***); and that the lower court believed the 2nd Respondent's evidence that the Appellant's lorry had crossed the yellow line in the path of the 2nd Respondent when the accident happened.

As this is 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 or 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 him and that he has not acted on wrong principles in reaching his conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

Here is what the Plaintiff, who was a passenger in the Appellant's motor vehicle, said (at P. 22 – 23 of the Record):

"The two vehicles were by passing one another when they collided on the side. Our lorry was climbing uphill while the other vehicle was moving downhill when they collided. The two vehicles were both lorries and were moving at excessive speed prior to the collision."

And, this is what he said in cross-examination:

"I could see the front of the lorry because I was standing while on top of the carrier on the right side. I noticed the other lorry belonging to NAS when we were about 40 metres away. It was descending down while our lorry was ascending. The vehicles were then on a sloppy section of the road. The lorries were being driven at high speed. Our lorry was at high speed and so was the other lorry. The drivers of both lorries were negligent. Our driver was also moving on the yellow line. The two lorries rubbed each other at the yellow line. It is not true that the second defendant's lorry moved into the path of the first defendant's lorry. I would blame both drivers for the accident but more so the first defendant's driver who was moving along our path prior to retreating to the yellow line".

The only other witness was the driver of the 2nd Respondent's motor vehicle. This is what he said:

"The vehicle was a lorry and as I was descending a hill section of the road I noticed the second defendant's lorry approaching and having crossed the yellow line into my path. I flashed my headlights and the driver of the other lorry retreated to his side but still the two lorries rubbed one another on the sides. I was not moving at a high speed prior to the accident. I was not on the wrong side of the road. The other lorry was larger and carrying a group of people on its rear carrier. I was not to blame for the accident. I was not careless at all".

Now, looking at the evidence of these two witnesses, what is not in dispute is that the Appellant's vehicle was going uphill, and the 2nd Respondent's downhill. By the 2nd Respondent's driver's own admission, the driver of the Appellant's vehicle "retreated to his side but still the two lorries rubbed one another on the sides".

This, to me, is consistent with the Plaintiff's testimony that both were to blame. If they were both on their respective sides, and still "rubbed each other", clearly the accident took place in the middle of the road. The 2nd Respondent's contention that he was not speeding is not possible, nor believable, because he was going downhill, while the Appellant's lorry, loaded with some 50 people, was going uphill. How could it possibly be speeding more than the 2nd Respondent's vehicle in such circumstances? And how could the 2nd Respondent's lorry, going downhill, not be speeding?

Unfortunately, the lower court's brief Judgment does not indicate why it believed the 2nd Respondent's driver, and it appears that the only reason it did so was because the Appellant called no witness of its own. I agree with the decision in ***Uganda Breweries*** case (supra) that "failure to call a witness will not attract adverse inference from the court against the party failing to call witness if the burden of proof has been discharged".

The circumstances of the accident here, as in the ***Lakhamshi and Simon*** cases (supra) indicate that it happened somewhere in the middle of the road, with both drivers to blame equally. That is what I find, and I believe this is a proper case where this Court should interfere with the findings of facts of the lower court.

Accordingly, I allow this appeal, and set aside that part of the Judgment and decree which provides that the Plaintiff's suit be dismissed with costs against the first defendant, and order that the decree be varied by providing that the liability in damages and costs shall be shared equally by the two defendants. The Appellant shall have 50% of the costs of this appeal to be assessed only against the 2nd Respondent.

Dated and delivered at Nairobi this 18th day of May, 2005.

ALNASHIR VISRAM

JUDGE