



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Civil Appeal 34 of 1999**

**UNGA LIMITED.....1ST APPLICANT**

**MICHAEL NJUGUNA MAINA.....2ND APPLICANT**

**VERSUS**

**LAYANDA MOTORS SPARES LTD.....RESPONDENT**

**JUDGMENT**

The respondent filed suit against the appellants seeking to be paid cost of repair and spare parts that were used to repair the motor vehicle registration number KAE 199U which was extensively damaged when the said motor vehicle crashed into motor vehicle registration number KAD 546S allegedly because motor vehicle registration number KAD 813R owned by the 1st appellant and driven by the 2nd appellant had overtaken another motor vehicle when it was prohibited to overtake and thus blocking the road to oncoming motor vehicles leading to the said accident. In the particulars of negligence pleaded in the plaint, the respondent averred that the 2nd appellant caused the said accident because he carelessly overtook another motor vehicle before ascertaining that it was safe to so overtake. The respondent further pleaded that the 2nd appellant had caused the said accident by overtaking dangerously and failing to give a right of way to motor vehicles registration number KAE 199U and KAD 546S.

The appellants filed a defence. They denied that their motor vehicle registration number KAD 813R caused the said accident. The appellants denied that they had anything to do with the accident which had involved motor vehicles registration number KAE 199U and KAD 546S. The appellants pleaded that the said accident was caused by the negligence of the said two motor vehicles and did not involve the motor vehicle owned by the 1st appellant and driven by the 2nd appellant. The appellants urged the trial court to consider applying the legal maxim of *res ipsa loquitur* in determining who caused the accident and thus apportion liability accordingly. After hearing the case, the trial magistrate's court apportioned liability at the ratio of 80:20 in favour of the respondent and against the appellants, that is, the appellants were to bear 80% liability whilst the respondent was to bear 20% contributory negligence. The trial magistrate awarded the respondent Kshs 46,000/= loss of user and Kshs 125,440/= being costs of repair (total Kshs 171,440/=), costs and interest.

The appellants who were aggrieved by the said decision of the trial magistrate, duly appealed to this court. The appellants raised six grounds of appeal which basically touched on the appellants vehement disagreement with the finding of the trial magistrate on liability. The appellants were aggrieved that the trial magistrate had found against them whereas the evidence pointed to the fact that it was the respondent who had caused the accident and further that the 1st appellant's motor vehicle was not at all involved in the said accident. The appellants were aggrieved that the trial magistrate had awarded loss of user and costs of repairs when the said claims had not been proved to the required standard. The appellants faulted the trial magistrate for arriving at the said decision in favour of the respondent after

applying the wrong principles of the law in all the circumstances of the case. During the hearing of this appeal, this court after being satisfied that the respondent had been duly served with the hearing notice of the date fixed for the hearing of the appeal, ordered the appellants to proceed with their appeal, the absence of the respondent notwithstanding.

In his submission before court, Mr Kagucia, Learned Counsel for the appellants argued that the respondent had not proved to the required standard that the appellants were liable in negligence to it. It was contended on behalf of the appellants that the collision which resulted in damage to the respondent's motor vehicle involved another motor vehicle other than that driven by the 2nd appellant. Evidence was adduced confirming that the 1st appellant's motor vehicle was not involved in a collision with the respondent's motor vehicle. The appellants further argued that the respondent had not pleaded that it suffered any damage, either general or special and therefore the trial magistrate had erred in making the said award in favour of the respondent. The appellants submitted that the respondent ought to have sued the owner of the motor vehicle which was actually involved in the collision with the respondent's motor vehicle. The appellants argued that the trial magistrate had not addressed the issues raised in the plaint, and had it done so the said trial magistrate would have arrived at a different decision.

The appellants were aggrieved that the trial court did not consider or address the pertinent issues raised in their defence. The appellants faulted the trial magistrate for awarding the respondent special damages when the said special damages had not been specifically pleaded and proved by the respondent. The appellants were aggrieved that the trial magistrate having found that the respondent's motor vehicle was being driven at a high speed, went ahead and found the appellants liable, yet the respondent's motor vehicle was not involved in a collision with the 1st appellants motor vehicle. The appellants further argued that the respondent should not have been awarded general damages because he had not pleaded the same. The appellant referred to several decided cases in support of its submission. In the premises therefore, the appellants urged the court to allow the appeal with costs and set aside the decision of the trial magistrate.

This is a first appeal. As was held in **Selle –vs- Associated Motor Boat Co Ltd [1968]EA 123 at page 126** by Sir Clement de Lestang V-P;

***“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohammed Sholan (1955)22 E.A.C.A. 270)”***

In the instant appeal, the respondent called two witnesses (PW2 and PW3) who testified as to the circumstances of the accident. PW2, the driver of motor vehicle registration number KAE 199U (*owned by the respondent*) testified that as he was driving the said motor vehicle, behind motor vehicle registration number KAD 546S, he saw a lorry owned by the 1st appellant (Registration number KAD 813R) overtaking another motor vehicle. PW2 testified that the said motor vehicle was overtaking another motor vehicle in a sharp bend where it was dangerous to overtake. According to PW2, when the driver of motor vehicle registration number KAD 546S saw the lorry on his lane, he swerved off the road and stopped the said motor vehicle. PW2 who was driving motor vehicle registration number KAE 199U closely behind motor vehicle registration number KAD 546S rammed behind the said stationary motor vehicle. The evidence of PW2 was corroborated by the evidence of PW3 who testified that on the material day, as he was driving motor vehicle registration number KAD 546S, he saw a lorry owned by the 1st appellant overtaking another motor vehicle. PW3 flashed in vain to warn the driver of the 1st appellant's motor vehicle not to overtake. As PW3 was too close to the oncoming lorry, he swerved off the road to avoid head on collision with the said lorry. Motor vehicle registration number KAE 199U

which was closely following him, rammed behind his motor vehicle when the said motor vehicle had already stopped off the road. Both PW2 and PW3 blame the driver of the 1st appellant's motor vehicle for overtaking when it was dangerous to overtake.

