REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 2 OF 2019

TIMELESS COURIER SERVICES.....APPELLANT

VERSUS

JAMES MOGENI OSUGO.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court

in Kisi CMCC No 223 OF 2016 on the 30th November 2018,

by Honorable S.K. Onjoro (SRM))

JUDGMENT

1. The respondent was the plaintiff before the lower court vide a plaint dated 16th March 2016 and an amended plaint dated 6th April 2017 before the Chief Magistrate's Court at Kisii. He alleged that on 24th October 2015 he was driving Motor Vehicle Registration Number KBA 441T along Kisii-Kilgoris highway when he saw the appellant's driver negligently driving Motor Vehicle Registration Number KCD 831E and permitted the same to collide with his vehicle. The respondent claimed that as a result of the accident he sustained severe bodily injuries and his motor vehicle was extensively damaged beyond repair and declared a write off with a pre-accident value of Kshs 2,530,000/-. He averred that the appellant should be vicariously liable for the tortuous acts committed on him.

2. He claimed that as a result of the loss he was left with no choice but to hire a taxi for a period of 60 days as alternative transport at the cost of Kshs 5,000/- per day. He also alleged for material damage, special damage and loss of user.

3. The appellant filed his defence on 26th April 2016 denying the claim. He claimed that the accident was not wholly caused by the negligence of the appellant and maintained that motor vehicle KCD 831E was driven prudently with due care at the time of the accident. It was further pleaded that the accident was occasioned by the negligence of the driver of motor vehicle registration number KBA 441T who drove the vehicle at excessive speed and failed to give proper warning and indication of his movement thereby stopping abruptly without regard to other road users specifically the driver of motor vehicle registration number KCD 831E.

4. The trial court found that the appellant was 100% liable and awarded the defendant Kshs 2,350,000/- for material damage and Kshs 5,900 as special damages.

5. Aggrieved by the trial court's finding the appellant lodged a Memorandum of Appeal on 15th January 2019 on the following grounds;

> *1. The learned trial magistrate erred by arriving at a finding on liability at 100% against the appellant which was not supported by the evidence adduced at the trial.*
>
> *2. The learned trial magistrate erred both in law and fact in basing his finding on irrelevant matters.*
>
> *3. The learned trial magistrate erred in law and in fact in failing to appreciate or take into account the appellant's submissions or at all.*
>
> *4. The respondent's case was not proved on balance of probabilities as is required by law.*
>
> *5. Special damages were not properly proved as required.*

6. The learned magistrate erred on all points of fact and law in as far as both liability and quantum are concerned.

6. The appellants are aggrieved by the trial court's finding on the issue of liability and quantum of damages. The duty of the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co. [1968] EA 123*)**.

7. The evidence before the trial court was as follows. James MogeniOsugo (Pw1) told court that on the material day whilst at Nyataro he saw a lorry on the opposite direction heading to its lane, he tried to swerve but was knocked down by the vehicle. He testified that he reported the incident to the police and also produced an assessment report showing the vehicle was a write-off. Caleb Osodo PC No 82021(Pw2) testified that the driver of motor vehicle registration number KCD 831E was driving from Kilgoris direction towards Kisii and upon reaching the accident location he improperly overtook and as a result collided with motor vehicle KBA 441T. The driver of the motor vehicle registration number KCD 831E, John Nderitu, was charged with careless driving to which he pleaded guilty and was fined Kshs 5,000/-. He produced the police abstract and the inspection report.

8. Francis Egesa (Pw3) told court that he works with AA Kenya as a motor vehicle assessor/valuer and has worked with the company for 5 years. He found that various parts of the motor vehicle in question was damaged and the extent of damage was Kshs 4,089,676/-. The pre-accident value was Kshs 2,000,530/- while salvage was Kshs 180,000/-. They were paid Kshs. 5900/.

