REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 243 OF 2018

MARGARET KANNES MUYANGA.....APPELLANT

-VERSUS-

JAMAL ABDULKARIM MUSA.....RESPONDENT

(*Being an Appeal from the Judgment/Decree of Honourable J. Kassam Senior Resident Magistrate in Mombasa RMCC No. 53 of 2015 delivered on the 9th November 2018)*

JUDGMENT

1. The Appellant was the owner of Motor Vehicle Registration **No.KBR 277C Mazda Station Wagon** while the Respondent was the owner of Motor Vehicle registration **No.KTWA 147C Mahindra**. The two vehicles were involved in a road accident at **Sai Rock Hotel** area along the Mombasa-Malindi highway **on 26th December, 2012**.

2. Consequently, the Appellant sued the Respondent in the Lower Court vide a **Plaint** dated and file **14th January, 2015** seeking compensation for extensive damage of her Motor Vehicle Registration **No.KBR 277C Mazda Station Wagon**. She prayed for a sum of **Kshs.144,524.00/=**, costs of the suit and interest.

3. The Respondent denied the entire claim in the **Statement of Defence** dated **16th February, 2015** and stated that the accident was *ipso facto*, caused solely by the negligence of the driver of motor vehicle registration **No.KAV 360Q Toyota Land Cruiser** which was being driven in a zigzag manner which was later established to be road unworthy.

4. After the preliminaries, the matter proceeded for hearing and **Judgment** was eventually delivered. The trial Magistrate found that the Appellant had not proved any facts of negligence against the Defendant and could therefore not establish who caused the accident or how it happened. The trial Magistrate further found that it had not been claimed that the suit before her was subrogation claim on the material loss and having been compensated by her Insurance Company, the Plaintiff could not again claim the amount from the Defendant since it would amount to a double compensation. She held that the suit was not brought on the basis that the Insurers were exercising subrogation rights and dismissed the suit.

The Appeal

5. Aggrieved by the **Judgment**, the Appellant filed this **Appeal** and raised **six (6) grounds** as follows;

a) The Learned Trial Magistrate erred in law and facts by

greatly misdirecting herself by treating the submissions of the Appellant very superficially thereby erroneously arriving at a wrong conclusion on both quantum and

Liability.

b) The Learned trial Magistrate erred in law and in Facts by finding that the Appellant having been compensated by her Insurer APA Insurance Limited was not entitled to any Compensation despite the fact that the suit was brought by the Appellant pursuant to the Doctrine of Subrogation.

c) The Learned trial Magistrate erred in law and in fact by finding that there was no claim for or neither was the pleadings suggested that it was subrogation claim when the Appellant in her pleadings expressly stated that she was recovering on behalf of APA Insurance Limited under the doctrine of Subrogation.

d) The Learned trial Magistrate erred in law and in fact in concluding that since no witness from APA Insurance Limited was called to testify the Appellant's case was not proved despite documents which were produced by consent clearly showing that all the expenses and/or costs were paid and/or incurred by the said Insurance Company.

e) The Learned trial Magistrate erred in law and in fact by completely ignoring to look at the Appellant's pleadings and evidence generally and thereby arriving at a very erroneous decision particularly on the principle of subrogation.

f) The Learned trial Magistrate erred in law and in fact by failing to access damages.

6. Directions were given that the **Appeal** be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

Appellant's Submissions

7. The Appellant opted to submit on each **Ground of Appeal** in a chronological sequence. On the first **Ground of Appeal**, it is argued that the Appellant's witnesses clearly gave evidence as to the occurrence of the accident and the circumstances. That **PW1** - the Appellant's mother testified that she was driving the Appellant's motor car when the same was hit on the right side by the Respondent. She testified to the occurrence of the accident and stated that the tuktuk was to blame for the accident. The Respondent called no witness to rebut that evidence and on that regard, the Appellant submitted that the trial Magistrate erred in holding that the Appellant had not proved her case on a balance of probabilities. The Appellant asserted that the Respondent should bear **100%** liability for failing to call evidence to rebut the Appellant's case.

8. The 2nd to the 5th grounds are submitted collectively. It is averred tha**t paragraph 8** of the **Plaint** states that the suit was brought pursuant to the doctrine of subrogation contrary to the finding of the trial Magistrate. The same is buttressed by the evidence of **PW1.** She reiterates that the suit was brought for purposes of recovering the cost of the repair on behalf of **APA Insurance Ltd**. The Appellant further submitted that as the Insured, she had all the rights under the doctrine of subrogation to institute the suit against the Respondent hence the Appeal should be allowed.

