REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 58 OF 2018

MWEMA MUSYOKA.....APPELLANT

-VERSUS-

PAULSTONE SHAMWAMA SHELI...RESPONDENT

(Being a first Appeal from the original judgment of the Learned Senior Resident Magistrate Hon. F. Munyi dated 27/4/2018 in her Nakuru Chief Magistrate's Court Civil Suit number 1466 of 2015)

JUDGMENT

1. This appeal arises from the judgment in favor of the plaintiff/Respondent in the lower court case **Number CMCC NO.1466 of 2015** delivered on the 27/4/2018.

The appellant, being dissatisfied with the said judgment lodged this appeal, on grounds appearing on the Memorandum of Appeal filed on the 24/5/2018 on two main grounds that:

1. The trial magistrate misdirected herself by reliance on the police abstract to come to a finding that the appellant's vehicle Reg. No. KBS 809Z was to blame for the accident.

2. The trial magistrate erred both in law and fact in her interpretation and application of the doctrine of subrogation thus arrived at a wrong conclusion, on the Respondents capacity to sue the appellant.

2. As the first appellate court, this court has been urged to re-examine the entire evidence and come to own findings and conclusion and set aside the judgment, and dismiss the lower court case with costs.

3. The pleadings.

By his plaint filed on the 21/12/2015, the Respondent being the registered owner of Motor Vehicle Reg. NO. KBS 183 N was on the material date, the 22/12/2012 hit by the appellant's vehicle, Reg. No. KBS 809Z along the Nakuru-Nairobi Highway by what the appellant pleads as negligence of the appellant's driver, in particular, by ramming into the rear of the vehicle, due to excessive speed, failure to keep a safe breaking distance between the two vehicles and failure to have a proper look out for other vehicles on the said highway.

As a result the respondent's vehicle was damaged and the loss assessed at Kshs.592, 570/= to which he was paid by his insurer under the Insurance Policy. The Respondent then proceeded to file the lower court case, on behalf of the insurance (Jubilee Insurance Co. Ltd) to recover the loss paid by the Insurance under the subrogation doctrine.

4. In its defence, the appellant denied the totality of the claim.

Upon hearing of the parties interparties, the trial magistrate allowed the respondent's claim and dismissed the appellant's defence stating that the claim was properly and competently in court under the doctrine of subrogation.

The above prompted the appellant to lodge this appeal, on the grounds as stated earlier at Paragraph (1) of this Judgement.

5. A brief background to the causation of the accident is that on the material time, the respondents vehicle KBS 183 N was violently rammed into its rear by the appellants vehicle KBS 809Z while it tried and attempted to swerve to avoid a head on collusion with an oncoming vehicle. The respondent's vehicle, upon impact, hit a trailer that was ahead of it.

The police abstract obtained after investigations stated that the appellants vehicle, KBS 809Z was to blame for the accident, and the appellant's driver held liable in negligent in the manner of controlling and driving the said vehicle KBS 809Z.

Together with the two vehicles stated, there were two others, that were in the pile up, following the accident.

These were motor vehicle Reg. No. KBK 823L and KAY 523 F, whose owners were not parties to the primary suit.

6. The Respondent's Case.

Evidence was adduced by the Respondent, the owner of the vehicle Reg. No. KBS 183N. The driver at the material time did not testify. He relied on what he stated as information from his driver, that his vehicle Reg. NO.KBS 183N was rammed onto from the rear by motor vehicle KBK 823L and as a result, it rammed onto motor vehicle KAY, and further that the two vehicles did not come into conduct with his vehicle. It was his testimony that upon investigations the appellant's vehicle was blamed and a police abstract issued to that effect. The respondent further testified that motor vehicle No. KBS 809 Z was found to have had part of its tyres outside the yellow line as it attempted to avoid an accident, which it could not, and the impact transmitted to the other vehicles and eventually reached motor vehicle KBS 183N, the Respondents vehicle.

7. Appellants Case.

The appellant testified before the trial court as the owner of vehicle Reg. No. KBS 809Z on the date of the accident, but being driven by his driver one Kamau, who did not testify.

He did not know how the accident occurred but relied on the police abstract, stating that his vehicle was among the piled up vehicles and was the one blamed by the investigating officer, yet it had no conduct with the Respondent's vehicle.

8. Issues For Determination.

1. Whether the Respondent had capacity to sue the appellant in the trial court.

2. Whether there was sufficient evidence on record upon which the appellant's vehicle Reg. No. KBS 809Z could have been held wholly liable for the accident loss and damage to the Respondent.

