



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.81 OF 2016

CONTINENTAL HAULIERS LIMITED.....APPELLANT

THOMAS NJENGA KIARIE.....APPELLANT

-VERSUS-

PATRICK WAMBUGU.....RESPONDENT

(Being an appeal from Ruling of Hon. M. Kasera Principal Magistrate dated 9th day of July 2016 reviewing her judgment dated 1st day of March 2016 in Eldama Ravine Resident Magistrate's Court Civil Case No.1 of 2013)

JUDGMENT

INTRODUCTION

1. This appeal arise from a ruling delivered by the trial magistrate on 19th day of July 2016 following an application dated 23rd May 2016 filed by the plaintiff/respondent seeking review in judgment delivered on 1st March 2016.
2. The judgment delivered on 1st March 2016 was in respect of claim by the plaintiff for special damages due to damage to his vehicle registration number KAU 971F which collided with the 1st appellant's motor vehicle registration number KBK 725S ZB1412 on 28th June 2012. The 1st respondent's vehicle was being driven by the 2nd defendant.
3. Upon considering application for review, the trial magistrate indicated that the special damages assessed were kshs 555,500 less 20% which she stated as prepayment contribution by defendants leaving a balance of kshs 444,400 payable to the plaintiff.
4. Being aggrieved by the said ruling, the respondents filed this appeal on the following grounds:-
 - i. That the trial magistrate erred in fact and law by disregarding that there was no arithmetic error.
 - ii. That the trial magistrate erred in fact and law in reviewing and revising her judgment not in arithmetic error alone but on issue of liability and in effect reversing her judgment on liability having held that total special damages were kshs 555,500 calculating 20% at kshs111,100 and awarded kshs 111,100.
 - iii. That the trial magistrate erred in fact and law in revising her judgment and revising liability and ignoring:-
 - a. Evidence adduced at hearing.
 - b. Burden to prove damages was on the plaintiff/respondent having rolled prior to defendant's vehicle colliding with his vehicle.
 - c. Changed her findings on apportionment of liability.
 - d. Reviewed her finding on apportionment of liability to a finding of contributory negligence.
 - iv. That the trial magistrate erred in fact and law in disregarding that no valid reason existed for review of judgment.
 - v. That the trial magistrate erred in fact and law by failing to appreciate totality of evidence before her particularly issue of perjury by plaintiff's witnesses.

SUBMISSIONS BY APPELLANTS

5. The appellant stated brief facts of the case and restated grounds of appeal. Appellant further submitted that DW3 who was a passenger in the respondent's vehicle testified that the vehicle rolled on the road before the 1st appellant's vehicle hit it. Appellant further submitted that respondent's driver who testified as PW3 admitted that he was charged for careless driving and fined kshs 5,000.

6. Among cases cited by the appellant is **Petition 6 of 2014 Fredrik Otieno Outa Vs Jared Odoyo Okello & 3 others** where the Supreme Court held as follows:

“...by nature the slip rule permits a court of law to correct errors that are apparent on the face of the judgment, ruling, or order of the court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the judgment or decision of the court. By the same token, such errors must be of such nature that their conclusion would not change the substance of the judgment or alter the clear intention of the court. In other words the Slip Rule does not confer upon a court, any jurisdiction or powers to sit on appeal over its own judgment, or, to extensively review such judgment as to substantially alter it...”

7. The appellants contention is that there was no error to be corrected in the judgments and in the ruling delivered the trial magistrate reviewed her finding on liability and failed to consider that the respondent's vehicle had rolled before being hit by appellant's vehicle therefore apportionment of liability in the revised ruling failed to consider evidence adduced. Appellant submitted that by reviewing the finding on liability the trial magistrate went against the above finding by the Supreme Court on Slip Rule.

RESPONDENT'S SUBMISSIONS

8. The respondent submitted that the trial magistrate did not reverse its judgment on liability as alleged by appellants. The respondent quoted page 91 of the judgment capturing determination on liability and submitted that it is clear from the judgment that the trial magistrate apportioned liability to the respondent at 20 and owners of the trailer 80% liability on ground that the trailer was heavier than the matatu and the push of the vehicle could have caused more damage not only to the rear of the motor vehicle but also to the front and side which rested on the ground.

9. Respondent submitted that upon filing application dated 23rd May 2016 seeking review and/or correction, the court was satisfied that there was an error on the face of the judgment and rectified the arithmetic error. Respondent submitted that if the appellants were not satisfied with apportionment of liability, they ought to have filed appeal on liability and not through the forum herein.

ANALYSIS AND DETERMINATION

10. I have considered submissions by parties herein. I wish to consider there was an error on the face of record of the judgment and two if an error existed, whether the trial magistrate went beyond correcting the error on record and altered her finding on liability.

11. In the ruling delivered by the trial magistrate she indicated that the special damages were kshs 555,500 less 20%, which she called contributory prepayment by defendants/respondents which is 111,100; the special damages is kshs 444,400.

12. On perusal of the judgment, I note that at page 149 of the record of appeal trial magistrate stated as follows:-

“it is true the motor vehicle KAU 971F was pushed by motor vehicle KBK 725S for a few meters. This push could have caused further damages not only to the rear of the vehicle but also the front and side, which rested on the ground. I therefore apportion liability to the plaintiff at 20% considering the trailer is heavier than the Toyota matatu.”

13. My understanding from the above statement is that the plaintiff was held 20% liable for the accident and defendant held 80% liable. The defendant's liability was therefore 80%. There is no dispute that special damages were assessed at kshs 555,500. The net award to be awarded to plaintiff was kshs 555,500 less 20%, which is kshs 111,100 leaving a balance of kshs 444,400.

14. There is no doubt that there was an arithmetic error as the issue of apportionment of liability is clear in the judgment.

15. The trial magistrate did not therefore review her finding on liability but only corrected the arithmetic error as prayed by the plaintiff/respondent.

16. FINAL ORDER

1. Appeal is hereby dismissed.

2. Costs to the Respondent.

Judgment dated, signed and delivered at Nakuru this 11th day of December, 2019.

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Court Assistants – Schola and Jeniffer

M/s Mukira holding brief for Maiyo for appellant

No appearance for respondent