Respondent's Submissions

9. The Respondent on the other hand submitted that the onus of proving negligence lies with Appellant and the Appellant failed to discharge that burden for among other reasons that; the Appellant did not explain why and how the accident occurred hence no negligence could be inferred to the Respondents. Further that the **Police Officer** who testified as **PW2** was unreliable according to the Respondents because he was not the Investigating Officer. He admitted that he could not trace the police file and further he did not know how the accident occurred. According to the Respondent, the Police Officer ought to have produced **Sketch Maps** and **Statements** of the **Investigating Officer** to guide the trial court in having a glimpse on how the accident occurred.

10. It is further submitted that the Respondent was never charged with any traffic offence and the court was right in dismissing the claim. In any event, the Respondent avers that the Appellant did not expressly state that the suit was brought on behalf of the Insurance Company and it is not upon the court to speculate on the same. In support of the submissions, the Respondent relied on the cases of **Edward Sargen… Vs…Chotabha Jhaverbhat Patel[1949]16 EACA 63**, **Treadsetters Tyres Ltd..Vs..John Wekesa Wepukhulu[2010] [2010] eKLR** and **East Produce (K) Limited…Vs… Christopher Astiado Osiro, Civil Appeal No.43 of 2001.**

Analysis and Determination

11. It is now settled that the duty of a first appellate court is to re-analyze and re-evaluate the evidence on record in order to arrive at its own conclusion while bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See the case of **Selle & Anor…Vs… Associated Motor Boat Company Ltd & Others 1968 E.A 123.**

12. It may be important to point out that though the Appellate court in the exercise of its appellate jurisdiction has power to interfere with the findings of the Lower Court, this power is not unlimited. It is limited to the existence of certain circumstances. As a general rule, an Appellate court should not interfere with the findings of the Lower Court unless it is satisfied that the court in reaching its findings considered extraneous factors or failed to take into account relevant factors or that it misinterpreted the evidence or applied the wrong legal principles.

13. Having considered the Grounds of Appeal, the rival submissions and the entire record, it is my considered view that the following issues arise for determination;-

a) Who was liable for the damage on the Appellant's Motor Vehicle and to what extent?

b) Whether allowing the Appellant's claim in light of compensation from its insurance company would amount to double compensation.

c) Whether the Appellant is entitled to the amounts claimed.

a) Who was liable for the damage on the Appellant's Motor Vehicle and to what extent?

14**. Pw1, Mary Nthenya Mutua** was driving the Appellant's car along Mombasa-Malindi towards Mtwapa when on reaching Sai Rock Hotel, she was knocked by a tuktuk. The damage on the vehicle was assessed by **Shelia Assessors** and then repair fees of **Kshs.128,716/=**

made by **APA Insurance**. **Pw1** sated they sought the court to order for the costs of repair to be reimbursed.

15. On cross examination, she stated that she did not know how the accident occurred. That the tuktuk was behind her and all of a sudden, she heard a bang when the tuktuk rammed unto his car. She was however critical that no other motor vehicle was involved or caused the accident.

16. **Pw2 - No.623251 CPL Pius Mutuga** from **Bamburi Traffic Base**. He produced the **Police Abstract** as **P. Exhibit 3(a)** and said that the driver of the tuktuk was to blame for the accident. He also told the court that he was paid **Kshs.5,000/=** for court attendance and produced a **Summons** as **exhibit 3(b).**

17. Upon cross examination, he said that he was not the Investigating Officer and the police file could not be traced. The Respondent/ Defendant did not call any witness to rebut the evidence but submitted that the Appellant failed to prove the case on balance of probabilities.

18. From the evidence of both parties there is no dispute that an accident involving the Appellant's car and the Defendant's tuktuk occurred on the material day.

19. Further, from the totality of the evidence on record and especially the contents of the Police Abstract confirmed the occurrence of the accident, parties involved and stated that the tuktuk registration number **KTWA 147C** was to blame. No objection was raised to its production. In the case of **Dorcas Wangithi Nderi…Vs…Samuel Kiburu Mwaura & Another (2015) KLR**, the Court held that if a Police Abstract is produced without any objection, its contents cannot be denied.

20. However, it is this courts view that a statement appearing on a Police Abstract, despite the abstract having not been objected to, ought to be interrogated and should not be taken at face value.

21. It was not explained to the court why the Investigating Officer did not testify, to at least shed light as to the point of impact. It is therefore not clear on which extent were the drivers to be blamed in view of the evidence tendered. However, from the evidence on record, it is clear that the vehicles were headed to Malindi direction when the accident occurred. It is also not denied that that the Respondent/Defendant's tuktuk was driving behind the Appellant's car before the accident occurred which evidence was not controverted. To that extent, this Court finds that the Respondent's/Defendant's tuktuk bears a higher degree of blame and the best this court can do is to apportion liability in the ration of **20%** as against the Appellant and **80%** against the Respondent.

22. That being the case, this Court is of the considered view that based on evidence presented before her, the Learned trial Magistrate arrived at a wrong finding on liability in the current case and the same is set aside and substituted with an Order that the Respondents bears **80%** liability whilst the Appellant bears **20%** liability.

b) Whether allowing the Appellant's claim in light of compensation from its insurance company would amount to double compensation?