9. The appellant called John Nderitu (Dw1) as its witness who adopted his statement filed on 7th October 2018. It was his testimony that on the material day he was driving at about 40 kph, traffic flow was light and it was raining heavily, the road surface was good wet tarmac his wipers and both head lights were on. As he was negotiating a sharp left curve on his left lane he saw another vehicle ascending the sharp curve. On reaching the middle of the road the land rover collided with his vehicle causing his vehicle to spin but he managed to stop the vehicle on the right lane. He blamed the motor vehicle registration number KBA 441T for the accident.

10. The appeal was canvassed by way of submissions. The appellant cited the case of **Kenital (K) Ltd v Charles Mutua Mulu & Other (Eldoret HCCA 103 of 2001) (unreported)** where the court found that failure of the police to determine from the scene of the accident which motor vehicle was to be blamed and the absence of eye witness evidence diminishes the appellant's chance to prove a case for negligence against the defendant. They submitted that the respondent did not avail an eye witness to corroborate his testimony and liability ought to have been shared equally between the parties. On the issue of quantum it was submitted that as per the assessment report the pre accident value of the vehicle was Kshs 2,530,000/- and the salvage value Kshs 180,000/-. They contend that the amount was not adequately justified and proved. As for the special damages awarded they argued that they were not genuine receipts produced to support the claim.

11. The respondent in his submissions argued that the appeal was incompetent and of no consequence as there was no certified copy of the decree appealed against. On the issue of liability they argued that Pw2 gave clear testimony that the appellant's driver was charged with an offence of careless driving in Traffic Case No. 749/2015 to which he pleaded guilty. Since the driver admitted that he drove the motor vehicle registration number KCD 831 E carelessly the trial court was correct in finding the appellant 100% liable. The respondent submitted that he pleaded and proved Kshs 2,350,000/- as material damages to the respondent and that there is not an ounce of evidence on record to warrant interference of the trial magistrate's finding on quantum.

12. Having considered the submissions of parties, the evidence and the law, I find that the court cannot support the trial's court holding that the appellant was 100% liable for the accident. In the case of **Robinson vs. Oluoch (1971) EA 376** it was held that:

> ***"Careless driving necessarily connotes some degree of negligence and in those circumstance it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent; but that is a very different matter from saying that a conviction for an offence involving negligence driving in conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what Section 47A states. It is quite proper from a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the Plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. Accordingly, the Judge was right in not striking out the defence as a whole."***

13. The appellant maintained that the accident was not wholly caused by his actions. The only persons who witnessed the accident were Pw1 and Dw1. Both the two witnesses had plausible rival explanation as to how the accident occurred. Although the respondent called Pw2 to its aid, Pw2 did not witness the accident and could not give any evidence as to the cause of the accident. There was no other evidence by the respondent to sway this court to make a determination that the accident was wholly occasioned by acts of the appellant. The Court of Appeal in ***Hussein Omar Farah v Lento Agencies*** **CA NAI Civil Appeal 34 of 2005 [2006] eKLR observed** that:

> ***In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.***

14. On the issue of quantum the respondent adduced sufficient evidence to prove his claim as was awarded by the trial court. To merely state that the amount of Kshs. 2,530,000/- was not adequately justified and proved without adducing evidence to support the said allegation is not enough. The appellant ought to have challenged the pre-accident value report at the hearing. The report was from AA Kenya, it gave details of the assessment done. The respondent sufficiently proved his claim as was awarded by the trial court.

15. In the end, having reviewed the evidence, I find that the respondent did contribute to the accident. I apportion liability in the ratio of 50:50. The appeal succeeds on both liability and quantum in the ratio of 50: 50. Each party to bear its own costs. It is so ordered.

Dated, signed and **delivered** at **KISII** this **13th** day of **February, 2020.**

R. E. OUGO

JUDGE

In the presence of;

Miss Nyandoro h/b Mr. Kibichy **For the Appellant**

Mr. Otaro **For the Respondent**

Ms Rael **Court Assistant**