REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 217 OF 2011

MATUNDA FRUITS BUS SERVICES LTD.....APPELLANT

VERSUS

MOSES WANGILA WANGILA.....1ST RESPONDENT

WELLS FARGO COURIOUR SERVICES LTD.....2ND RESPONDENT

JUDGMENT

1. By a Plaint dated 10/03/2010, the Appellant sued the Respondents jointly and severally for special damages of Kshs. 1,548,840.00 together with interests and costs. The claim arose from a road traffic accident which occurred on 14/05/2008 along the Nakuru-Eldama Ravine Road involving two motor vehicles. One of the motor vehicles was the Appellant's motor vehicle, a bus, registration number KAW 367W owned by the Appellant and driven by one of its agents. The second motor vehicle was a Mitsubishi Canter, registration number KAT 270U which was being driven by the 1st Respondent.

2. It would appear from the pleadings and the evidence tendered in Court, only the Appellant's motor vehicle was damaged during the accident. The Appellant pleaded that it cost it Kshs. 262,740 to repair the motor vehicle. It also pleaded that it took 32 days for the repairs to be completed. As such, the Appellant prayed to be compensated for loss of earnings during those 32 days at Kshs. 40,000 per day. The total amount the Appellant claimed under this heading was Kshs. 1,280,000. The Appellant also claimed assessment fees and Police Abstract fees. The total claim was for Kshs. 1,548,840.00.

3. The Respondents denied the claim and filed a defence. The case proceeded to full hearing. The Appellant called two witnesses and closed its case. The Respondents called one witness and closed their case. The Learned Trial Magistrate returned a verdict dismissing the claiming finding, in essence, that the Appellant had not discharged its burden to prove its claim to the required standard. In material part, the Learned Trial Magistrate analyzed the case as follows:

> It is clarified (sic) both Plaintiff and Defence are blaming each other. The Plaintiff brought evidence of a Police Officer who has not assisted the Plaintiff's at all. The Police have no evidence to support the indication on the Police Abstract that the 1st Defendant be charged, he was never charged with a traffic offence, at least the Plaintiff's do not have that evidence (sic). The Police Officer did not furnish the Court with the findings at the scene of the accident. If any sketch plan was drawn it is not produced. One cannot tell where the point of impact was, each driver claims it was in their lane.
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> If there was broken glass or debris, there is no evidence of where it was (sic), to give the Court a rough idea of where the impact was. At the end of the day, it is the word of PW1 against DW1. The Court has then had to go to the pleadings and see how the evidence supports the claim. The Defendant is clear in his pleadings that the Plaintiff's driver is the one who crossed into his lane.
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> In the Plaint, the Plaintiff did not come out clearly that his claim would have been the Defendant's driver drove into his lane. The particulars of negligence are wide but the PW1 was very specific as to the wrongs things which the defendant did yet the same are not specifically drawn out. The evidence of PW1 on negligence of the Defendant's driver appears to be an afterthought or if it was not then it was an omission for the Plaintiff to avoid being specific on the allegations
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> The Court is not able to find in favour of the Plaintiff who had the onus of proving what his claim was but did not have a right to bring up fresh allegations not pleaded, by way of proving blame. The Plaintiff has not, on a balance of probabilities, proved that the defendants are liable to him (sic)…..

4. The Appellant is aggrieved by the findings and conclusions of the Learned Trial Magistrate dismissing its claim. On appeal, it has enumerated the following nine grounds of appeal:

> 1. The learned trial magistrate erred in law and in facts in her analysis on facts on liability thereby arriving at a wrong conclusion to

the prejudice of the Appellant.

2. The learned trial magistrate erred in law and facts in her analysis of evidence before her on facts manifesting bias against the Appellant's case from onset of the judgment to her conclusion thereby causing her judgment to fall short of establishment principles of a legal judgment

3. The learned trial magistrate erred in facts and law in finding that the Appellant has not proved its case against the Respondents on liability despite the corroborated evidence of the Appellant's PW1 the driver and that of the police as against that of the Respondents driver without any justification in law thereby arriving at a wrong decision to the prejudice of the Appellant.

4. The learned trial magistrate erred in law in using the police failure to prosecute the 1st Respondent with a traffic offence as a failure or inadequacy of the Appellant's case thereby denying the Appellant a justified judgment on the basis of law the Appellant having no mandate to carry out such prosecution.

