



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCCA. NO. 562 OF 2013

ALBERT FARRAH MAONGA.....APPELLANT

-VERSUS-

ATTORNEY GENERAL.....RESPONDENT

(Formerly Milimani Commercial Courts CC 12645 of 2005).

JUDGEMENT

INTRODUCTION

1. The Plaintiff ALBERT FARRAH MAONGA sued the Defendant - The Attorney General of Kenya seeking Judgement for Kshs. 460,480/= as a principal sum for damages, loss and expenses incurred in repairing his motor vehicle registration number KAS 123F which he claims was hit by a prisons' department motor vehicle registration number GK 470M, an Isuzu lorry.
2. The particulars of the alleged accident of 25th November 2004 were pleaded in the plaint filed in court on the 24th November 2005.
3. On the 2nd March 2006 they entered a memorandum of appearance. They filed the same in court on 3rd March 2006 together with their defence dated 28th February 2006 in which they denied causing the accident in question and averred that if indeed the said collision happened then it was solely as a result of the Plaintiff's driver's negligence.
4. The Plaintiff replied to that defence on the 7th April, 2006 reiterating the contents of the plaint and joining issues with the Defendant by denying ever solely or contributing to the occurrence of the accident in question.
5. After full hearing of the case, the Trial Magistrate dismissed the suit prompting the filing of the instant appeal. The appeal sets 3 grounds of appeal namely:-

1) The Learned Magistrate erred and was wrong in her assessment of the evidence as to who between the Appellant's driver and the Respondent's driver was to blame for the accident and as a consequence arrived at an erroneous decision with regard to liability for the accident.

2) The Learned Magistrate erred and was wrong in relying on her own knowledge with regard to the scene of the accident in determining liability instead of relying on the evidence actually given before her as to how the accident happened.

3) The Learned Magistrate erred and was wrong in determining that the Appellant had not proved the damage occasioned to him by the accident when from the evidence and documents produced before her the Appellant had proved such damages.

6. The parties agreed to canvass appeal via submissions. no party has complied with timelines of filing submissions thus judgement prepared without benefit of the parties submissions.

DUTY OF 1ST APPELLATE COURT

7. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

EVIDENCE

8. PW1 Alphaxad Mworia Nyambura stated that he was along Jogoo road having come from Donholm direction headed for town centre. That he did not reach his destination safely.
9. That then at a turn off on Jogoo road to Donholm direction back to town centre, he saw a prisons lorry coming from the Makadara Law Courts and did not stop to give way but just got into the main road in the slip road to give way to main road users.
10. That PW1 was on the extreme left lane facing town when the prisons lorry got into the main road abruptly up to his side and he braked urgently hooted at him and swerved to his right side in order to avoid hitting him at the rear when he realized he made a mistake and also swerved back to the right lane on Jogoo road and it hit his vehicle.
11. That the lorry rear angle line hit PW1's vehicle's extreme left side and then both stopped.
12. Upon cross-examination PW1 stated that he tried to avoid the accident by swerving to the right and the lorry also swerved to its right and it also hit his vehicle. Its rear right angle line hit PW1's left extreme left side of the vehicle and the lorry joined from the slip road abruptly without stopping hence the accident. That the lorry's speed as it joined PW1's road he could not tell.
13. That PW1 hooted at the lorry and it swerved back to the right and it hit his vehicle. That the driver of the lorry changed lanes without checking his side mirror to see the vehicle PW1 was driving had gone to the right.
14. PW1 further stated that in the mornings they do not compete for passengers. That there was a drizzle in the morning and he was doing a low speed.
15. That the drizzle could be a cause of the accident but the lorry's driver's negligence caused the accident. He made a u-turn abruptly hence it came to PW1's left lane. That PW1 did not see the lorry in advance. The lorry had already got fully on the road to Nairobi direction. That slip road at Jogoo road has no waiting acceleration lane.
16. PW1 further explained that a vehicle has to wait for vehicles from Donholm to clear before joining the main road.
17. That the speed he was doing was not so high. That he (PW1) hooted at him (lorry driver) but it changed lanes back to the right lane where PW1 had swerved to hence the accident. The lorry came from the right slip side to the left fully.
18. PW2 Albert Farrar Maonga being the owner of the vehicle Reg. No. KAS 132F, stated that PW1 called him on that day and stated that he had an accident with a prisons lorry near a slip road near Makadara Law Courts. That he found that his vehicle was damaged on left hand side at the front. No noticeable damage on the GK lorry. That he found the police already there.
19. That PW2 later obtained an abstract and blamed the lorry's driver for the accident. The abstract was in the bundle as No. 1. That since his vehicle was damaged, he went and repaired it in the same month. Assessment of damages indicated repair costs would be Kshs. 144,500/=. The assessors report is in the bundle. Assessor's report – MFI P1.
20. PW3 Evans Orege own Kalama 200 Motor Vehicle assessors. That on 19th January 2005, PW3 recalls he was instructed by Mr. Maonga to do assessment of motor vehicle Reg. No. KAS 132F. It had had an accident so he was to assess it for repairs. It was a Nissan matatu. It was in the garage known as Secure Auto Garage. It had been hit on the left hand side, right hand side and on the rear.
21. PW3 further stated that he did assessment and the costing was in his report. Then he did labour costing at Kshs. 16,000/= i.e. painting material charges Kshs. 3,000/=, miscellaneous Kshs. 2,000/=. The total costing was Kshs. 148,480/=. He did a report and gave it to Mr. Maonga (PW1). PW3 charged Kshs. 5,800/= and was paid.
22. DW1 Joseph Marakwet Koech stated that when he got to Jogoo road, he gave way. He went to a slip road to return towards city stadium. As he got into the road, he was surprised he was hit behind. His vehicle was in front and so he stopped. He went out of the prisons lorry and found that a matatu had hit him.
23. He further stated that the Nissan matatu was going to town. According to him it seems they were competing for passengers. It seemed to him the one which hit him tried to overtake another one on the left side. He was not over speeding. He had only got into the slip road when he was hit. He was the one hit from behind. That he attempted to overtake other vehicles when not safe was false.
24. After the accident DW1 called his bosses who called police, then came to headquarters for inspection. Then he went to Parklands station where he turned out to be the one charged for careless driving. His vehicle was hit from behind.
25. That the case proceeded but DW1 was discharged under section 87(a) of the CPC.
26. That the accident was due to competition between the Matatus. DW1 denied causing the accident since he was on his lane going ahead and he did not swerve.
27. During cross-examination DW1 insisted that he was hit on his right rear side hence he concluded that the matatu drivers were competing on the road. He did not enter the road without checking. That he was heading to get other remandees and with two escorts. That he was required to bring prisoners fast hence speeding was false.

