



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**APPELLATE SIDE**  
**CIVIL APPEAL NO. 159 OF 2002**

**BETWEEN**

**FOAM MATTRESS LTD. .... 1ST APPELLANT**

**BARAZA PAPAUSA ..... 2ND APPELLANT**

**AND**

**KENNEDY ODHIAMBO OTIENO ..... 1ST RESPONDENT**

**GEORGE OKETCH ..... 2ND RESPONDENT**

**PAUL MBOYA JAMAHI ..... 3RD RESPONDENT**

**[An Appeal from the decision and ruling of Senior Principal  
Magistrate's Court, Kisumu delivered on 13th June 2002 by F.**

**M. KINYANJUI ESQ. - S.R.M.**

**IN**

**SPMCC No. 686 OF 2001]**

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**JUDGMENT OF THE COURT**

The first appellant is the owner of motor vehicle registration No. KAL 168A, while the second appellant is the driver of the said motor vehicle. It is alleged by the plaintiff that motor vehicle registration No. KAL 168A Fuso Lorry was involved in an accident with motor vehicle registration No. KAD 295N Nissan Matatu on 27th April 2001 along Otiende near K.B.C. Kisumu. The appellants were found liable for the cause of the accident by the trial Court and being aggrieved with the verdict of the trial Court the two filed 6 grounds of appeal. The complaint of the appellants is that the trial Court grossly misdirected himself in treating the evidence on liability and quantum presented before me in a superficial manner and consequently came to a wrong conclusion.

Mr. Oloo Advocate who argued the appeal on behalf of the appellant only contested the issue of liability. He attacked the trial Court's failure to consider the evidence that was presented in totality so as to come to an objective judgment. He submitted the driver of the appellant though charged with careless driving was acquitted while the driver of the other motor vehicle was not only charged but convicted and fined KSh.2,000/=. He stated that fact was not considered by the trial Court. He further submitted that there was no evidence produced by the plaintiff in support of the allegation that the first appellants motor vehicle had no lights at the time of the accident because the accident occurred during the night.

Mr. Anyul Advocate for 2nd and 3rd respondent opposed the appeal. He submitted that mere acquittal

does not absolve the appellants from blame. He stated that there is no evidence to show that the unroad-worthiness of his client's motor vehicle was the cause of the accident. It depends on the kind of defect i.e. side mirror, or broken glass, cannot cause or contribute to an accident unless there is evidence to support such a claim.

After hearing all the sides the trial Court held:-

**"DW2 was the driver of the lorry KAL 168A. He told the Court that he was on his way when he saw 3 Nissan Matatus competing for passengers. He said the second Matatu which I presume to be KAD 295N lost control and hit a tree. He told the Court that he called his boss and the police came. He told the Court that his lorry had not been involved in the accident---."**

I don't believe DW2 that he was not involved in an accident. He must have been involved and that is why he called his boss. That is why he called the police and that is even why he was charged. I find that DW2 the 2nd defendant is solely to blame for this accident. Equally I find the first defendant to be 100% vicariously liable.

According to the police inspector the driver of the lorry he was emphatic that he was not involved in any accident either with motor vehicle registration No. KAD 295N or otherwise. I have noted that he was charged with careless driving and though he was acquitted, he should have been discharged because the reason was lack of police file and no witness testified against him to justify a direct acquittal. It is my view that a person was charged and acquitted cannot be a basis for absolving himself from blame in Civil matter. Indeed it is a consideration which must guide the Court on apportioning or determining blame. In my considered view before the issue of blame is determined, the issue of the cause of the accident must be determined.

According to the police inspector stated that the driver of motor vehicle registration No. KAL 168A was to blame for the accident. And on cross-examination he stated that the author of the accident was the second driver Baraza. Further the driver of the other motor vehicle also blamed the driver of the lorry having no lights on and taking his line which made him to hit the rear part of the Nissan and as a result the Nissan lost control and went off the road.

I must appreciate that I did not have the opportunity of hearing and seeing the witnesses who gave evidence on behalf of all the parties to examine the veracity and probative value of their evidence. As a result of that disability I have to be very careful not to whimsically interfere with the decision of the trial Court. There must be ample material or evidence to show that the trial Court misdirected himself in some respect of the facts and the law. And as a result of that misdirection or misapprehension came to a faulty decision which is amenable to my judicial obligation to interfere. It was incumbent upon the appellants to bring to my attention evidence of misdirection or misapprehension to enable me to readily overturn the decision of the trial Court. There is no evidence to show that the trial Court failed to take into consideration matters which he ought to have considered or has taken into consideration matters, facts or law which was not available to him.

The trial Court was guided by the evidence that was presented before him by the parties. He has adequately fulfilled his obligation in evaluating the facts before he came to the conclusion he reached. He was entitled to trust and believe one of the parties in view of the available material presented before him for determination. The trial Court saw the demeanour of all the witness. He saw the sketch map that was drawn and presented before Court. The Traffic Officer who lay the blame on the shoulders of the driver of the lorry notwithstanding the acquittal. He had taken into consideration the driver of the lorry who was discharged with careless driving while the driver of the matatu was charged with driving unroad-worthy motor vehicle. Prima facie when the decision to charge the two drivers was reached the police must have acted on the evidence that was available having done proper investigation as to the cause of the accident.

I have noted as earlier indicated the driver of the lorry vehemently denied being involved in any accident. It is my judgment, the said driver was not candid enough and did conceal material facts from the

Court. If he was not involved in an accident, why did he take the initiative to report to his boss and police? Moreso he left his motor vehicle at the scene of the accident. It is my finding that his allegation, that he was not involved in the accident at all, was outrageous and manifestly depicts him as a habitual liar. His testimony was nothing but a bunch of calculated lies meant to deceive the Court, but cannot even sway a kindergarten child, given such an opportunity to believe him or not.

The appellant's Advocate did not contradict the evidence against appellants when they had the opportunity to do so. Their cross-examination was as poor as the evidence of their driver, therefore the appeal is unmeritorious with the sole aim of delaying justice to first respondent/plaintiff. Their decision and desire to delay justice may fail.

The appeal is dismissed with costs to the respondents.

Dated and delivered at Kisumu this 4th day of August 2004.

**MOHAMED WARSAME**

**AG. JUDGE**

Delivered in the presence of:

Mr. Anyul for 2 and 3 respondents.

Mr. Mochama for 1st respondent.

No appearance for the appellant.