



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 30B OF 2018

MULTIPLE HAULIERS (E.A) LTD.....1ST APPELLANT

DUNCAN MAINA NGUGI.....2ND APPELLANT

-VERSUS-

PETER MUNAYO GIDEON.....RESPONDENT

(Being an appeal from the Judgment of the SRM at Kilungu (Mr. P. Wambugu) delivered on 9/03/2018 in Kilungu PMCC no. 244 of 2015).

JUDGMENT

1. Multiple Hauliers (E.A) Limited and Duncan Maina Ngugi the Appellants were sued by Peter Munyao Gideon the Respondent in the lower court, for special damages of (Kshs.366,000/=) general damages, costs and interest. The claim arose from an alleged accident involving the 1st Appellant's Nissan Prime motor lorry/truck registration No. KAZ 506 R/ZC 7484 driven by the 2nd Appellant and the Respondent's motor vehicle KBD 772 F.

2. The Respondents filed their joint defence dated 29th February 2016 denying the entire claim.

3. After all the preliminaries had been complied with, the matter proceeded to full hearing. The Respondent called three witnesses while the Appellants closed their case without calling any witness. Judgment was given in favour of the Respondent in the sum of Kshs.366,500/= as special damages plus costs and interests.

4. Being dissatisfied the Appellants filed a memorandum of appeal through Mulwa & Mulwa advocates dated 9th April, 2018. The following were the grounds of appeal:

a) ***That***, the learned trial Magistrate erred in law and in fact in finding the Appellants 100% liable for the accident where no tangible evidence was given to prove the same.

b) ***That***, the learned trial Magistrate erred in law and in fact when he found that the Respondent's motor vehicle was extensively damaged when indeed there was no certificate of inspection to prove such damage,

c) ***That***, the learned trial Magistrate erred in law and fact when he relied on receipts dated long before the accident subject matter of suit at trial.

d) ***That***, the learned trial Magistrate erred in law and in fact when he admitted as evidence and indeed relied on receipts that had no stamp duty on them.

e) ***That***, the learned trial Magistrate erred in law and in fact in finding that the Respondent indeed used alternative means of transport for thirty (30) days when indeed the evidence provided showed that he only used alternative means of transport for fifteen (15) days only.

f) ***That***, the learned trial Magistrate erred in law and fact when she relied on the Respondent/Plaintiff's evidence against the Appellant/Defendant's evidence on a wrong basis.

g) ***That***, the learned trial Magistrate erred in law and in fact for failing to consider the Appellant's submissions thus arriving at a wrong finding.

5. The appeal was argued by way of written submissions. The Appellants submit that the only available evidence showed the occurrence of an accident, but not the cause of the accident. They therefore prayed for liability to be apportioned.

6. On quantum they submit that no certificate of inspection was produced to show the extent of the damage on the said vehicle. They claim that some receipts like receipt no. 311 from Amua auto spares JW1c Limited dated 01/08/2015, receipt no. 104762 from Machakos Glass enterprises dated 08/09/2015 for vehicle registration No. KBT 722F which is not the vehicle in issue were unrelated to this case. It's their submission that the undisputed receipts amount to Kshs.43,500/=.

7. On loss of user they raise issue on the letter dated 15/09/2015 which was written long after the taxi man had rendered services for 30 days. The 1st receipt for Kshs.100,000/= is dated 31/08/2015. That by 15/09/2015 he had only used the alternative transport for 15 days.

8. For stamp duty it's their argument that none of the receipts produced had stamp duty. They refer to the case of **Darshan Shar –vs- Roopman (K) Limited & 3 Others (2005) eKLR** where the High court considered the question of the stamp duty Act and held:

“Under the Stamp Duty Act section 19 in civil cases only, a party wishing to claim expenses paid to him under the special damage claims and on proof of such claim must have complied with the Stamp Duty Act. The revenue stamp on such a receipt should have been issued. Where this has not been complied with by the person issuing the said receipt, section 20 requires that such a person do proceed to the collector of stamp duty to assess the penalty required to be paid for failing to comply”.

9. They also refer to **Leonard Nyongesa –vs- Derrick Ngula Righa Civil Appeal No. 168 of 2008 (Mombasa)** where Justice Kasango held as follows:

“The position therefore, is that a receipt for which payment of stamp duty is required under the Stamp Duty Act is admissible in evidence on condition that the person issuing the same takes it for stamp duty assessment before the court can attach any probative value to it. In my opinion, if that is not done, the court cannot award damages based on such a receipt.”

10. The appeal was opposed by the Respondent. In the submissions the Respondent states that the Appellants were liable for the accident and this was proved by the evidence of his two (2) witnesses. That the Respondent gave his evidence on what happened and produced his witness statement, agreements dated 28/08/2015 (PEXB1 and 2), police abstract, copy of records, P3 form among others.

