Orient Banko Freighters Ltd v Waithaka (Civil Appeal E126 of 2021)
[2024] KEHC 10707 (KLR) (16 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10707 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E126 OF 2021

FR OLEL, J

SEPTEMBER 16, 2024

BETWEEN

ORIENT BANKO FREIGHTERS LTD ..... APPELLANT

AND

LIVINGSTONE WAITHAKA ..... RESPONDENT

(BEING AN APPEAL FROM THE WHOLE JUDGMENT DELIVERED BY HON CHARITY CHEBII OLOUCH (MRS) CHIEF MAGISTRATE IN MAVOKO CMCC NO 990 OF 2017 DATED 30th JUNE 2021)

JUDGMENT

A. Introduction

1. The Appellant was the plaintiff in the primary suit, where they pleaded that they were the beneficial owner/user and insured owner of motor vehicle registration Number KBF 986H Isuzu Pick -up (hereinafter referred to as the 1st suit motor vehicle) insured by Jubilee Insurance Company Ltd and sued the Respondent as the insured/ beneficial owner of Motor vehicle registration Number KAL 171U Volvo Salon (hereinafter referred to as the 2nd suit motor vehicle). It was alleged that on 28th July 2014, the 1st suit motor vehicle was being lawfully and carefully being driven along Namanga road and while at Athi River area, the 2nd suit motor vehicle was carelessly and recklessly driven by the respondent, his driver and/or servant that it was allowed to loss control and violently ram into the 1st suit motor vehicle, thereby causing it extensive damage. The Appellant therefore sought for damages to the tune of Kshs.891,160/= being cost of repair and investigations costs.

2. The respondent did file his statement of defence where he denied all the allegations made with respect to ownership of the 2nd suit motor vehicle and as to how the accident occurred. The respondent averred that on the material date, he was lawfully driving along Athi River – Namanga Road and noticed that two motor vehicles ahead of his motor vehicle had stopped and signaled indicating the drivers wished

to turn Right. The 1st suit motor vehicle was immediately ahead of his motor vehicle and he did stop at a distance behind it. Suddenly he realized that the 1st suit motor vehicle was reversing after it had collided with the Toyota probox which was ahead and despite hooting to warn the driver of the 1st suit motor vehicle not to reverse, he continued to do so and hit the 2nd suit motor vehicle by it rear. The respondent vehemently denied being negligent and to the contrary alleged that it was the Appellants driver who was negligent and urged the trial court to dismiss the suit.

3. During trial, the Appellant called Six (6) witnesses, who all testified and produced the relevant documents to prove its case. The respondent also testified and closed his case. The trial Magistrate after considering the evidence adduced and submissions made did find that the Appellant did not prove their case on a balance of probabilities and proceeded to dismiss the same with costs to the respondent.

B. The Appeal

4. The Appellant, being dissatisfied by the whole judgment did file their memorandum of Appeal dated 29th July 2021 and raised the following grounds of appeal namely: -

    a. That the learned trial Magistrate greatly misdirected herself in treating the submissions of the Appellant very superficially thereby erroneously arriving at a wrong conclusion on both liability and quantum.

    b. That the learned trial Magistrate erred in law and in fact by failing to appreciate that the Appellant had proved its case on a balance of probability thereby wrongly dismissed its case.

    c. That the learned trial Magistrate erred in law and fact in failing to appreciate liability on the part of the respondent without any basis in law and fact.

    d. That the learned trial Magistrate erred in law and fact by totally ignoring the evidence of the police officer who told the court that the Defendant was solely blamed for the accident.

    e. That the learned trial Magistrate erred in law and in fact in ignoring the contents of the police abstract which entirely blamed the defendant for the accident

5. At the hearing, the Plaintiff called five (5) witnesses. PW1 Bernard Kalei testified that he worked at Investic International investigators and was instructed by Jubilee Insurance co ltd to trace and establish the owner of the 2nd suit motor vehicle and his financial status. He did his investigations and established that the 2nd suit motor vehicle was owned by one Arthur Gichubi but he had sold it to the respondent, who was the beneficial owner thereof. He submitted his investigations report as Exhibit 8 and stated that he charged the Appellant insurer Kshs.35,150/=. PW2 Philip Wachira Gicheru stated that he worked at Jubilee Insurance Company as head of motor vehicle assessor. They received instructions from the claims adjustors to assess the 1st suit motor vehicle which was at Unity Auto Garage in Nairobi Industrial Area. They did assess the said 1st suit motor vehicle and compiled their report. The total costs of its repairs came to a sum of Kshs.879,651.20/=.

6. Upon cross examination PW2 indicated that he was a qualified motor vehicle assessor, and the assessment report presented to court was made in 2014 before he joined the Jubilee Insurance company ltd. The accident had occurred on 28.07.214 and the assessment was done two months later on 30.09.2014. The said report had photographs of the 1st suit motor vehicle and only one photo had a visible registration number of the said 1st suit motor vehicle.

