REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 154 OF 2018

SIMON WAWERU MUGO.....APPELLANT

VERSUS

ALICE MWONGELI MUNYAO.....RESPONDENT

(Being an appeal from the judgement and decree of Hon Y.A. Shikanda (S.R.M) at Machakos Chief Magistrate's Court in CMCC No. 773 of 2016 delivered on 5th November, 2018)

BETWEEN

SIMON WAWERU MUGO.....PLAINTIFF

VERSUS

ALICE MWONGELI MUNYAO.....DEFENDANT

JUDGEMENT

1. By a plaint dated 3.3.2016 the appellant herein claimed for special damages in the sum of Kshs 327,500/- from the appellant being pre-accident value of the suit vehicle less salvage value, assessment, search and towing charges as well as costs and interest. The appellant had claimed that his vehicle was registration number KBA 351B whereas the respondent was the registered owner and in full control of motor vehicle registration number KBU 461A. The appellant pleaded that on or about the 7.2.2015 while his motor vehicle was being driven along Machakos-Nairobi Road at Kathome, the respondent managed vehicle KBU 461A and negligently caused the same to veer off the road as he tried to overtake without ensuring that it was safe to do so and remained on the lane of incoming motor vehicles and therefore rammed the appellant's motor vehicle KBA 351B which rolled several times and as a result thereof the said motor vehicle was extensively damaged and declared a total loss hence unrepairable and that the appellant suffered damages for which the respondent was liable. The appellant pleaded *res ipsa loquitor* and sought to rely on the Traffic Act and the Highway Code Regulations.

2. Interlocutory judgement was entered against the respondent for the sum of Kshs 327,500/-, which judgement was later set aside upon the application of the respondent who filed her defence on 4.12.2017.

3. The respondent in her defence denied the accident, denied ownership of the suit vehicle, denied negligence, the applicability of *res ipsa loquitor* and pleaded in the alternative that the accident was wholly caused and or substantially contributed to by the negligence of the appellant as particularized in paragraph 6 of the defence. The respondent denied the special damages and sought that the suit be dismissed.

4. The trial court vide judgement delivered on 5.11.2018 observed that the accident was not in dispute and that there was no contrary evidence that the respondent was not the owner of the suit vehicle. It was found that there was no eye witness to the accident and in appreciating that there was a collision and that the appellant's vehicle was pushed off the road, found the parties 50% vicariously liable for the accident. On the issue of quantum, the learned magistrate relied on the appellant's assessment report and awarded special damages in the sum of Kshs 327,000/- less 50% contribution.

5. Being dissatisfied with that finding and decision, the appellant filed this appeal on 29.11.2018 vide a Memorandum of Appeal on an even date that in essence faulted the trial magistrate for:

a. Failing to give a concise statement of the case, points of determination, decision and reasons for his judgement.

b. Failing to consider the applicant's submissions and thereby ignoring relevant guiding facts to reach a fair and reasoned

determination and thereby proceeding to apportion liability without putting into consideration the evidence on record;

c. Apportioning liability in the ratio of 50%:50% and failed to award costs which is unrealistic in the circumstances against the costs and damages incurred by the appellant;

d. Applying the wrong and inapplicable principle of law in a civil case and which did not form any basis to warrant his determination on liability and general damages.

6. The appellant prayed that the appeal be allowed and judgement against the appellant be set aside; that the order apportioning liability at 50:50 and failing to award costs be reviewed and or revised accordingly and judgement be entered in favour of the appellant; the costs of the appeal and the costs of the lower court be granted to the appellant.

7. The appeal was canvassed by way of written submissions.

8. In support of the appeal, learned counsel Kitindio Musembi & Co Advocates filed written submissions on 19th August, 2020, and framed one issue for determination, *to wit*; holding the appellant and respondent equally liable and proceeding to apportion liability in the ratio of 50:50 for and against the appellants.

