



**Key Freight Limited v Abdi (Civil Appeal 32 of 2019)
[2024] KEHC 17157 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 17157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 32 OF 2019
TM MATHEKA, J
APRIL 12, 2024**

BETWEEN

KEY FREIGHT LIMITED PLAINTIFF

AND

MOHAMED ABDI DEFENDANT

JUDGMENT

1. On 20/2/2019 the learned trial Magistrate JD Karana RM delivered a judgement in which she made a finding in favour of the Plaintiff/Respondent for the sum of Kshs. 2,248,084, less 10% contribution.
2. The Plaintiff /Respondent had filed Makindu MCCC 152 /2017 seeking special damages of Ksh 2,221,915 costs of the suit, interest at court rates from the date of filing.
3. The cause of action was that at all material times the Plaintiff was the registered /beneficial owner of motor vehicle registration no. KBU 980U insured by Kenya Alliance Insurance Co. Limited while the Defendant/Appellant was registered/beneficial owner of motor vehicle registration KAA 506 E/2E 125/Insured by First Assurance Company Ltd.
4. It was the Plaintiff's claim that on 4/11/2024 the Defendant's motor vehicle was negligently driven that it violently hit the Plaintiff's Motor Vehicle causing it extensive damage in repair costs and assessment fees valued at Ksh 2,221,915.
5. The Defendant filed a statement of defence - denying all the allegations of negligence and liability and equally accused the Plaintiff's driver/agent/or servant of negligence.
6. The Defendant was aggrieved by the finding on liability and quantum and filed this appeal on the following grounds;
7. The learned Magistrate erred both in law and fact in finding that the Respondent had proved his claim on a balance of probabilities and proceeding to make an award against the Appellant.



8. The learned Magistrate erred both in law and fact in holding the Appellant liable to the Respondent amidst nil, deficient or no worthy evidence relating to causation of the accident the subject matter thereof.
9. The learned trial Magistrate erred in law and fact in failing to hold that the Respondent's suit was devoid of merits and hence not entitled to the relief's claimed.
10. The learned Magistrate misdirected herself in her assessment, analysis or interpretation of the evidence and thus arriving at a wrong, erroneous and unjust conclusion and judgment.
11. The learned Magistrate erred in law in failing to determine all issues placed before her for determination and/or arising from the pleadings and the evidence.
12. The learned magistrate erred in law in her failure to properly and correctly evaluate the entire evidence given and failing to give due regard to the Appellant's Statement of Defence, the evidence of the Defence witness and the Appellant's submissions thereof.
13. The learned Magistrate erred in law in basing her decision on extraneous factors.
14. The learned Magistrate erred in law and fact in apportioning liability 90%: 10% as against the Appellant in favour of the Respondent and failing to apportion the Respondent's liability at a minimal of 80%.
15. The learned Magistrate erred in law in holding that the Respondent proved his special damages claim of sum of Ksh. 2,216,415 which damages were not strictly proved as required in law.
16. The learned Magistrate erred in law and fact in failing to appreciate the correct evidence adduced and tendered in court and thereby granting a gratuitous award.
17. The decision in its entirety is against the evidence adduced before the trial court.
18. The entire decision is a misapprehension of the law.
19. Parties proceeded by way of written submissions.
20. It is not in dispute that an accident occurred on the material night at 1.02am; it is also not in dispute that the Plaintiff's Motor Vehicle sustained damage.
21. Despite the Appellant's having listed twelve grounds of appeal it is evident from the submissions that the only dispute is on the apportionment of liability by the learned trial magistrate.
22. On the issue of liability, the Plaintiff called three witnesses - the Assessor, the witness from the insurance company who confirmed that the money had been paid to settle the cost of repairs - and the police officer No. 80975 CPL Edward Mwaura from Emali Police Station.
23. No. 80975 CPL Edward Mwaura testified that the Road Traffic Accident was booked in OB 6/4/11/2014 at 6:20am by driver of KBY 980U that he had rammed into motor vehicle reg. No. KAA 506E/ZE 125/ along MSA/NBI Highway; that his motor vehicle was extensively damaged. He testified that he was the Investigating Officer in that case and upon investigations the driver of motor vehicle KAA 506E was charged for obstruction in Makindu MCC Traffic Case No. 280/14. He told the court that he visited the scene - and contrary to the evidence of the Driver of KAA, that there were no twigs at the front/back of the stationary motor vehicle, neither were the hazard lights on, there were no, warning signs. He established from the driver that the motor vehicle had stalled due to mechanical problems.