7. PW3 Amiani Micheal stated that he worked at Jubilee insurance co ltd as a recoveries officer and his duties included following up on matters pertaining to subrogation. The appellant was their insured under policy Number NRB/2040/2012/92378 and after the accident he had reported the same to

them. They undertook assessment of the damages that occurred and commissioned Unity Auto garage to undertake its repairs and the same costed them Ksh.857,660/=. They further assigned PW1 to undertake investigations to established the owner of the 2nd suit motor vehicle and also paid his firm a sum of Kshs.33,500/=.PW3 produced into evidence all documentations made to support their claim and urged the court to enter judgment in their favour.

8. Upon cross examination, PW3 stated that as a matter of policy an insured should report an accident to the police station within 14 days and if there was a delay, proper reason should be given for the same. The accident occurred on 28.07.2014 and the appellant had reported it on 18.08.2014, which was outside the statutory period he was expected to have reported the same. As per their investigation, the 2nd suit motor vehicle hit the 1st suit motor vehicle from behind and the impact cause caused him to hit another motor vehicle in front. He also did not know where the 1st suit motor vehicle was before the accident occurred. In reexamination, the witness confirmed that the accident was reported immediately as the police abstract was dated 30.07.2014 and the 14 days provided was for the report to be made to the Insurance broker, who filled the accident report on 18.08.2024 and it was received at the insurance company on 19.08.2014,

9. PW4 P.C Maurice Juma attached to Athi River traffic base, stated that he had access to the documents relating to this accident and they had issued the police abstract on 30.07.2014 concerning a non-injury accident that occurred along Namanga road at Portland Area. Four motor vehicles were involved as per the OB No 4 of 28/7/14. The 2nd suit motor vehicle had rammed into the back of the 1st suit motor vehicle and as a result the 1st suit motor vehicle rammed into Toyota Probox KBQ 032B driven by one Emmanuel Wambua, and the said Probox as a result also rammed into the rear of motor vehicle KAY 457X pick-up driven by one Joseph Rono. All the four motor vehicles were being driven in the same direction and the respondent was to blame as he was driving the last car which hit the car in front of his, causing this chain reaction.

10. Upon cross examination, PW4 stated that he was not the investigating officer, but his testimony was based on the record obtained from the police file. The accident involved four motor vehicles and the volvo was the last vehicle, followed by the 1st suit motor vehicle, then the Toyota probox and the car ahead was KAY 457X pick up. The witness was shown photographs of the accident scene, but stated that he could not comment on the same as he did not know where the photographs originated from. He had blamed the 2nd suit motor vehicle as it was the last car in the chain and should have kept reasonable distance. He also did not believe the respondents version of events that it was the 1st suit motor vehicle that reversed into the 2nd suit motor and that was a misrepresentation of the facts relating to the accident.

11. PW5 (wrongly recorded as PW6) Paul Kibunyi Mutiro adopted his witness statement and stated that he was one of the directors of the Appellant Company, which owned the 1st suit motor vehicle. The said motor vehicle had been involved in a road accident on 28.07.2014 near Portland cement and had been hit from behind by the 2nd suit motor vehicle. At the time of the accident the said vehicle was being driven by their driver known as Joseph Nkoyo and they reported the said accident to the police and their insurer, Jubilee Insurance Co ltd, who allowed them to take the said motor vehicle to Unity Garage for repairs. He blamed the respondent for causing this accident and urged the court to allow his claim.

12. Upon cross examination, PW5 stated that he was not at the accident scene and the same was reported to him while he was working at Kasarani, and his diver had since left employment in 2015 and could not be traced to come testify in court. His wife too was a passenger in the 1st suit motor vehicle at the time of the accident and had informed him that the accident involved three motor vehicles. The 2nd

suit motor vehicle had rammed into their motor vehicle and the chain result was it ramming into the car in front. The witness was further show photographs taken at the accident scene and confirmed that it showed that his motor vehicle was damaged at the rear. He also knew the respondent and after the accident had spoken and each party agreed to repair their respective motor vehicles.

13. DW1, the respondent adopted his witness statement and confirmed that indeed an accident occurred on 28.07.2014 at Athi River area at about 2.00pm. He was from Namanga going to Athi River and on reaching Athi River - Namanga road Junction he came across vehicles waiting to turn into Athi River road. He stopped to wait for the motor vehicles ahead to move but suddenly notice that the 1st suit motor vehicle had engaged its reverse gear, as he saw the reverse lights. He hooted but the said motor vehicle reversed and hit his bumper. What had cause it driver to reverse was that it had hit a Toyota probox in front and hit his vehicle while reversing to disengage from the first accident. He came out and recognized he knew the passenger being carried in the 1st suit motor vehicle as PW5 wife and they were family's friends. He photographed the accident scene and they both drove to Athi River police station to report the accident and were all advised to repair their own motor vehicles. He was not to blame for the accident which occurred and was not charged in court. DW1 also categorically denied that the side of the 1st suit motor vehicle was damaged during this accident. That damage did not occur during the said accident.