9. On the issue of the finding for the apportionment of liability, counsel submitted that there was reliance by the appellant on the doctrine of *res ipsa loquitor*, therefore in placing reliance on the case of **Dun Onyango Odera v Aineah Amakumbe Mbuyia (2015) eKLR** as well as the documentary and oral evidence of the appellant submitted that liability be apportioned at 100%. On the issue of special damages counsel submitted that the respondent pay the appellant the full special damages as pleaded and proved during trial.

10. The appeal herein was opposed by the respondent whose counsel submitted that negligence was not proved. Reliance was placed on the case of **Fourways Travel Services (A) Ltd v Drumcon (1972) Ltd (2015) eKLR** as well as section 107(1) of the Evidence Act.

11. Counsel submitted that the appeal lacks merit and should be dismissed with costs to the respondent.

12. This being a first appeal, the role of the court in section 78 of the Civil procedure Act is to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions though bearing in mind that it neither saw nor heard the witnesses testify. In addition, the responsibility of the appellate court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. This was observed in **Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212) CA.**

13. In light of the above, I shall consider the evidence on record. The appellant had 3 witnesses in support of his claim. Pw1 was Pc Robert Tomno, attached to Machakos Traffic Base. He testified that he, on 7.2.2019 received a report that an accident had occurred on 7.2.2019 involving Motor Vehicle KBU 461A, Subaru Impreza that was being driven by the respondent and KBA 351B Nissan Saloon being driven by Julius Maingi Kimanthi. It was testified that the driver of the vehicle KBU lost control of the motor vehicle due to disengagement of the front tyre and that the vehicle veered to the right and hit KBA 351B that was pushed off the road. He told the court that both vehicles were extensively damaged; that the accident was recorded via OB 7 of 714/15 and that PC Kimaiyo and Pc Mugoya visited the scene; that on 10.2.2015 a police abstract was issued. It was his testimony that KBU was to blame for the accident; the police abstract was produced as exhibit Pexh1. On cross examination, he testified that he was not the investigating officer but he relied on the OB.

14. Pw2 was the appellant who testified that he was not driving the vehicle KBA but he had given it to a friend; that he did not know how the accident occurred but however he was issued with a police abstract and he paid for the inspection; the assessors report was produced in evidence.

15. Pw3 was John Waweru Wachira, a loss assessor who testified that he received instructions on 24.2.2015 from Simon Waweru to assess his motor vehicle KBA 351B and he noted that the vehicle had been hit from the front right side and was excessively damaged. He testified that he listed and quantified the parts that had been damaged and that the repair would have cost Kshs 288,840/- inclusive of VAT but that it would not be economical to repair the vehicle as the value was about Kshs 400,000/-. He told the court that he estimated the salvage was at Kshs 100,000/-; he prepared a report that he produced as well as a receipt for his charges for court attendance of Kshs 9,400/-. On cross examination, he testified that he did not know if the vehicle was repaired. After the appellant closed their case, the respondent prosecuted her case.

16. The respondent's sole witness was Stella Nthenya Nzioka who testified that on the material day she was driving her sister in law's car that was KBU 461A and she was going uphill at Kyumbi Junction from Machakos. She told the court that she heard a bang from her vehicle and she got out and saw a vehicle had overturned. On cross examination, she told the court that when she got out of her car, she noticed that a tyre was missing and did not know what had caused the accident.

17. I have carefully considered this appeal; the evidence in the trial court, the submissions by both parties' advocates in the trial court and in this appeal, as well as the authorities relied on by the appellant's counsel and the issues for determination in this appeal, in my view, are whether the liability was proven; whether this court could interfere in the apportionment of liability by the trial court and whether the trial magistrate erred in his finding on costs.