In his defence, DW1 (*the 2nd appellant*) testified that on the material day as he was driving motor lorry registration number KAD 813R from Nairobi to Eldoret, he saw a motor vehicle (KAD 546S) overtake a trailer. The said motor vehicle could not however overtake the trailer and therefore stopped on the road. Another motor vehicle (KAE 199U) came from behind motor vehicle KAD 546S and rammed it from behind. It was DW1's evidence that when the respondent's motor vehicle rammed into motor vehicle KAD 546S, the said motor vehicle was stationary and had stopped on the road. DW1 denied that he had dangerously overtaken another motor vehicle and thus causing the accident. DW1 blamed the driver of motor vehicle KAD 546S for causing the accident as he had stopped his vehicle on the road and did not move his motor vehicle from the road once he had stopped and thus causing the motor vehicle from behind to ram into it.

I have re-evaluated the evidence adduced by the parties to this suit. The appellants and the respondent gave evidence which did not differ on the material aspects save for the apportionment of the blameworthiness. On re-evaluation of the evidence, it is an admitted fact that motor vehicle registration number KAE 199U rammed into motor vehicle registration number KAD 546S from behind. The driver of motor vehicle registration number KAD 546S testified that he had swerved off the road and stopped his motor vehicle to avoid a head on collision with the motor vehicle being driven by the 2nd appellant (i.e. KAD 813R) which was overtaking another motor vehicle at a sharp bend that was dangerous for overtaking. The driver of the motor vehicle registration number KAE 199U then rammed into the rear part of motor vehicle KAD 546S which had stopped to give way to the oncoming lorry to overtake the other motor vehicle. The respondent blamed the 2nd appellant for causing the said accident. The 2nd appellant testified that his motor vehicle did not collide with any of the two vehicles involved in the accident. This fact is confirmed by the evidence of the respondent's witnesses.

Having carefully re-evaluated the evidence, it is clear that the driver of motor vehicle KAE 199U caused the accident. In the first instance, the said driver was driving the said motor vehicle at a high speed whilst following closely behind another motor vehicle (*i.e. KAD 946S*). When motor vehicle KAD 946S stopped, the driver of motor vehicle KAE 199U did not have sufficient distance between his motor vehicle and the vehicle in front of it to safely bring the said motor vehicle to a stop. The driver of motor vehicle KAE 199U thus caused the accident in two respects; He failed to keep a safe distance between his motor vehicle and the motor vehicle that was in front of him (*i.e. KAD 946S*). When the motor vehicle that was in front suddenly stopped, the driver of motor vehicle KAE 199U did not have a safe and clear distance which he could safely bring the said vehicle to a stop. The accident in that regard was inevitable. Secondly, the driver of motor vehicle registration number KAE 199U was driving the said motor vehicle at a speed that was too high in the circumstances. That is why he was unable to safely control the said motor vehicle and bring it to a stop when he encountered an obstacle on the road in the form of motor vehicle registration number KAD 946S.

Even if this court were to find that the 2nd appellant was overtaking another motor vehicle dangerously, it would not alter its finding holding the driving of motor vehicle KAE 199U responsible for the said accident. If motor vehicle KAD 946S had collided with motor vehicle KAD 813R, then the driver of motor vehicle registration number KAD 813R could have been held liable. But in this case, the respondent's motor vehicle KAE 199U collided with motor vehicle KAD 946S from behind. All the facts of the case point to the negligence of the respondent's driver. To find the 2nd respondent liable in the circumstances of this case, would be pushing the boundaries of liability in negligence too far. The finding of the trial magistrate finding the 2nd appellant 80% liable in negligence is not therefore supported by evidence on record. I agree with the appellants that the trial magistrate erred in his appreciation of the evidence and thus reached an erroneous conclusion not supported by the evidence adduced by the parties to this suit.

Having carefully evaluated the said evidence, I find that the appeal filed by the appellants has merit. The respondent's driver having solely caused the said accident, the appellants cannot be held liable. On

this point alone, this appeal succeeds. I will therefore not address the other issues raised by the appellant on this appeal. It would be an exercise in futility. The orders that commends itself to me in the circumstances of this case are as follows:

(i) The appeal filed by the appellant is hereby allowed with costs.

(ii) The appellants shall have the costs of this appeal.

(iii) The judgment of the lower court delivered on the 6th of October 1997 in favour of the respondent is hereby set aside and substituted by an order of this court dismissing the said respondent's suit against the appellants with costs to the appellants.

**DATED at NAKURU this 14th day of July 2005.**

**L. KIMARU**

**JUDGE**