5. The learned trial magistrate erred in law and facts in using police failure to charge the 1st Respondent with a traffic offence as acquittal of the 1st Respondent or liability in causing the accident thereby arriving at a wrong decision to the prejudice of the Appellant.

6. The learned trial magistrate erred in law and facts in placing greater weight on the Respondents driver evidence as against the Appellant's driver that was corroborated by the police findings on the police abstract that the party to blame for the accident was the 1st Respondent's without any justifiable reason in law and facts or evidence before the court thereby arriving at a wrong decision to the prejudice of the appellant.

7. The learned trial magistrate erred in law and facts in purporting to manufacture her evidence by alleging that PW3 produced financial statements on income whereas PW3 produced copies of receipt books for passengers for the accident bus prior to the accident showing daily average income which formed the basis for claim for loss of income for the period the bus was on repair without justifiable grounds in law to support such a finding or analysis.

8. The learned trial magistrate erred in law and facts in finding that the Appellant had not proved loss of income contrary to the documentary evidenced on record thereby arriving at a wrong decision to the prejudice of the Appellant.

9. That the judgment of the trial magistrate is not supported by the evidence on record.

5. The Appeal is opposed by the Respondents. By dint of the Court's directions, each party filed their written submissions – and on the appointed date for oral highlighting, each party wholly relied on those submissions.

6. In short, this appeal revolves around the question of burden of proof and when it can be said that a Plaintiff in a civil claim has not reached the threshold of quantum of proof, namely, preponderance of evidence, to deserve a positive verdict to their claim.

7. I will quickly rehash the evidence taken by the Trial Court and then return to this question.

8. PW1 was Jackson Chepchumba Kiron, the driver of the ill-fated bus owned by the Appellant on 14/05/2008. He testified that he was ferrying passengers from Nairobi to Kitale using the Nakuru-Eldama Ravine Road. Between 11:00pm and midnight he was nearing Ravine town; driving uphill, he told the Court. He testified that he saw a Canter heading in his direction from about 100 metres out. As the canter came closer, he said, he realized it had crossed the divided yellow line and had come to his lane. PW1 testified that he drove to his left and out of the paved road in a bid to try and avoid the oncoming Canter. However, the Canter still hit the bus on the right, driver's side causing substantial damage. PW1 says he stopped the bus just a few metres from the place of impact and came out. He was categorical that he stopped the bus outside the paved road; and that it was the driver of the other motor vehicle who left his lane to hit the bus.

9. PW2 was a Police Officer from Mogotio Police Station. His task was to produce the Police Abstract. He was not the investigating officer of the accident; and he did not find any file opened for the accident. He could, therefore, not give any evidence about how the accident occurred other than reiterate the facial contents of the Police Abstract. And the Police Abstract recommended that the driver of the Canter (the 1st Respondent) be charged with a traffic offence for the accident.

10. However, in fact, no one was charged for the accident. DW1, the 1st Respondent, testified that he was not charged with any offence and contested that he was to blame for the accident. His recollection of the accident was the exact opposite of what PW1, the driver of the Bus, was. DW1 remembered the bus coming straight at him, its lights in full glare. He remembered dimming his lights at least four times in a bid to get the other driver to dim his blinding lights. But the oncoming vehicle did not dim its lights. DW1 remembered slowing down as the other vehicle came closer to him – and realizing that the bus had crossed the yellow dividing line and was on his lane. He further remembered moving cautiously to his extreme left in a bid to avoid an accident and even went completely off the tarmac. However, he testified, the bus went and hit the right side of the Canter and ended up scratching the right side mirror and the right body of the Canter.

11. DW1 was categorical that he swerved to try and avoid a head-on collision and that by the time the bus hit the Canter, about half of the Canter was outside the tarmacked area. He further testified that the bus hit the Canter and, since it was speeding, the driver was only able to bring it to a stop about 200 metres from the point of impact. DW1 recalled that there was broken glass on his left lane where the impact was. He also recalls the Police who came to the scene the following morning at 6:00am stating that the driver of the bus (PW1) was to blame for the accident. He was also not tried for the accident.

