REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 495 OF 2012

(CORAM: F. GIKONYO J.)

KANALE DAVID AMUKUHUMA.....APPELLANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

(Being an appeal from the judgment of Hon. S, Atambo, PM, delivered on 7.9. 2012 in the Milimani CMCC No. 2742 of 2009)

JUDGMENT

[1] The six (6) grounds stated in the memorandum of appeal relate to the following three matters;

> **a. Attribution of 30% contributory negligence to the Appellant;**
>
> **b. Failure to award loss of goods and profit thereof on the basis that the Appellant did not prove he was transporting his goods in the vehicle;**
>
> **c. The award of Kshs. 20,000 as dental cost which the Appellant considers to be inordinately low, and one reached upon after disregarding the amendment of the plaint by consent leaving assessment of dental cost to the trial; and**
>
> **d. Consideration of extraneous matter**

Contributory negligence

[2] As first appellate court, I will re-evaluate the evidence adduced and come to own determination of the issues at hand. In this case, the Appellant started by stating that the trial court seemed not to have knowledge of the subject of negligence or contributory negligence. He claimed that as a passenger he could not be condemned to any contributory negligence. Thus, by merely boarding a non-public service vehicle does not attach any contributory negligence to the passenger who does nothing that causes the accident. The Appellant further quipped: -

> **And how would safety belt prevent a vehicle from overturning if it is driven negligently.**

[3] I will consider these arguments in the factual and legal context of this case. The Respondent pleaded contributory negligence on the part of the Appellant and provided particulars thereof in paragraph 7 of the Defence. *Inter alia* the Respondent claimed that the Appellant did not take any or adequate precaution for his safety; and did not buckle up the safety belt while on board. Contributory negligence refers to the Plaintiff's own negligence that played a part in causing the plaintiff's injury. In this case, the Appellant told the court that he sat between the driver and the turn-boy. There was no evidence that he buckled up his safety belt. Ordinarily, the front passenger seat is mean for one person. The plaintiff sat between the turn-boy and the driver. This is a precarious position and he exposed himself to injury. The injury to the teeth betrayed him. But of greater significance is that safety belts are safety measures and must be fastened at all times when the vehicle is in motion, for they serve a useful purpose of reducing the risk or mitigating the magnitude of injury. Failure to fasten them or to ride in a vehicle without safety belt is contributory or comparative negligence on the part of such passenger. Therefore, it is wrong to diminish the role of safety belts in the event of an accident in the manner the Appellant has done in his submission. The trial court did not consider extraneous matters as was submitted by the Appellant in the determination of this issue. In the circumstances of this case, the Appellant is liable for contributory negligence of up to 30%. I so find and hold. I am aware that the judgment by the trial court was muddled up; at one point it apportioned liability on equal basis; at another at 20%:30%; and ultimately at 70%:30%. This should be avoided through mere proof-reading of the judgment before delivery.

Loss of goods and profit

[4] The Appellant argued that he adduced evidence to prove that his goods worth Kshs. 200,000 were damaged as a result of the accident. He also stated in court that he was to sell the goods in Nairobi Ngara market and expected to make Kshs. 1,000,000 out of the sale. He called PW2 who testified that he lent the Appellant Kshs. 50,000 and he saw him buy bananas and pawpaw which he loaded on to the vehicle herein. The Appellant stated that he bought these fruits from farmers. I am aware that there is no requirement that such claim of loss of goods must necessary or only be through documentary evidence. Oral testimony would be sufficient. But in this case, it is surprising that, other than PW2 the Appellant did not call any of the persons from whom he bought the fruits to give evidence to that effect. He did not also see the need of calling any person who assisted in the loading of the fruits on to the lorry. Pieces of evidence of the kind I have alluded to is important in such cases. But it is lacking- something that makes the denial by the Respondent of the presence of goods in the vehicle indomitable defence. This case is not an example of properly litigated case. In the upshot, there was no evidence to show that more probable than not the goods alleged by the Appellant were on board of the lorry in question and were destroyed in the accident. In addition, value of alleged lost goods is special damages which in law should not only be specifically pleaded but also proved a such. Other than the oral word of the Appellant on this subject, there was not any other credible evidence on the value of the goods. The evidence provided is not sufficient whatsoever to proof on a balance of probabilities that the goods were worth Kshs. 200,000 or the expected sale value was Kshs. 1,000,000. Therefore, the trial magistrate was right in dismissing the claim for loss of goods entirely.

Dental Cost

[5] This ground of appeal was abandoned by the Appellant through his submission at paragraph 11 thereto.

[6] In conclusion, I see nothing on which to interfere with the decision of the trial court. Consequently, I find this appeal to lack merit and is dismissed. However, in the circumstances of this case, I order each party to bear own cost of the appeal. It is so ordered.

Dated and signed at Meru this 20th day of November 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 11th day of December 2019

L. NJUGUNA

JUDGE