24. On their part the defence proceeded by having the statement of the driver of their motor vehicle adopted as evidence. The statement was admitted as evidence and the witness was not cross-examined. In the statement he stated that he had placed twigs & hazards to warn other motorists of his stalled motor vehicle.
25. The learned trial magistrate on hearing the matter considered the evidence and was persuaded that the Defendant's driver was to blame; that his motor vehicle stalled on straight stretch of road, at night and that he failed to warn over driver's/ road users of his stationary motor vehicle, a fact that was confirmed by the police officer who visited the scene. In those circumstances the court found the Defendant's driver was 90% to blame for the accident, and that the plaintiff's contribution was 10%.
26. It is argued by the Appellant that the fact that collision occurred is reason to hold the two drivers to blame - and that the learned trial magistrate was wrong to take the evidence of the police officer as against the uncontroverted evidence of the Defendant's driver on how the accident happened ; that the fact that the police chose to charge the Defendant's driver was not proof that he was more culpable than the Plaintiff's driver, and that the Plaintiff's driver failed to come to testify and to give his version on how the accident happened. This by itself left the Defendant's driver's testimony on how the accident happened uncontroverted.
27. It is submitted that the court in *Abbey Abubakar Haji v Marair Freight Agencies Ltd and Anor* showed a way of resolving such matters in the following statements:
28. A trial judge is under a duty when confronted by conflicting evidence in a traffic accident case to reach a decision and conclude that on a balance of probabilities one or other driver was guilty of negligence, or both are.
29. In some cases, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both
30. It is usually possible, but extremely difficult, to apportion the blame between two drivers guilty of negligence. If not, it is proper to divide the blame equally between them.
31. If the evidence as a whole is insufficient to establish the negligence of any driver or it cannot be inferred from the circumstances of the accident the drivers are not equally to blame. Neither is.
32. And on the weight of the evidence of a traffic charge against one of the drivers, the learned Judge in *Techard Steam & Power Limited v Mutio Muli & Mutua Ngao* [2019] eKLR had this to say

“It must always be remembered that the decision of who to charge where there is a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other cannot be taken to be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of appeal in *Calisto's Ochien'g Oyalo & Others v Mr. & Mrs. Aoko* Civil Appeal No. 130 of 1996, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it. I therefore do not read too much into the fact that the Appellant was charged and acquitted of the traffic offence



1. Further that each driver has the responsibility to be careful on the road and that the words of the Judge in *Karissa & Anor v Solanki and Another* [1969] EA Pg. 320 apply to the plaintiff's driver;

“but I am not satisfied that the car driver could not and should not as a reasonably careful driver, keeping a particularly keen look- out have seen the lorry in time to have swung to the left on to the verge left, no matter how uncertain his knowledge of the precise terrain there rather than run straight into the stationary lorry.”

1. It is further submitted that in *KCM Thyssen v Wakisu Estate Limited* [1960] EA Pg 288 where the driver of car was alleged to have been dazzled and/ or momentarily blinded by lights of oncoming vehicles leading him to crash onto a stationary truck on the road, the court found the driver guilty of some contributory negligence at 25%. The court held;

“The Plaintiff was guilty of some contributory negligence in that he should have slowed down or stopped when dazzled and was also driving at over 40m.p.h but there was less reason for the Plaintiff to expect a lorry to be parked in a prohibited area on a town road than in the country side and since the lorry was unlighted the Defendants were liable to the Plaintiff for three quarters of the damages.”

33. It is further submitted that regarding the degree of blameworthiness of drivers in a collision involving unlighted motor vehicles the court in *Patel v Yafesi & Others* [1972] EA pg 28 held that;

“The greater blame attaches to a driver who runs into such an unlighted vehicle on a straight road.”

20. It is the Respondent's position that the Appellant failed to discharge its evidential burden – or produce any prima facie evidence against the Respondent on liability. The respondent relied on *Quest Resources Limited v Japna Port Consultants Limited* [2015] eKLR and. *Winfred Nyawira Maina v Peterson Onyiego Gichana* where the court stated that;

“I think the foregoing justifies a little rendition of evidential burden for a fuller understanding of the decision of the court in this matter. The way I understand the law, the term Burden of proof, entails the Legal Burden of proof and evidential burden. The two terminologies are most of the time misunderstood; albeit distinct. I am concerned mostly with the evidential burden which initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See *Halsbury's law of England*, 4th Edition Vol. 17, Therefore, the Applicant must first lay prima facie evidence against the Respondent if evidential burden is to be created on the shoulders of the Respondent. In simple terms see what the Supreme Court said in the case of *Raila Odinga v IEBC & 3 others* [2013] eKLR that: -

“... a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden.”