9. Analysis of the Pleadings, the evidence and findings.

Issue NO 1.

The Respondent's vehicle Reg. NO. KBS 183 N was insured through Jubilee Insurance Co. Ltd. The policy document was produced in Court as well as the assessment report as Exhibit 2 and 3 respectively. The vehicle was repaired as per the assessment report in the sum of KShs. 527, 040/= - Exhibit 5-9. The lower court suit was filed in the respondent's names, but on behalf of the Insurance Company under the doctrine of subrogation.

In his submissions, the appellant faults the trial court stating that it misdirected itself on the said doctrine while admitting that the respondent was duly compensated for the loss by his insurers, and thus submitted that it is the Insurance Company that ought to have instituted the suit in the name of the respondent, and not the respondent in his name.

10. I have considered the plaint as drawn.

Paragraph 6 thereof states:

> "The loss was duly paid for by the insurers of the plaintiffs' said motor vehicle Reg. No. KBS 183 N namely Jubilee Insurance Co. Ltd which has instituted this suit in the name of its insured namely the plaintiff herein for the recovery of its outlay in accordance with the doctrine of subrogation".

I have also considered the documents produced by the plaintiff as exhibits. These are:

> The police abstract that shows the insurer of the vehicle KBS 183N as Jubilee Insurance Co. Ltd – (PExhibit 4), Assessment report, motor vehicle accident claim form, motor vehicle Repair estimates and Garage, Haji Motors, claim credit note showing amount paid as Shs.527,040/= to the garage, Haji Motors as well as the investigation report.

11. These documents are under the letter head and produced by authority of Jubilee Insurance Company Ltd – Pexhibit 2-7 – without any objection from the appellant's advocates who participated in the court proceedings fully.

It is therefore evident that Jubilee Insurance Company, the insurer of the Respondent's vehicle participated in the case through the respondent, contrary to the appellant's submission that it did not participate in the suit.

12. The doctrine of subrogation has been stated, and defended in numerous court decisions, among them:

i. The Court of Appeal in **African Merchant Assurance Co. Ltd Vs. Kenya Power & Lighting Co. Ltd (2018) e KLR** rendered that

> "Every right of the insured accrued or to accrue will by way of subrogation pass to and absolutely rest in the insurer to the extent that loss or damage incurred by this policy may be made good or diminished thereby"

ii. In **Dock Ltd Vs. Innesco Assurance Co. Ltd the Court (Odunga J)** stated

> "that subrogation applies in situations where, by virtue of being an insurer, the Insurance Company is entitled to be placed in the position of the insured and to succeed to all rights and remedies against third parties in respect to the subject matter of insurance".

iii. Further in Opiss Vs. Lion of Kenya Insurance Co. Ltd. Civil Appeal No. 185 of 1991, it was held that

> "the right to subrogation does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured"

13. Thus, for an insurer to be subrogated the rights of the insured, the insured must first be indemnified by the insurer and only then can the insurer step into the shoes of the insured.

The Insurance Company must in the first instant satisfy the loss claim so as to give a right to itself to sue in the insured's name, to recover the loss from the liable party.

14. In this appeal, it is evident that the insurance had satisfied the respondents claim by payment of the loss to the respondent which was evidently done, in the sum total of Kshs.592,570/= plus costs.

There is no doubt therefore that the respondent was properly suited and had the necessary legal capacity to sue by its name on behalf of the insurer, to recover on behalf of the Insurance Company, from the party it deemed to have been at fault, and blamed for the accident.

15. Issue NO 2.

The appellant's and respondent's evidence has been briefly stated above. The appellant's driver did not testify as to how the accident occurred, in his view. That left the respondent's evidence unchallenged and uncontroverted. The investigating officer made a finding that the appellant's driver was to blame and stated so in the police abstract.

Five vehicles were involved in the accident. The respondent testified that his vehicle Reg. NO.KBS 183 N did not come into conduct with the Appellants vehicle Reg. NO. KBS 809Z, and that upon investigations, the traffic officers found the appellant's vehicle to have been the cause of the accident, resulting to the pile up where the five vehicles rammed onto each other's rear side.

16. It was his evidence that the vehicle that directly hit and had contact with his vehicle was Reg. No. KBK 823L upon which his vehicle rammed onto the rear of vehicle Reg. NO. KAY 523L, and that there was no direct contuct between his vehicle and the Appellant's vehicle KBS 809Z. The respondent reiterated that as the vehicle (lorry) Reg. NO. KBS 809Z was the one that initiated the accident, and further blamed by the police, it was the right party that was sued for the eventual damage.

