Makau & another v National Assembly (Civil Appeal E199 of 2022) [2024] KEHC 7815 (KLR) (1 July 2024) (Judgment)

Neutral citation: [2024] KEHC 7815 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E199 OF 2022

WM MUSYOKA, J

JULY 1, 2024

BETWEEN

PHYLIS MAKAU ..... 1ST APPELLANT

MARTIN MASINDE ..... 2ND APPELLANT

AND

NATIONAL ASSEMBLY ..... RESPONDENT

(An appeal arising from the judgment of Hon. SA Opande, Principal Magistrate, PM, delivered on 1st March 2022, in Milimani CMCCC No. 951 of 2019)

JUDGMENT

1. The suit, at the primary court, was initiated by the respondent, against the appellannts, for compensation, arising from a road traffic accident, which allegedly happened on 8th March 2016, within the basement at Protection House, along Parliament Road, involving motor vehicles registration marks and numbers KBT 522L and GKB 107B, belonging to the appellants and respondent, respectively. The allegation was that the appellants vehicle was so negligently driven that it hit and damaged the vehicle belonging to the respondent which was parked. The appellants filed a defence, in which they denied liability, and everything else pleaded in the plaint. In the alternative, they attributed negligence on the respondent.

2. A formal hearing was conducted. 4 witnesses testified for the respondent, and none for the appellants. Judgment was delivered on 1st March 2022. Liability was apportioned at 50%:50%. The respondent was awarded Kshs. 2,750,000.00, being the pre-accident value of the motor vehicle, and Kshs. 2,250,000.00, for loss of user. Each party was to bear its own costs.

3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 22nd April 2022, revolve around the award on loss of user not being supported by evidence; the

basic principles on material damage not being applied; and the court basing its decisions on extraneous factors.

4. Directions were given, on the disposal of the appeal, on 29th May 2023. The appeal, was, nevertheless, canvassed by way of written submissions. Both sides filed written submissions.

5. The appellant has submitted that the claim for loss of user was a special damage, that ought to have been specifically pleaded, and specifically proved. It is argued that what was produced, to prove the loss, was an invoice, and there was no evidence that the same was ever settled, and Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevams Limited [2015] eKLR (Warsame, M'Inoti & Murgor, JJA) is cited on that. It is also submitted that the loss of user was on the higher side, as the respondent hired a larger vehicle than the one that was damaged. It is submitted that the respondent should have attempted to mitigate his losses, and Kiptoo vs. Attorney General [2010] 1 EA 201, was cited . It is further submitted that that once the vehicle was written out, what is to be paid should be less the salvage value, and Pemuga Auto Spares and another vs. Margaret Korir Tagi [2015] eKLR (Janet Mulwa J) and Bungoma Line Sacco Society Limited vs. Super Bargains Hardware (K) Limited [2021] eKLR (Kemei, J). It is further submitted that the hiring of alternative transport for over 137 days was unreasonable, arguing that 14 days was what was reasonable, going by Farah Awad Gullet vs. CMC Motors Group Limited [2017] eKLR (HA Omondi, J). It is submitted that what ought to have been awarded was the loss of user at Kshs. 150,000.00, being Kshs. 5,000.00 for 30 days; and Kshs. 2,200,000.00, being the pre-accident value, less the value of the salvage.

6. The respondent has raised 3 issues for determination, different from the grounds of appeal in the memorandum of appeal, which was the basis of the appellants submissions. The 3 issues are whether the respondent was liable for the accident, it was entitled to the award of damages made, and costs. MacDougall, App vs. Central Railroad Co. Resp. 63 Cal. 431 and Francis Karanja Kimani vs. Wells Fargo Limited [2020] eKLR (Maina, J) are cited, for the submission that, with respect to contributory negligence, the burden was on the defendant to establish it, and not on the plaintiff, and, therefore, the court ought to have found the respondent 100% liable. It is further submitted that the principle of res ipsa loquitor should have been applied, and Leah Wambui Ngugi vs. George Mbugua Karanja & 2 others [2016] eKLR and Gachanja Thagana vs. Mwangi Wanjohi [2020] eKLR (Ngaah J). Finally, it is submitted that the trial court should have awarded costs to the respondent, as the successful party, and Party of Independent Candidates of Kenya & another vs. Mutula Kilonzo & 2 others [2013] eKLR (Mutende, J) and Orix Oil (Kenya) Limited vs. Paul Kabeu & 2 others [2014] eKLR (Gikonyo, J) are cited.

7. The appeal turns on only 2 issues, around material damage and loss of user.

8. On the award of Kshs. 2,700,000.00 for material damage, being the loss of the car, which was declared a total loss, it will be noted that the respondent retained the salvage, whose value was assessed at Kshs. 500,000.00. That meant that the actual loss to the respondent was not the total pre-accident value, of Kshs. 2,700,000.00, but that pre-accident value, less the salvage. I agree with the appellants, the trial court erred in awarding the pre-accident value, without deducting the salvage value. The awardable sum should have been Kshs. 2,200,000.00, and not Kshs. 2,700,000.00.

