REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 32 OF 2011

MULTIPLE HAULIERS LTD.....APPELLANT

VERSUS

GLADYS ATIENO.....1ST RESPONDENT

ROSE KENJU.....2ND RESPONDENT

(Being an Appeal from the Judgment and decision of the Hon. A.C.Ong'injo (PM) in Kisumu in CMCC NO. 551 of 2006 delivered on 19th December, 2009)

JUDGMENT

1. GLADYS ATIENO ***(hereinafter referred to as 1st respondent)*** sued and **ROSE KENJU** ***(hereinafter referred to as 2nd respondent)*** and **MULTIPLE HAULIERS LTD** ***(hereinafter referred to as appellant)*** in the lower court claiming damages for injuries she suffered on 5th November, 2005 when the 2nd respondent's M/V KAQ 138N that she was travelling as a fare paying passenger collided with the appellant's M/V KAU 480Y.

The 2nd respondent and the appellant filed respective statements of Defence and denied the claim and urged the court to dismiss the 1st respondent/plaintiff's claim with costs.

2. In a judgment delivered on **19th December, 2009,** the learned Magistrate apportioned liability at 80% against the 2nd respondent and 20% against the appellant and awarded the 1st respondent general damages in the sum of Kshs. 600,000/-

The Appeal

3. The Appellant being dissatisfied with the lower court's decision preferred this appeal. The Memorandum of Appeal dated 15th March, 2011 sets out 6 grounds of appeal that may be summarized into 5 grounds that:-

1) The Learned Magistrate erred in fact and in law in holding the appellant liable at 20% when the evidence of the 1st respondent blamed the 2nd respondent's driver fully

2) The Learned Magistrate erred in fact and in law in failing to hold the 2nd respondent 100% liable when she failed to enter appearance or defend the suit

3) The Learned Magistrate erred in fact and in law in being guided by the evidence of PW3 who never witnessed the accident nor investigated the accident

4) The Learned Magistrate erred in fact and in law in considering the plaintiff's uncorroborated evidence which never identified the registration number of the appellant's motor vehicle

5) The Learned Magistrate erred in fact and in law in assessing special damages that were neither pleaded nor proved

SUBMISSIONS BY THE PARTIES

4. On 31st October, 2017, directions were taken that the appeal be disposed off by way of written submission which counsels dutifully filed.

Appellant's submissions

5. Further to the grounds set out in the Memorandum of Appeal, it was submitted that there was evidence that the 1st respondent discharged her burden and blamed 2nd respondent's driver for the accident a fact that was confirmed in ***Ukwala Inquest No. 4 of 2006.*** The appellant placed reliance on the case of ***Nickson Muthoka Mutavi v Kenya Agricultural Research Institute [2016] eKLR*** which quoted **Halsbury's Laws Of England, 4th Edition** at paragraph 662 at page 476 with respect to the what is required to be proved in an action such as the Appellant's:-

> **"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."**

Respondent's submissions

6. In response, the 1st respondent submitted that the court's finding that the appellant was also to blame and placed reliance on the case of ***EMBU PUBLIC ROAD SERVICES vs RIIMI [1968].***

7. It was further submitted that the fact that 2nd respondent's driver was blamed in ***Ukwala Inquest No. 4 of 2006*** and by PW3 was not *primafacie* evidence that he was negligent.

The evidence

8. This court has very carefully considered the pleadings, proceedings, exhibits, the grounds of appeal and the oral submissions by both counsels.

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified.

The principles governing the consideration and evaluation and findings of an appeal court have well been established particularly in the case of ***Kiruga Vs Kiruga & Another [1988 KLR page 348*** where the Court of Appeal held

> ***"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."***

9. In her testimony, the 1st respondent confirmed that the accident occurred on the lawful lane of the appellant's vehicle but blamed both drivers for driving fast. In cross-examination by appellant's counsel, the 1st respondent told the trial court that's she did not know the speed at which the appellant's vehicle was being driven. The 2nd respondent did not defend the suit and appellant did not tender any evidence

Analysis and Determination

10. The evidence on record blames 2nd respondent's driver for driving fast on the lawful lane of the appellant's vehicle thereby causing the accident. **1st respondent did not in her testimony demonstrate that appellant's driver committed the acts of negligence attributed to him at paragraph 7 of the plaint i.e, drove at an excessive speed, failed to control his motor vehicle, failed to recognize the presence of 2nd respondent's vehicle, drove without due care and attention or failed to swerve, brake or stop to avoid the accident.**

11. No evidence was tendered against the appellant. I have considered the cases of ***EMBU PUBLIC ROAD SERVICES vs RIIMI [1968]*** and I am not persuaded that the appellant should be held liable only for the fact that it did not tender any evidence.

12. In the result and for the reasons given hereinabove, I find that the learned trial magistrate's decision on liability was based on a misapprehension of the evidence.

13. The sum of Kshs. 16,460/ for special damages was pleaded and proved and there would be no reasonable cause to interfere with the same.

Orders

14. In the result, the appeal succeeds to the extent that judgment on liability at 20% against the appellant is set aside and in its place, judgment on liability is entered as against the 2nd respondent at 100%. 2nd respondent is liable to pay the total sum of quantum in the sum of Kshs. 600,000/- assessed by the trial court. Each party shall bear its own costs of this appeal.

DATED AND DELIVERED THIS 6th **DAY OF** February **2018**

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix & Carol

Appellant - N/A

1st Respondent - Mr. Odhiambo h/b for Mr. Ndinya

2nd Respondent - N/A