17. It is trite that he who alleges must prove, and a statement of defence which is not supported by evidence remains as mere statements without any evidential value – **Section 107 Evidence Act.**

Section 109 Evidence Act places the onus of proof on the person who alleges a fact. In the case **Kiema Mutuku Vs. Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258** the Court rendered that there is no liability without fault in the Kenyan legal system and a plaintiff is under a duty to prove his allegations of negligence on the defendants driver, and as specifically pleaded in the statement of claim.

18. At paragraph 4 of his plaint, the respondent alleged that the appellant's vehicle Reg. NO. KBS 809Z violently rammed into the rear of his vehicle, and reiterated the same in the particulars of negligence.

It is trite that a party is bound by its pleadings and that any party's evidence that is at variance with its pleadings must be disregarded, - **Court of Appeal Civil Appeal NO. 219/13 I.E.B.C & another Vs. Stephen Mutinda Mule & 3 other.**

A close examination of the Respondent's evidence shows that the said pleadings are not supported by the evidence adduced before the trial court.

The appellant's vehicle never came into contuct with the respondent's vehicle there having been two vehicles between the two.

19. Was the reliance on the statement in the police abstract therefore sufficient to place all the blame on the appellant's vehicle?

First, the appellant's driver did not testify. Though the respondent's evidence was unchallenged, he had a duty to adduce cogent and clear evidence to attach liability on the appellant's driver, taking circumstances thereto into consideration. It cannot be taken as the gospel truth, for the mere fact that it was unchallenged. Further, none of the drivers of the accident vehicles was charged in a traffic court. The investigating officer did not testify. To that extent, it is not clear on what basis the police abstract was filled, attaching total blame on the appellant's vehicle, more so after the respondent admitted that his vehicle was not hit by the appellant's vehicle.

20. In the case **Mzamili Katana Vs. MG Motors Group Ltd & Another (2006) e KLR, Maraga J (as he then was,)** faced with similar circumstances rendered that,

> "A problem, however arises where the injury or further injury suffered does not appear to all as an immediate and obvious consequence of the defendant's wrongful act or omission. In such greater burden of proving that his injury or further injury, though not as an immediate and obvious consequence of the defendant's wrongful act, is nonetheless attributable to the defendant's act and that there was no norus actus interveniens. He has to prove that there was no break in the chain of action and that the defendant's negligence was the effective or proximate cause of his injury".

21. In this appeal, there is no complete and unbroken chain from which an inference can be drawn that it was the appellants vehicle that alone caused the damage and loss to the respondent, more so upon the respondents evidence that the appellants vehicle did not directly ram onto the rear of his vehicle – **Mzamili Kata (Supra).**

Further, I have not found any evidence that the appellant's vehicle was the sole cause of the accident save an entry in the police abstract that the appellant's driver was to blame, without any evidence to support the statement.

22. As stated in **Kiema Mutuku Case (Supra),** a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

In my considered opinion, the respondent has failed to establish a firm case that the appellant's vehicle was the obvious and immediate cause of the accident, and the Sequel damage to his vehicle, despite failure by the driver of the vehicle to testify.

I do not agree with the respondent's submissions that the appellant's vehicle was held liable upon investigations by the Nakuru Traffic Police officers on whose behalf no evidence was tendered on the alleged investigations and findings. Other than the police abstract, no other documents were produced by the investigating officer, having not testified.

23. An entry in a police abstract is not prove of the cause of an accident. Evidence ought to be called to support the credibility or otherwise of the entry, more so in a Civil suit.

Having rendered as above, I am not persuaded that there was sufficient evidence presented before the trial court upon which the finding of blame upon the appellant could be base on.

24. Ultimately, upon careful re-examination of the entire evidence adduced before the trial court as mandated of the first appellate court, as this court is, I am persuaded that the trial court applied itself properly on the application of the Doctrine of Subrogation, but misapprehended the evidence on record as to causation of the accident and thus arrived at an entirely erroneous findings and conclusion that the appellant's vehicle was wholly to blame for the accident.

25. Consequently the Appeal succeeds in part. I set aside the trial court's judgement delivered on the 27/4/2018 and substitute it with a finding that the respondent failed to prove his case upon a balance of probability on liability and dismiss the suit.

Parties bears its own costs on the appeal, and the court below.

Orders accordingly.

Delivered, signed and dated at Nakuru this 6th Day of February 2020.

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J.N. MULWA

JUDGE