28. According to DW1 the accident happened on the far left lane of the dual lane to town. He declined entering the road without checking hence hitting PW1's vehicle. That he could not be going forward and backward at the same time.

29. That when the matatu hit the lorry, others were competing with just proceeded with the journey. He was hit on right rear side on the lorry. However the lorry was not damaged because of the heavy metal it was made of only just peel of colour. That he only did service as usual with no major repairs.

30. Later the police charged DW1 for the offence. He was charged in Nairobi Law Courts. His case was heard in City Hall Court. At City Hall Court the case was heard a little. Then DW1 was transferred to Kericho. He would come for mentions and hearings.

31. That the case was withdrawn under Section 87(a) of the CPC. DW1 further stated that he had never known that PW1 attended court at City Hall twice and never testified. He couldn't tell if he was being discharged because witnesses did not testify. He thought he was discharged as a result of giving his statement to the police.

ISSUES, ANALYSIS AND DETERMINATION

32. After going through the evidence on record, I find the issues are:-

1) Whether the Appellant proved his case on balance of probabilities?

2) If above in positive, what is the quantum?

3) What is the order as to costs?

33. In those circumstances of the accident it emerged that the matatu hit the lorry from behind. PW1 who was driving the matatu at the time blames the lorry driver for failing to stop at the slip road junction and failing to give way to the main Jogoo road users headed to the city centre.

34. PW1 said that when the matter was reported to the police who were on patrol they called their counterparts from parklands police station where incidents involving government vehicles would be reported and that initially those officers who visited the scene blamed DW1 but later on being charged with a traffic offence at a city court PW1 was summoned thrice but that the court never heard the case.

35. It was upon the Plaintiff's side to produce evidence to show that traffic proceedings went on at city court and that the outcome of the traffic was in their favour to prove the carelessness of the defendant's driver. That evidence was not before the trial court which led same court to examine the circumstances of the accident as placed before it.

36. The Trial Court took judicial notice that it was well aware of the slip road in question from the Makadara Law Courts as one turns into Jogoo road to go to the city centre. It also took cognizance of the prisons' vehicle's body size viz-a-viz the rigours of turning immediately from Makadara Law Courts into the main road to town.

37. The fact also that the matatu hit the prisons' lorry vehicle from behind was also taken into consideration in determining this issue of negligence as between the two drivers. The matatu driver was on the main road and must have seen the lorry turning into the slip road to go to town. Given that it was day break at around 8.45 a.m., the matatu driver must have sufficiently seen it.

38. As submitted by defence counsel in lower court, had the matatu driver kept a safe distance than the accident would not have occurred the way it did. The motor vehicle assessor did not produce photographs to show to what extent the damages occurred at the matatu. No single passenger from the matatu gave evidence as to the manner in which the accident occurred to give weight to PW1's testimony.

39. It is clear that the prisons lorry was already in the inner lane to city stadium before the matatu's left side was hit by the right rear angle line of the lorry.

40. These circumstances lead Trial Court to conclude that the matatu vehicle was being driven at a high speed hence the driver could not control the vehicle hence the accident happened.

41. The police abstract relied on by the Plaintiff did not help the court because it showed that investigations were still pending hence even police did not yet know who was to be blamed for the accident.

42. In the decision of Justice Nyakundi in **Mbugu David & Anor -Vs- Joyce Gathoni Wathena & Anor [2016] eKLR** where the learned judge adopted the position in **Kiema Mutuku -Vs- Kenya Cargo Handling Services Ltd [1991] 1Kar 258** where the court held on this issue;

“There is as yet no liability without fault in the legal system in Kenya and a Plaintiff must prove negligence against the Defendant where the claim is based on negligence.”

43. I agree with Trial Court finding that PW1 Alphaxad Mworira was the one solely to be blamed for the accident.

44. Thus the court makes the following orders;

1) Appeal herein is dismissed.

2) As no party complied with directives on filing of submissions, they will bear their own costs.

SIGNED, DATED AND DELIVERED THIS 14TH DAY OF DECEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE