



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

HIGH COURT CIVIL APPEAL NO.13 OF 2018

MULTIPLE HAULIERS (E.A.) LIMITED.....APPELLANT

VERSUS

ABDI FATAH.....1ST RESPONDENT

ABDUL HALIMA HUBILE.....2ND RESPONDENT

(Being an Appeal and Cross Appeal from the Judgment and Decree of Hon.

S.M. MOKUA (CM) delivered at Kericho on 10/4/2017 in CMCC. No.473 of 2014)

J U D G M E N T

1. The Plaintiff/Appellant filed a Plaint in the Chief Magistrate's Court in CMCC. No.473 of 2014 seeking the value of Plaintiff/Appellant's Motor Vehicle and costs for extensive damages occasioned to the Appellant's Motor Vehicle and loss of user of Motor Vehicle Registration No.KBY 796 Y on 26/9/2014 when it was involved in an accident with the Defendant/Respondent's Motor Vehicle Registration No.KBM 702 V/ZC 4181 along Kerico-Nakuru Road at Chegaik Area.

2. The Defendant/Respondent denied the Plaintiff/Appellant's claim and they filed a defence and Counter-Claim also seeking damages occasioned to the Prime Mover and Trailer and also loss of user.

3. The Plaintiff/Appellant was seeking the following damages: -

(a) Cost of Motor Vehicle

Registration No. KBY 796F (plus VAT) - Kshs.1,959,124/=

(b) Motor Vehicle Assessor - Kshs. 21,760/=

(c) Police Abstract - Kshs. 100/=

(d) Motor Vehicle Search - Kshs. 1,500/=

(e) Loss of user - Kshs. 225,000/=

4. The Defendant/Respondent also Counter-Claimed for the following: -

(a) Damage to the Prime Mover

Reg. No.KBM 702V - Kshs.2,915,000/=

(b) Damages to Trailer ZC 4181 - Kshs.3,000,000/=

(c) Loss of 17,174 Litres of HFO - Kshs.1,304,685/=

(d) Towing charges from scene to NBI - Kshs. 105,000/=

(e) Police Abstract - Kshs. 100/=

(f) Loss of user - Kshs. 800,000/=

5. The Court found that it was not possible from the evidence to ascertain who was to blame for the accident and apportioned liability at 50:50%.

6. The Court awarded the Plaintiff/Appellant Kshs.2,288,750/= and the Defendant/Respondent Kshs.4,577,500/= subject to apportionment at 50:50%.

7. The Plaintiff/Appellant appealed to this Court and the Defendant/Respondent filed a Counter-Appeal.

8. The Plaintiff/Appellant appealed on the following grounds:-

(a) THAT the Learned Magistrate erred by apportioning liability at 50:50% yet the Appellant had called a Police Officer who said the Defendant's Vehicle was to blame for the Accident.

(b) THAT the Court erred in admitting the Defendant/Respondent's documents that were not filed in Court.

(c) THAT the Court did not rely on the Assessor's Report despite the fact that the Assessor attended Court and testified.

(d) THAT the Court erred in dismissing the Plaintiff's claim for Special Damages yet the same were specifically pleaded and proved.

(e) THAT the Plaintiff/Appellant was not served with the hearing notice during the hearing of the Counter-Claim and yet despite that, Judgment was rendered in the case.

9. The Defendant also Counter-Appealed on the following grounds:-

(a) THAT the Trial Court erred in apportioning liability at 50:50% yet the Defendant/Respondent called witnesses who testified and produced Exhibits that exonerated Motor Vehicle Reg. No.KBM 709Z V/ZC 4181 from liability.

(b) THAT the Trial Court erred in law and fact in failing to appreciate the law relating and dealing with disputes of this nature.

10. The parties filed written submissions in the appeal which I have duly considered. The Plaintiff/Appellant submitted that Trial Court erred in apportioning liability at 50:50% yet the Plaintiff called a witness who blamed the Defendant's Driver (the 1st Defendant) for the Accident.

11. The Plaintiff/Appellant further submitted that the Trial Court relied on the testimony of the 1st Defendant who was charged with a Traffic Offence arising from the Accident and further that the Trial Court admitted the Defendant/Respondent's document which were not filed in Court.

12. The Defendant/respondent opposed the Appeal and submitted that the same should be dismissed and the Cross-Appeal be allowed for the following reasons:-

(a) THAT the Plaintiff's witness, a Police Officer was not at the scene of the Accident when the Accident occurred and he only described the scene of the Accident as he found it after the Accident and his evidence required corroboration.

(b) THAT the 1st Defendant/Respondent was acquitted of the Traffic Offence and the Plaintiff failed to prove that the 1st Defendant/Respondent was to blame for the Accident.

(c) The Defendant/Respondent also submitted that the Plaintiff did not point out which of the documents produced by the Defendant/Respondent had not been filed in Court. On the issue of non admission of the Assessor's Report by PW.1, it was submitted that PW.1 was not the author of the said document.

13. The first duty of the first Appellate Court is to re-evaluate the evidence adduced before the Trial Court and arrive at its own conclusion bearing in mind that the Trial Court had the opportunity to see the witnesses. (See *Selle -VS- Associated Motor Boat Co.* [1968] E.A. 123.

14. In the current case, the issue for determination are as follows: -

(i) Whether the Plaintiff/Appellant proved his case to the required standard.

(ii) Whether the Defendant/Respondent proved the Counter-Claim to the required standard.

15. On the issue of prove of the Plaintiff/Appellant's claim, the Plaintiff/Appellant called the Police Officer who visited the scene after the Accident had occurred. This witness did not witness the Accident and further he was not the right person to produce the Assessment Report.

16. The Plaintiff did not call the Assessor and it follows that the Plaintiff did not prove his case to the required standard in civil cases that is

on a balance of probabilities.

17. I find that the Defendant/Respondent called the 1st Defendant/Respondent who was driving the Defendant's Motor Vehicle when the Accident occurred. His evidence was not controverted.

18. Although the 1st Defendant/Respondent was not convicted in the Traffic Case, the standard of prove required in Traffic Cases is higher than that in Civil Cases.

19. I find that the Trial Court was right in apportioning liability at 50:50 in the circumstances of this case.

20. I also find no reason to tamper with the award by the Trial Court. *The Court of Appeal in Kemfro Africa Limited t/a "Meru express Services (1976)" & Another versus Lubia & Another (No.2) (1985) eKLR* stated as follows; "*The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.*"

21. Similarly in *Catholic Dioses of Kisumu versus Tete (2004) eKLR*, the Court of Appeal at Kisumu stated as follows; "*It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.*"

22. I find that both the appeal and Counter-Appeal lack in merit and both are dismissed.

23. Each party to bear its own costs of the Appeal.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 1ST DAY OF OCTOBER, 2021.

A. N. ONGERI

JUDGE