18. There is no dispute that an accident did occur involving the suit vehicles at the Machakos- Nairobi Road and the ownership of the vehicles is not disputed. There is also no dispute that the appellant's vehicle overturned and that it was hit from the front meaning there was a head on collision. It is not clear where the accident scene was. Was it near bumps? Was it at a corner? The evidence is scanty and one cannot tell. In this regard it is not clear how negligence was inferred. However, the report of the assessor is indicative of heavy impact as shown by the nature and extent of damages as per the uncontroverted evidence on record by the police officer and the vehicle assessor. This means that I can safely rely on the doctrine of *res ipsa loquitor* to infer negligence. This being a head on collision, case law is to the effect

that where the circumstances of the accident give rise to the inference of negligence or recklessness, then the defendant has a duty to prove there was a probable cause of the accident which does not connote negligence (see **Embu Public Road Services Ltd v. Rimmi [1968] E.A 22.**

19. There are certain things that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer **See Hoe v Ministry of Health (1954) AC Pages 66, 87- 88 Morris LJ**.

20. A carefully driven vehicle does not overturn on the road, unless it was over speeding. A carefully driven vehicle does not just ram into another vehicle unless the driver was overspeeding on the road or unless the vehicle's brakes were faulty.

21. The respondent pleaded contributory negligence but however did not testify or call any witnesses to speak on that fact. In order to successfully establish contributory negligence, a defendant must prove that the plaintiff, through his or her own negligence, contributed to the accident. Every person using the road, pedestrian, motorist, and car passenger, is required to use reasonable care to protect his or her own safety as well as the safety of others. If a car accident victim fails to protect his or her own safety and the safety of others, he or she is being negligent and will be considered partly at fault for his or her own injuries. To succeed in a defence of this nature, a defendant has to show that the plaintiff's negligence contributed to the causation of the accident. If the plaintiff's behaviour simply made his or her injuries worse, but did not actually cause or contribute to the causation of the accident, the defence is not available. The respondent has not proved the claim that any of the alleged appellant's negligent acts or omissions caused or materially contributed to the damages giving rise to the claim. The respondent's witness who was driving her car stated that she was surprised to find another vehicle had overturned and did not know how the accident had occurred yet there had been a head on collision. She must have clearly seen the other vehicle otherwise that was evidence of lack of proper lookout for other road users. Hence the respondent's negligence was revealed through the evidence of the driver.

22. Where negligence has been established and where there is a head on collision the court is required to make a call on apportionment of liability. Spry V P in **Lakhamshi v Attorney General, (1971) E A 118, 120** rendered himself thus:

> "*It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident*."

23. I took note that the respondent's vehicle tyre had disengaged and I required more evidence vide a report on the condition of the vehicle; however, in considering the evidence of Pw1 who gave evidence of a report as was recorded by the investigating officer and in placing reliance on the provisions of the Evidence Act to the effect that public documents, i.e. entries made by authorized agents of the public relating to facts of public interest or notoriety are generally admissible at common law. (See section 33, 38, 45, 68 and 79 of the Evidence Act) I find that it is more probable than not that the respondent's vehicle was faulty; that she was overspeeding hence as a result of impact, her vehicle pushed the appellant's vehicle off the road. I also make a call as to the demeanor of Dw1 who in her evidence was reported as testifying that she just "found herself on the other side of the road…" does not appear to be truthful in her account. I must attribute a higher percentage of liability than the appellant. Both appellant and respondent were expected to have taken measures to evade and to avoid coming into contact. It is also noted that the appellant was then on his rightful lane when his vehicle was hit. I therefore find that the appellant's evidence is believable. I find reason to interfere in the apportionment of liability and enhance the respondent's liability to 80% and reduce the appellant's liability to 20%.

24. With regards to the claim for special damages, the same not being challenged I see no reason to disturb the same.

25. On the evidence, the law and submissions, I find that the trial magistrate erred in allowing the parties to bear their own costs. The appellant ought to have been awarded costs of the suit since he had proved his case on balance of probabilities against the respondent. Had the converse been the case then the suit would have been dismissed.

26. The upshot of the foregoing is that the appeal partly succeeds. The trial court's judgement on liability and costs is set aside and substituted with a judgement on liability in the ratio of 80% to 20% as between the respondent and appellant respectively. Special damages shall remain undisturbed. The appellant is awarded half costs of the appeal as well as full costs in the lower court.

It is so ordered.

Dated and delivered at Machakos this 8th day of October 2020.

D. K. Kemei

Judge