11. He argues that the 2nd Appellant upon arrest admitted having hit the motor vehicle KBD 772F Toyota Noah from the rear and he agreed to compensate the owner by repairing the vehicle. He signed an agreement to that effect and the same was produced as an exhibit. That he proved his travel from Makindu to Machakos law courts where he worked as a court clerk.

12. It's his submission that his witness (Pw2) confirmed charging the Respondent Kshs.10,000/= per day from Machakos to Makindu and back home on a daily basis. He was paid Kshs.300,000/= for the 30 days, and he produced receipts which were never objected to.

13. It is the Respondent's submission that the Appellants did not adduce any evidence nor produce any written statement. He refers to the case of **Stephen Gachau Githaiga & Anor –vs- A.G (2015) eKLR** which had similar circumstances and the court held that there was no basis for apportionment of liability. He also refers to the case of **Kenneth Nyaga Mwige –vs- Austin Kiguta & 2 others Civil Appeal No. 140 of 2008** on the same point on liability.

14. Counsel for the Respondent has also submitted that since the Appellants did not call any witness the Respondent's claim of occurrence of an accident plus repairs of the vehicle and use of alternative transport were not controverted. He cites the case of **Motex Knitwear Ltd –vs- Gopitex Knitwear Mills Ltd (2009) eKLR** among others in support.

15. On grounds 2 and 3 he submits that the 2nd Appellant agreed to compensate the Respondent after admission of liability. Receipts were produced to confirm alternative transport used and expenses incurred. The receipts were within the dates of the accident.

16. On ground 4 he submits that the receipts produced had stamp duty and none was objected to by the Appellants. On the rest of the grounds he submits that his claim on the 30 days is supported by his further statement which was produced as an exhibit and adopted by the Respondent. That Pw2 well explained the issuance of the receipt dated 15/09/2015. He prayed for the appeal to be dismissed.

Analysis and determination

17. This being a first appeal, this court has a duty to re-evaluate and re-consider the evidence adduced and arrive at its conclusion. It must bear in mind that it did not see or hear the witnesses. See **Selle & Anor –vs- Associated Motor Boat Co. Ltd & others (1968) E.A 123**.

18. I have considered the evidence on record, the grounds of appeal, submissions by both parties and authorities cited. The issue for determination is whether the Respondent proved his case on a balance of probabilities on both liability and quantum.

19. First and foremost, the Appellants are not disputing the occurrence of an accident between the Appellants' vehicle KAZ registration No. 506 R/ZC 7484 and the Respondent's vehicle No. KBD 772F on 28th August 2015. The issue is who caused the accident.

20. The Respondent who was driving motor vehicle registration No. KBD 772F testified as Pw1 in the lower court explained that as he drove his car and doing 40kilometers per hour the Appellants' lorry which was behind him hit him from behind. In cross examination, he said the accident occurred just after he had finished going downhill. He said there are two (2) lanes at the scene of accident. Further that he never saw

other vehicles following the lorry.

21. The scene was just after Salama town. Police officers from Salama police station came to the scene. A police abstract was issued in respect of the accident (PEXB3). The Plaintiff recorded a statement and a further statement with the police. He produced them as PEXB1a and b.

22. The 2nd appellant filed a written statement of defence dated 18th March 2016. One would keenly have expected him to come and testify and adopt the said statement as his testimony in readiness for cross-examination. After the close of the Plaintiff's case, the Defendants were given two opportunities to prosecute their case by availing witnesses but they failed to do so. On 24/10/2017, Mr. Loki for the Defendants is recorded stating this **"We close defence case without calling the witnesses."**

23. The Respondent further referred to an agreement between him and the 2nd Appellant whereby the latter accepted liability and agreed to repair his vehicle. The agreement was produced as PEXB2. In cross examination he said the accident agreement was done because the 2nd Appellant agreed to repair his car.

24. The 2nd Appellant was the driver of the 1st Appellant's lorry that was involved in this accident. Him and the Respondent were the key witnesses who could have assisted the court in arriving at a just determination as to who was to blame for the causation of the accident. The 2nd Appellant did not appear to testify and challenge the Respondent's evidence.

25. From what the Respondent told the court, he was knocked from the rear of his car by the 2nd Appellant who was driving behind him. He further produced an accident agreement signed by the 2nd Respondent (PEXB2). It was therefore incumbent upon the 2nd Appellant to give some explanation as to why he hit the Respondent from behind and also to own or disown PEXB2.