23. The Learned trial Magistrate opined that the Appellant had not pleaded in her pleadings that the suit was a subrogation claim nor was there evidence led to suggest as such. She went ahead to indicate that no witness from the Appellant's insurer, **APA Insurance Company** came to give evidence to prove their claim against the Defendant. In the absence of such particulars, she concluded that the suit was not brought on the basis that the Insurers were exercising subrogation rights and since the Appellant had already been compensated on account of her motor vehicle, she cannot receive any further payment as the same would amount to double compensation.

24. I will draw guidance from the case of **Reinan…Vs.. Pacific MotorTrucking Company,** where the Court stated as follows: -

> ***The term "double recovery" implies that a plaintiff has received and will retain the same remuneration from two outside sources – the defendant and a third-party benefit provider – to compensate for a single harm. However, rarely will that assumption prove entirely accurate. A plaintiff who receives life or medical insurance benefits from a third-party provider generally will have paid premiums for those benefits or will have earned them as compensation for employment.***
>
> ***Similarly, a plaintiff who receives retirement benefits, whether from a private corporation or a government program, generally will have earned or invested those funds. In addition, there are many instances in which the third-party benefit provider retains a right of subrogation for any tort award that beneficiaries recover. As a result, the collateral benefits paid by a third party may only reimburse the plaintiff for his or her prior labor or investment or may be returned to that third party. See, e.g., ORS 742.538 (providing insurers with right to subrogate insured's proceeds in tort actions); William M. Landes and Richard A. Posner, The Economic Structure of Tort Law 252 (1987) (noting that plaintiff who recovers insurance benefits and damages from defendant does not receive double recovery because "the plaintiff paid for the benefit in his insurance premium").***

25. It is my considered view, and with regard to the above authority that the Insurer on payment of the loss, is entitled to the advantage of every right of the Assured, whether it consists in contract or in remedy for tort, or to anything he has received or is entitled to receive in diminution of the loss. The Insurer is not entitled to sue a Third Party in the name of the Assured unless the Assured has assigned to the Insurer his right of action. Therefore, the doctrine of subrogation allows an Insurer to exercise only those rights or remedies that accrue to the Insured or Assured which means that the Insurer cannot have any greater right than the Insured. Put differently, this means that the Insurer can only exercise the rights and have access to only those remedies available to the Insured and nothing else.

26. Consequently in the circumstance of this case, I have considered the **Plaint** filed before the Lower Court and **paragraph 8** thereof reads as follows:-

> ***"The Plaintiff's claim is brought for and on behalf of its insurers; M/s APA Insurance Limited under the doctrine of***

Subrogation for recovery by the insurer of its outlay as a consequence of the damages sustained the insured, the Plaintiff, due to the negligence of the Defendant, its driver, servant and or agent."

27. On the foregoing, it is clear that the Assured had assigned to the Insurer her rights of action and having found that the Respondent was **80%** liable for the accident, in my view, he remains a tortfeasor regardless of whatever arrangements may have been in existence between the Appellant and her Insurer and holding otherwise is tantamount to benefiting a tortfeasor. While dealing with a similar issue in the case of **Leli Chaka Ndoro…Vs…Maree Ahmed & S.M Lardhib (2017)eKLR,** the court observed that;

"I do entirely agree with this view as the opposite would be to allow negligent tortfeasors to go scot free only because their victims were careful enough to take up personal accident policies……I do agree that the Respondent's liability is not dependent on the Appellant's wise decision to take up an accident or medical cover."

28. Similarly, I am not convinced that the absence of the said particulars in the pleadings should allow the Respondent to go scot free.

c) Whether the Appellant and Respondent are entitled to the amounts claimed by each.

29. With regard to the damage on the motor vehicle, the Appellant produced a Report by the Assessor and there is no dispute to the amounts assessed for each. The Appellant produced copy of **Cheques** made by **APA Insurance** to **Jaffery Motors** for the repairs done. They paid a total of **Ksh.128,760/=**.

30. The amount is not disputed and it is hereby awarded as prayed. With regard to Assessment charges and the Investigation Report, there were no receipts presented as a prove thereof. This Court must hasten to reiterate that special damages must not only be specifically pleaded but also specifically proved. That being said, I decline to award the Investigation and Assessment charges as pleaded under **paragraph 7** of the **Plaint**.

31. The upshot is that the Appeal has merit. The Learned trial Magistrate's dismissal of the suit in its entirety is set aside. I enter Judgment for the Appellant for the sum of **Kshs.128,760/=**(***One Hundred and Twenty Eight Thousand, Seven Hundred and Sixty Shillings Only***). The Appellant shall have the costs of the Appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MOMBASA** on this **7th** day of **October, 2020.**

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules** which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE