



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.77 OF 2017

BETTIN N.OKUMBE.....APPELLANT

VERSUS

TROPICANA LINKLINE LIMITED.....RESPONDENT

(Being an Appeal from the Judgment, Decree and Order in Maseno PMCC NO. 18 of 2014 delivered by Hon. B.K.Kiptoo (RM) on 13th November, 2017)

JUDGMENT

1. **TROPICANA LINKLINE LIMITED (hereinafter referred to as respondent)** sued **BETTIN N.OKUMBE (hereinafter referred to as appellant)** in the lower court claiming Kshs. 668,667/- being the cost of repairs of M/V KBE 779H which was damaged after a collision with appellant's M/V KAH 466 D as a result of the negligence by appellant and/or her authorized driver, servant, employee or agent.

2. The appellant filed a statement of Defence and denied the claim.

3. In a judgment delivered on **13th November, 2017**, the trial court found the appellant liable at 100% and awarded damages in the sum of Kshs. 636,417/-, costs and interest

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 22.11.17 filed the Memorandum of Appeal dated 20.11.17 which sets out 11 grounds of appeal that may be summarized into the following 5 grounds that:-

- 1) **The judgment delivered on 13.11.17 does not comply with Order 21 rule 4 of the Civil Procedure Rules**
- 2) **The Learned trial Magistrate erred in law in holding the appellant liable when there was evidence that the respondent's motor vehicle had hit a second motor vehicle on the rear**
- 3) **The Learned trial Magistrate erred in law in not considering the defence and written submission by the defendant**
- 4) **The judgment goes against the principle of law governing special damages**
- 5) **The respondent had already been compensated by its insurer**

SUBMISSIONS BY THE PARTIES

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Appellant's submissions

6. Appellant's submissions are an explanation of the grounds of appeal. Appellant placed reliance on ***John Wilkins -vs- Buzeki Enterprises Ltd (2015) e KLR.***

Respondent's submissions

7. It was submitted for the respondent that the trial court rightfully decided that the respondent had ***loci standi*** to sue the appellant under the

doctrine of subrogation as was decided in the case of John Wilkins -vs- Buzeki Enterprises Ltd (Supra). On liability of the appellant's driver, the respondent relied on Morgan'sv Launchbury & others [1972], 2 All ER 606 at p 609.

Analysis and Determination

8. 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. This principle of law was well settled in the case of Selle v Associated Motor Boat Co. Ltd (1968) EA 123.

Burden Of Proof

9. It is trite law that "whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** stipulates this in the following terms:

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

10. Further **Section 109** in narrowing down to proof of particular facts, stipulates:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

11. **Section 110** further provides that:

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

12. Regarding the incidence of burden, **Section 108** provides that:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

13. PW1 the respondent's drive stated that appellant's driver drove M/V KAH 466 D without due care and attention and joined a feeder road ahead of respondent's motor vehicle causing the respondent's motor vehicle to hit the appellant's motor vehicle on the rear wheel thereby damaging respondent's motor vehicle on the front part.

14. The appellant testified but conceded that she did not know how the accident occurred. The appellant's driver did not testify to explain if the accident occurred otherwise other than stated by respondent's driver. The evidence of respondent's driver that appellant's driver was to blame for the accident was not controverted.

15. In the case of Morgan'sv Launchbury & others [1972], 2 All ER 606 at p 609, it was held:-

"In order to fix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner's servant, or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner."

16. The appellant conceded that the driver of M/V KAH 466 D was acting on her behalf. The respondent discharged its burden of proof and the appellant having failed to prove the contrary, the trial court rightfully found the appellant vicariously liable on account of her driver's negligence.

17. ICEA Lion General Insurance by a letter dated 14.5.13 instructed Ms. Kimanga & Company Advocates to file suit against the appellant for recovery of the damages arising out of the accident in issue. It was for that reason that the suit was filed in the name of the insured since as stated in the case of John Wilkinsv Buzeki Enterprises Ltd (Supra):-

"Under the subrogation principles, the Insurance Company cannot file a suit in its name, but it gives that power and authority to its insured to claim or defend a suit, and only after an order or judgment has been passed does the insurance company comply with Section 10 of Cap 405".

18. The totality of the evidence demonstrates that the trial court correctly considered the evidence on record and gave reasons for finding the appellant liable at 100% and I find no reason to interfere with that finding.

19. On quantum, the respondent proved a total of Kshs. 644,607/- made up of Kshs. 636,417/- for repair and Kshs. 8,190/- as assessment fees.

Disposition

20. In the end and for the reasons given on the assessment above, the appeal partially succeeds. The trial court's order on quantum is set aside and substituted with the sum of Kshs. 644,607/-. Each party shall pay its own costs

DATED, DELIVERED AND SIGNED THIS 1st DAY OF November 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - N/A

Respondent - N/A