14. Upon cross examination, DW1 stated that he did not report this accident to his insurer nor did the police blame him for causing the accident. He blamed the driver of the 1st suit motor vehicle for causing the accident and also confirmed that he had not pleaded fraud in his statement of defence filed. The photographs of the accident scene did not have a time cap and also did not show the side of the 1st suit motor vehicle. In reexamination DW1 reiterated that his version of events as to how the accident occurred was accurate and the photograph's produced to show the extent of damages were taken immediately after the said accident.

C. Determination

15. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123).

16. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal held:

> " This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect".

17. In Nkube v Nyamiro [1983] KLR 403, the same court stated that :

> " A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion".

18. Therefore, this court has solemn duty to delve at some length into factual details and revisit facts as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

19. In this appeal, the only issue for determination is whether the Appellant proved on a balance of probability that an accident did occur on 28th July 2014 along Namanga – Nairobi Road at Athi River area, involving the 1st and 2nd suit motor vehicle and if so, who was to blame for the said accident, what was the extent of damage to the 1st suit motor vehicle and at what cost was the 1st suit motor vehicle repaired.

20. From the record, it is not in dispute that an accident occurred involving the 1st and 2nd suit motor vehicle on 28th July 2014, which accident was reported at Athi River police station and police abstract issued on 30.07.2014. Further from the evidence adduced by PW4, PW5 and DW1 it was proved that the accident involved a pile up of four motor vehicles. Pick up KAY 457X was in front, it was rammed on the back by motor vehicle KBQ 032B Toyota probox, which in turn had been rammed on the back by motor vehicle KBF 986H Isuzu double cabin pick up (the 1st suit motor vehicle) and the last car in the pile up was KAL 171U Volvo saloon, (the 2nd suit motor vehicle) driven by the respondent.

21. The respondent was to blame as it was his car that rammed into the appellants car and caused the chain reaction of the pile up, and as a general rule, he should have kept safe distance and/or been more diligent to have braked on time to avoid the said accident. The respondent attempted to explain off the accident, by making averments that it was the 1st suit motor vehicle that had rammed into Toyota probox and in the process of reversing had hit his motor vehicle, but that explanation was found to be illogical by the trial court and I concur.

22. The third issue, and which determines the crux of this appeal is the extent of damage caused to the 1st suit motor vehicle. The trial magistrate did find that as a result of the accident, the major impact ought to have been on the rear and not the left side mirror to the back door, fuel tank and side of the 1st suit motor vehicle as alleged and certainly the side mirror would not have been ripped off. Such extensive damage could only have happened if the accident impact was on the said left side of the said motor vehicle. The other possibility was that the photographs tendered into evidence by the appellant were not a true representation of the 1st suit motor vehicle after the accident.

23. I have critically analyzed, all the evidence presented during trial and find that the representation made by the Appellants witnesses as to the extent of damage, which occurred on the 1st suit motor vehicle as a result of the said accident was not accurate. First and foremost, it should be noted that evidence presented did prove that the 2nd motor vehicle rammed into the back of the 1st suit motor vehicle and not to its left side. The extensive damage to the 1st suit motor vehicle, especially damage on the left back door (as point of impact), as shown in Exhibit P12 (Photograph's), was not explained by the appellants witnesses and leads to the irresistible conclusion that the damages to the 1st suit motor vehicle had been exaggerated and photographs produced most likely belonged to a different car thus not a true representation of the 1st suit motor vehicle damage after the said accident

24. Further still on the said evidence, the respondent also did rely on his photograph take of the accident scene captured by his phone and showing the four motor vehicles at the accident scene. The trial Magistrate did not rely on the respondent's photo for want of authenticity, but should have applied the same yard stick for the appellants photographs of the 1st suit motor vehicle, as both set of evidence were introduced into evidence in breach of Section 106 of the *Evidence Act*.

25. Finally, on the said issue, the Appellants first three photographs show a pick up's back and side view, which pick up has no number plate, it is extensively damages on the left side, and has no spare wheel. While last photograph then purports to exclusively show the 1st suit motor vehicle number plate. The first two photograph's taken from the back view should have shown the said spare tire and number plate and the only plausible conclusion that one can make is that there is no correlation between the first three photographs purportedly taken of the 1st suit motor vehicle and the last photograph showing the Number plate and spare tire alone.

26. In the case of Ndungu Kimanji v Republic [1979] KLR 282 it was held that :-

> " The witness in a case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

27. Unfortunately for the appellant, while he did prove that indeed an accident did occur, and the respondent was liable for the loss incurred, they exaggerated the damage occasioned to the 1st suit motor vehicle and presented untruthful evidence to prove the same. The trial magistrate cannot be faulted for arriving at her determination and I do uphold the same.

D. Disposition

28. Accordingly, I find that this Appeal lacks merit and proceed to dismiss the same with costs to the Respondent.

29. The Respondents costs of this Appeal is assessed at Kshs.150,000/= all inclusive.

30. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 16th day of September, 2024.

In the presence of: -

Mr. Okoyo for Appellant

No appearance for Respondent

Susan/Sam Court Assistant