34. This court is urged not to disturb the award on liability as the learned trial court considered the facts in arriving at its decision. The court is urged to either dismiss the suit or find that the Plaintiff/ Respondent was 80% to blame for the road traffic accident and further that the Respondent did not prove its claim.

Analysis and Determination

35. Evidently from the foregoing the issue for determination is whether the subordinate court was in error in finding in favor of the Plaintiff/ Respondent, in finding liability against the Defendant/Appellant at 90:10% in favour of the Plaintiff/Respondent.
36. On the issue of the claim – In the plaint - the particulars of special damages are set out at Kshs. 2,216,415/=, assessment fee at Ksh. 5,500 total - 2,221,915. The Plaintiff produced the certificate of motor vehicle examination by the NTSA showing the damage to the m/vehicle, an invoice from Simba Colt Motors dated 15/1/2015 no. 128239 for Kshs. 2,216,414/90, a letter of authority to repair, from the Insurance Co. to Simba Colt to repair the m/vehicle as per the Assessor's report dated 17/11/2014. There is also a supplementary report from Safety Surveyors Limited - changing the cost from Ksh 2,087,477/13 to Ksh 216,414/90, There is a previous report dated 10/11/2014 by the same Assessor indicating that cost of repair will be 2,087, 477/13. There is evidence that Safety Surveyors Ltd were paid Ksh. 5,550 assessment fees, and a satisfaction note signed by Muli Node – to the effect that the motor vehicle was repaired to his satisfaction. The note is dated 8/01/2015. In addition, there is a claim form from Mohammed Abad - to Kenya Alliance dated 7/11/2014.
37. The Plaintiff produced evidence to show that a Cheque was forwarded to the Assessor for the sum of Ksh. 5,550. There is an invoice from Simba Colt Motors and evidence that Simba Colt asked Kenya Alliance to pay . PW2 - testified that they produced a letter dated 23/1/2015 to Simba Colt informing them that the money was paid through RTGS - and a voucher as a proof of payment of the money to Simba Colt. She told the court that she had not brought the RTGS form - but that the bank statement clearly indicated that the money was paid.
38. From the record it is evident that the lower court file had disappeared and there was reconstruction and I can see from the record that some of those exhibits have not been availed in the record of appeal. However, from the judgment the learned trial court it is stated, "I note payment from Ksh. 2,222,214/ for repair being payment of Simba Corporation Ltd."
39. Hence though I did not see the documents, from the evidence of the PW2 and the finding of the trial court on the fact of payment, I find no reason to interfere with the finding of fact that the money was paid to Simba Colt by Kenyan Alliance.
40. On liability - it is not in doubt that the Defendant's motor vehicle stalled on the road creating obstruction. It is also not disputed that the Plaintiff's motor vehicle rammmed into the Defendant's motor vehicle - Evidently both the drivers are to blame to some extent. What is that extent of that blame is the issue?
41. Looking at the facts, the driver of the Defendant told the court in his evidence that he had put warnings, on the road when his motor vehicle stalled. However, when PW3 the Police Officer came to the scene no such warnings were visible. However he testified that it was a straight stretch of road. Hence in my view the Plaintiff's driver - if he was driving carefully and at a reasonable speed, would have seen the stalled motor vehicle and acted to avoid the accident. He never testified and hence the testimony of the other driver remains unchallenged.



42. A lot of weather has been put on the fact that Defendant's driver pleaded guilty to the traffic charge, but there are authorities that that by itself is not proof of negligence – as it is the police who chose who to charge when it comes to the criminal side of the matter.
43. My understanding of the facts as to how the accident happened is this, - one had their motor vehicle stall on the road, the other one drove into that motor vehicle. It appears to me that he drove too fast, without attention and hit the stalled motor vehicle from behind. Without evidence to show who was more negligent than the other it is my view that both ought to be equally at fault.
44. In the end - I find that on a balance of probability the claim was established as was the finding of the learned trial court.
45. On liability, the learned trial court put a lot of emphasis on the traffic charge to determine the degree of culpability. It is my view that was in error and it is on that basis that the judgment of the subordinate court is set aside and substituted with an award of liability at 50:50.
46. Judgment is entered for the appellant for the sum of 2,248,084 less 50% = 1,124,042 plus costs and interest of here and below.
47. The Appellant will have half the costs of this appeal
48. Right of Appeal 30 days

DATED SIGNED AND DELIVERED, THIS 12TH DAY OF APRIL, 2024.

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-05-21 08:42:27