12. Faced with these rival theories about how the accident occurred, the Learned Trial Magistrate did not reach conclusions whether she

believed either one was more credible than the other and why. Instead, she found refuge in what she saw as inadequate particularization of negligence claims by the Appellant in its Plaint. She reasoned that whereas the Respondents were particular in their defence that it was PW1 who drove the bus in such a manner that it crossed the yellow line and went into DW1's lane, the Plaint did not contain any such specific claim. Based on this, the Learned Trial Magistrate concluded that the Appellant had not proved its case to the required standard.

13. The Appellant scoffs at the idea that it did not produce sufficient evidence to prove its case and is adamant that the Learned Trial Magistrate fundamentally misconstrued the applicable legal principles. On the other hand, the Respondents have reminded me of the constraints which an appellate Court must have before interfering with findings of fact of a Trial Court.

14. The Respondents' Counsel cited to this Court the elegantly vivid admonition by Lewinson LJ in ***Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5, [2014] FSR 29*** where he stated:

> Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them…The reasons for this approach are many. They include:
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> 1. The expertise of the trial Judge in determining what facts are relevant to the legal issues to be decided and what those facts are if they are disputed.
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> 2. The trial court is not a dress rehearsal. It is the first and last night of the show.
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> 3. Duplication of the trial Judge's role on Appeal is a disproportionate use the limited resources of an Appellant court, and will seldom lead to a different outcome in an individual case.
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> 5. In making his decisions the trail Judge will have regard to the whole of the sea of evidence presented to him, whereas an Appellant court will be island hopping.
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> 6. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

15. The Respondents support the Learned Trial Magistrate's position that given the two different versions of the accident, and without independent corroborative testimony on behalf of the Appellant, the only logical conclusion is that the Appellant did not discharge its burden of proof. This is because, the Respondents argue, it is the Appellant who was saddled with that duty.

16. I am unable to agree with the Learned Trial Magistrate's view that the particulars of negligence pleaded in the Plaint were insufficient and at variance with the evidence proffered at trial. This was pivot upon which she declared that the Appellant had not discharged its burden of proof. Paragraph 5 of the Plaint lists down the alleged particulars of the 1st Defendant's negligence thus:

> a. Failing to keep any or any proper lookout or to have any sufficient regard for other lawful users of the road, the Plaintiff included.
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> b. Driving at a speed that was excessive in the circumstances.
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> c. Failing to see the Plaintiff's motor vehicle in sufficient time or at all so as to avoid the said collision.
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> d. Failing to give any or any adequate warning or signal of his approach.
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> e. Failing to slow down, stop, swerve or brake or in any way maneuver the said motor vehicle under his control so as to avoid the said accident.
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> f. Colliding into the Plaintiff's motor vehicle aforesaid thereby causing damage to it.
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> g. Failing to adhere to the provisions of the Highway Code.
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> h. So far as is necessary, the Plaintiff will rely on the doctrine of *res ipsa loquitur*.

17. From this catalogue of specifics on negligence, it is, with respect, a stretch to conclude that the Appellant's claim lacked in specifics. For example, the Appellant's witnesses tendered evidence aimed to demonstrating that the 1st Respondent was driving at excessive speed – which would be covered by paragraph 5(b) or that he failed to keep to his proper lane – which would be covered by paragraphs 5(a); (d); and (f).

18. In my view, therefore, it was an error for the Learned Trial Magistrate to have concluded, merely based on alleged lack of specifics in the Appellant's claim, that it had not proved its case to the required standard. It behooved the Learned Trial Magistrate to come to a conclusion which of the two versions of how the accident occurred she believed.

19. After analyzing the Trial record and all the evidence tendered in the case, and having had no advantage of seeing and hearing the witnesses, it is challenging to make that determination on appeal. It would appear, from the circumstances of the accident, when all is considered, the fair outcome would be to conclude that the drivers of both motor vehicles were equally to blame for the accident.

20. In ***Hussein Omar Farah v Lento Agencies [2006] eKLR (Nairobi Civil Appeal No. 34 of 2005*)*,*** the Court of Appeal, faced with a similar situation held as follows:

> In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame… The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame.