9. On loss of user, there are 2 aspects. The first is whether the said loss was specifically pleaded and proved, and the second is whether the respondent attempted to mitigate its loss. Let me consider the first aspect. Was the loss specifically pleaded? Yes, it was. At paragraph 13 of the amended plaint. Was it specifically proved? No, it was not. PW1 produced an invoice to support that expenditure. An invoice is a demand for payment, it Is not evidence or proof of payment. The appropriate proof of payment should have been a receipt, or some other document establishing that Kshs. 2,250,000.00

moved from the respondent, to the firm that provided the alternative transportation, or some other document evidencing acknowledgement of payment. Indeed, in Great Lakes Transport Co. (U) Ltd vs. Kenya Revenue Authority [2009] eKLR (Waki, Onyango Otieno & Visram, JJA), the court asserted that invoices were not receipts, unless they carried an endorsement that the goods, or services for that matter, for which the invoice was raised, had been paid for. The loss of user was not proved, in the circumstances.

10. On the second aspect, on whether there was mitigation of loss, in terms of the respondent looking for more reasonable or less costly alternatives, costing around Kshs. 5,000.00 or thereabouts, the appellants did not adduce any evidence on what would have been more reasonable. Indeed, they did not provide any material to demonstrate that the hiring of a car equivalent to the accident vehicle would have cost about Kshs. 5,000.00 per day, rather than Kshs. 25,000.00 per day. On the 137 days being unreasonable, and that the respondent should have hired an alternative for a period ranging between 14 and 30 days, I am cognisant of the fact that the respondent is a Government entity, funded from public funds, and can only procure a vehicle based on budgets and approvals, and purchasing a replacement of the vehicle written off cannot possibly be achieved within 14 or 30 days.

11. The respondent has raised, in its written submissions, certain issues. In fact, it has not responded to the grounds of appeal in the memorandum of appeal, nor to the issues submitted upon by the appellants. It has raised its own issues. It argues that liability should have been assessed at 100%, in its favour, rather than on a 50%50% basis between the parties. It has argued that the principle of res ipsa loquitor should have applied. It has also argued that costs should have been awarded to it.

12. All these arguments are formidable. On liability, the car belonging to the respondent was stationary, and was rammed from behind. The principle is that a driver who rams his vehicle into another from the rear is wholly to blame. In Multiple Hauliers (EA) Ltd vs. Justus Mutua Malundu & 2 others [2017] eKLR (PJ Otieno, J), the court stated that there is a general "presumption that he who hits another from behind is ipso facto negligent." It is proof of lack of proper lookout to ram into a stationary vehicle, whether the same is parked badly or not. No evidence was adduced by the appellants, that the said car was badly parked, so much so that a clash was inevitable. Liability should have been awarded at 100% against the appellants. See also Christine Mwigina Akonya vs. Samuel Kairu Chege [2017] eKLR (J. Ngugi, J), Samuel Stephen Were vs. Sukari Industries Ltd [2018] eKLR (Majanja, J) and Stanley Ogutu Attai vs. Peter Chege Mbugua [2019] eKLR (Ng'etich, J). The doctrine of res ipsa loquitor was pleaded, at paragraph 7 of the amended plaint, dated 3rd April 2019. The trial court should have considered it. It was pleaded that the vehicle was properly parked at a basement, and it was rammed into while so parked, and the material on record shows damage to the rear of the vehicle. That damage made the fact of negligence or lack of care speak for itself. See Nzoia Sugar Company Limited vs. David Nalyanya [2008] eKLR (W. Karanja, J). On costs, the mantra is that costs follow the event. The car owned by the respondent was rammed into, at its rear, while parked at a parking lot. That is what the documents placed on record say. If liability is apportioned at 100%, it should follow that the costs ought to be borne by the party bearing the greater responsibility for the loss.

13. The respondent did not file a cross-appeal, and I wonder whether I should consider the issues that it raises. the arguments it makes are very attractive, and in fact, correct positions. However, I cannot make any determinations on them, as there is no cross-appeal. A court decides on the basis of pleadings, where none exist, there would be no foundation for making determinations.

14. In the end, I find and hold that there is merit in the appeal, to the extent stated in paragraphs *8* and *9* of this judgment. I allow the appeal herein in those terms, so that the award of Kshs. 2,700,000.00, on material loss or damage, is set aside, and substituted with an award of Kshs. 2,200,000.00, and that

of Kshs. 2,250,000.00 is set aside altogether. Each party shall bear its own costs of the appeal. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 1ST DAY OF JULY 2024

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Ochieng, instructed by Ochieng K & Associates, Advocates for the appellant.

Mr. Atingo, instructed by Sophie Otieno, Advocate for the respondent.