REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 140 OF 2018

DOMINIC KIOKO MAKAU.....APPELLANT

-VERSUS-

DUNCAN NDONYE..... 1ST RESPONDENT

MORDERN COAST LTD .... 2ND RESPONDENT

(Being an appeal from the Judgment of Hon. J.D Karani (SPM) in the Senior Principal Magistrate's court at Makindu, civil case No.486 of 2018, delivered on 22nd August 2018).

JUDGMENT

1. In a judgment delivered on 22nd August 2018 the magistrates' court at Makindu gave judgment in favour of the Appellant as follows –

a. General damages - Kshs.800,000/=

b. Add specials - Kshs. 3,550/=

c. Less 40% liability - Kshs. 321,420/=

TOTAL - Kshs. 482,130/=

2. Dissatisfied with trial court's judgment the Appellant has now come to this court on appeal on the following grounds –

1. That the magistrate erred in law and fact in devising a theory that the offending vehicle was not a public service vehicle purely because it was described in the copy of records as Mitsubishi F.H during registration, contrary to evidence tendered before her and which was not controverted by the defendant.

2. That, the honourable court erred in law and fact in assuming that a bus cannot be made out of the chasis of a Mitsubishi; F.H and fell into error in insisting that the vehicle must have been a lorry.

3. That, the honourable magistrate erred in fact and law in holding that the plaintiff was not a passenger in a public service vehicle contrary to evidence tendered before her by the plaintiff and which was not controverted by the defence.

4. That, the honourable magistrate erred in law and fact in holding the plaintiff to have contributed to the occurrence of the accident at 40% when he was not the driver of the offending motor vehicle or in control of the said motor vehicle or any other vehicle.

3. The appeal proceeded by way of filing written submissions. The Appellant filed written submissions but the Respondents failed to file submissions, even when they were given an opportunity to do so. I also note that though the Appellant's counsel filed written submissions no legal authority was cited by them.

4. This being a first appeal, I have to start by reminding myself that I am required to reconsider the evidence afresh and come to my own independent conclusions – see **Selle –vs- Associated Motorboat Co. Ltd (1968) EA 123** – wherein the court stated –

"An appeal to this 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 an allowance in this respect …"

5. The main issues for my decision are two. The first is whether the magistrate was correct in finding that the subject vehicle was not a public service vehicle. The second issue is whether the trial court was right in finding that the Appellant was contributorily negligent.

6. With regard to the first issue, the vehicle in question was officially described in the official records of the National Transport and Safety Authority as Mitsubishi – vehicle model FH215, and body type LORRY/TRUCK. Though the Appellant says that this is the only evidence the magistrate relied upon in finding that the subject vehicle was not a public service vehicle, that is not true. Under section 107 of the Evidence Act (Cap 80) the burden was on him to establish that he was a fare paying passenger in a public service vehicle.

7. I note that in the P3 form (medical examination report) the vehicle was described as MITSUBISHI (FH). In the expert medical report by Dr. Dino Aaron Kyalo dated 6/5/2016 also the vehicle was described as MITSUBISHI (FH). Further in the evidence of Pw1 Cpl Willengum Wambu the police officer who produced the police abstract report the vehicle was merely described as Mitsubishi motor vehicle. Though the witness said that it was a minibus his evidence was that he got that information from the Occurrence Book which was not produced in court.

8. It is also of note that in his own evidence in chief, the Appellant never stated that the vehicle was a passenger minibus, and only in cross examination did he state that it was a public service vehicle without saying whether it was a bus or a minibus. He also said in cross-examination that he was seated between the driver and conductor in the front cabin but did not say that he paid fare or was to pay fare or whether there were other passengers in that vehicle when he boarded it.

9. In my view from the evidence on record, the Appellant failed to establish on the balance of probabilities that the Mitshubishi vehicle was a minibus or a public service vehicle. I thus agree with the trial court's finding that the vehicle was not a public service vehicle.

10. With regard to the second issue whether the trial court was correct in finding that the Appellant was contributory negligent, the burden was on the Respondent to establish such contributory negligence on the balance of probabilities. In this regard, there is no evidence at all that there was any notice to the Appellant that he was voluntarily taking a risk by boarding the vehicle. There is also no evidence or suggestion that the Appellant did anything or failed to do anything that contributed to the occurrence of the accident.

11. In my view, the fact that a person boards a vehicle that is not a public service vehicle *per se,* does not render him or her contributorily negligent. I thus find no legal basis for the trial court's finding that the Appellant was contributorily negligent herein. I will thus vary the trial court's finding in that aspect.

12. Consequently, the appeal succeeds in part. I will uphold the trial court's finding that the subject vehicle was not a public service vehicle. I however, vary the trial court's finding on contributory negligence and find that the Appellant was not contributorily negligent.

13. As a result, I set aside the magistrate's findings that the Appellant was contributorily negligent and enter judgment for the Appellant against the Respondents jointly and severally in the following terms –

a. General damages - Kshs. 800,000/=

b. Add special damages - Kshs. 3,550/=

Total - Kshs. 803,550/=

14. I award the costs of the appeal and interest to the Appellant against the Respondents jointly and severally.

Dated and delivered this 2nd day of March 2021, in open Court at Makueni.

GEORGE DULU

JUDGE.