21. Justice Meoli followed the principle in this decisional law in ***Eliud Papoi Papa v Jigneshkumar Rameshbai Patel & another [2017] eKLR (High Court of Kenya at Naivasha Civil Case No. 23 of 2015)*** where she stated as follows:

> Thus, the court is confronted with conflicting and irreconcilable evidence regarding how the collision occurred and which driver is to blame. It is true that under Section 107 of the Evidence Act the Plaintiff was obligated to prove his allegations of negligence against the Defendants. However, the existence of conflicting versions on the collision does not necessarily mean that nobody was liable; a collision involving two vehicles almost always involves fault on the part of one or both drivers….
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> > i. The Plaintiff's and Defendant's account of the accident was equally doubtful. Of the collision however there is no dispute. In the circumstances, and based on the decision of the Court of Appeal in **Hussein Omar Farah** and **Anne Wambui Ndiritu**, I must find that the deceased and DW1 contributed equally in causing the collision and both must shoulder liability at 50:50.

22. I am inclined to follow similar reasoning. Given the two rival accounts of how the accident occurred, I am unable, at this stage, to pick one over the other. The truth of the matter is that two motor vehicles were involved in a road traffic accident on a fairly straight road. Without more evidence, blame should be shared between the two drivers. I would therefore apportion liability 50%:50%.

23. Turning to the liquidated damages, I note that the Appellant pleaded Kshs. 262,740.00 for repair costs of the motor vehicle. However, it can only recover the actual amount it paid. That sum, according to the receipt produced as an exhibit, is Kshs. 226,500/-. That is the amount recoverable. The amounts paid for motor vehicle assessment as well as for the Police abstract are also recoverable.

24. The second heading of claimed liquidated damages is more problematic. The Appellant claims Kshs. 1,280,000.00 as loss of user. This was calculated using a figure of Kshs. 40,000/- per day for 32 days. To prove the damages under this heading, the Appellant produced Manifests for a given period in January- February, 2007. The Travel Manifest is a summary of all the revenue generated by the bus per trip as well as all the expenditures for that trip – including fuel; salaries for the personnel; and commissions. The Travel Manifests submitted as exhibits tended to show the following:

> a. That the bus plied the Kitale-Nairobi route and each day it did one trip each way.
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> b. That the highest net profit for one-way trip over that period was Kshs. 31,500/- while the lowest over the same period was Kshs. 16,290/-. Looking at the numbers, it would appear that the suggested average of Kshs. 40,000/- as net profit per day is eminently reasonable.

25. However, it is not entirely clear to me why it took 32 days to repair what would appear, in the context of a Public Service Vehicle, to be minor repairs. A party injured through the negligent actions of another has a duty to mitigate damages through prudent preventative action. The duty to mitigate should have kicked in here for the Appellant to ensure that the bus would be repaired as quickly as possible. In my view, a claim for loss of use must be for a reasonable period of time which is strictly necessary for the repairs to be made on the damaged vehicle. In most cases, absent exceptional circumstances, such reasonable period should not exceed fifteen days. In the present case, no exceptional circumstances were shown. I will, therefore, cap the number of days over which the Appellant can claim loss of use of the motor vehicle to fifteen days.

26. Finally, as the Respondent argued in the Court below, the average figure of Kshs. 40,000/- per day derived from the Travel Manifests does not account for the income tax which would have been paid on the profits by the Appellant. It seems reasonable, given the tax regime in Kenya, to assume that at least thirty percent of the figure would have gone into tax. The final award, therefore, will be reduced by that amount.

27. The outcome, then, is the following:

> **a. The decision by the Learned Trial Magistrate dismissing the suit in its entirety is hereby reversed. In its place there shall be a judgment apportioning liability equally at 50%:50% between the Appellant and the Respondents.**
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> **b. The proved liquidated damages shall be as follows:**
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> |---|---|
> | **Repair costs** | **Kshs. 226,500** |
> | **Assessment fees** | **Kshs. 6,000** |
> | **Police Abstract** | **Kshs. 100.00** |

Loss of Earnings (Kshs. 40,000 per day

for 15 days less 30% tax) **Kshs. 420,000**

Total **Kshs. 652,600**

Less 50% contribution **Kshs. 326,300**

c. There shall, therefore, be entered a judgment for the Appellant against the Respondents jointly and severally for Kshs. 326,300/-.

d. Each party shall bear its own costs.

28. Orders accordingly.

Dated and delivered at Nakuru this 18th day of October, 2018

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JOEL NGUGI

JUDGE