26. The pleadings and their defence on the cause of the accident were not tested by way of cross examination. They remain mere statements. There are many decisions of this e.g. **Trust Bank Ltd (supra), Singh Bahra and Anor –vs- Raju Govindjl HCCC No.548 of 1998; Motex Knitwear Ltd (supra) and Stephen Gachau Githaiga & Anor (supra).**

27. Upon analyzing the Respondent's evidence on the occurrence of the accident and its causation, I agree with the finding of the learned trial Magistrate's finding that liability was proved at 100% in favour of the Respondent.

28. The next issue is quantum. The Respondent had pleaded special damages of Kshs.366,000/=. This was broken into two main items.

- i. Repairs Kshs.65,500/=
- ii. Alternative transport at Kshs.10,000= per day for 30 days equals(=) Kshs.300,000/=.
- iii. Search certificate Kshs.500/=

The Respondent produced a bundle of receipts as PEXB5 for the repairs, without any objection from counsel for the Appellants. He explained that the rear windscreen, the wiper pump and whole door were damaged. Since there was an agreement (PEXB2) there was no need for an inspection certificate.

29. The Appellants have raised issue with two receipts in the bundle being receipt No. 104762 dated 08/09/2015 for Kshs.10,000/= in respect of motor vehicle KBT 772F and receipt No. 311 for Kshs.12,000/= dated 01/08/2015. I have looked at the said receipts and I am in agreement with the Appellants on this one. It has not been shown that these two (2) receipts from PEXB2 relate to the motor vehicle KBD 772F which was involved in an accident on 28/08/2015. That leaves the proved claim on repairs at Kshs.65,500 – Kshs.22,000/- equals(=) Kshs.43,500/=.

30. The Respondent claimed Kshs.300,000/= for alternative transport for 30 days. The accident occurred on 28/08/2015. The Respondent explained that he was a staff of the Judiciary working in Machakos and staying in Makindu and would drive daily to the office. He hired the services of Pw2 to be picking him and taking him to his place of work and dropping him back home. That Pw2 did this for 30 days.

31. The simple question is how the Respondent mitigated his loss. When was the vehicle admitted for repairs and when was it discharged from the garage? When was the vehicle back on the road? The invoice for the repair charges is dated 06/09/2015. I take it that, that is the time the assessment was done. A number of items were bought (as per the receipts) on 7th September 2015. The Respondent did not explain any challenge in the purchasing of the spares required for the repairs.

32. The Respondent testified that the vehicle was in the garage for 30 days. He did not however avail evidence to show why it took that long yet the spare parts had been purchased on 07/09/2015. Which is this work that would have lasted that long?

33. Another element the trial court ought to have considered is the issue of weekends. The Respondent's claim for alternative transport was for purposes of being taken to and from work in Machakos from Makindu. The Judiciary operates from Monday to Friday only. He did not therefore require the taxi to take him to Machakos over the weekends. The weekends should have been deducted from the thirty (30) days claim.

34. The law is clear that special damages must not only be pleaded but strictly proven. Even with the uncontroverted evidence and production of receipts the court had a duty to satisfy itself as to the reasonableness of the claim and the action taken by the Respondent to

mitigate his loss. From my re-evaluation of the evidence, I find the Respondent's evidence to be lacking an essential detail in terms of alternative transport.

35. He told the court that he is a very serious businessman besides being a judicial staff. The stay of his motor vehicle in the garage for 30 days ought to have been explained. Secondly the weekends should not have been included in the 30 days' claim.

36. The law and caselaw is clear about claims where stamp duty is due but has not been paid. This issue was well addressed by the learned trial Magistrate who saw the original receipts. This is what he said at page 139 Record of Appeal

“However my scrutiny of the receipts presented to me show that they all have stamp duty receipts attached to them, and thus this averment and or assertion has no merit.”

37. I have also confirmed from the original record that indeed all the receipts the bundle PEXB5 have stamp duty, receipts /stamps. The receipts PEXB4a – c confirm that the Respondent did a search from the registrar of motor vehicles. He paid Kshs.1,500/= as per receipt PEXB4c.

38. Having reanalyzed the evidence on record and applied the relevant law, I find that the finding on liability is sound and is upheld. I will however interfere with the judgment on quantum and allow the following sums:

- Repairs Kshs.43,500/=
- Certificate of search Kshs.1,500/=
- Alternative transport for eighteen (18) days = **Kshs.180,000/=**.

39. I therefore set aside the judgment entered on 9th March 2018 and substitute it with a judgment for **Kshs.227,000/=** (*Two hundred and twenty-seven thousand only*) plus costs and interest at court rates. The Appellants will get costs for the appeal.

Orders accordingly.

Delivered, signed & dated this 7th day of May 2020, in open court at Makueni.

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H. I. Ong'udi

Judge