REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL APPEAL NO. 640 OF 2012

LAWRENCE ONGONDI BOGONGO ……..…….1ST APPELLANT

NAIROBI BOTTLERS COMPANY LIMITED ….....…..2ND APPELLANT

VERSUS

PETER KIMANI MWAURA …….....1ST RESPONDENT

MILKA WANGUI NJOROGE ……...…….....……2ND RESPONDENT

JUDGMENT

By a plaint dated the 30th September, 2005 and filed in court on the 3rd October, 2005 the Respondent (Plaintiffs) herein sued the Appellants (defendants) claiming special damages, general damages, costs of the suit and interest.

In the Plaint, it is averred that on the 4th day of December, 2004, the 1st and 2nd plaintiffs were lawfully traveling in motor vehicle Registration number KAJ 962H driven by the 1st Plaintiff along Mombasa road when, on reaching Firestone in Nairobi, the 2nd defendant's driver (1st Appellant) so negligently drove motor vehicle KAK 259G that it blocked and/or obstructed motor vehicle KAJ 962H thereby causing an accident as a consequence of which the Plaintiffs were injured.

The particulars of negligence against the first defendant (1st Respondent) and the particulars of injuries sustained by both the Respondents are particularized in paragraph 5 and 6 of the Plaint.

The defendants (Appellants) filed a defence on the 12th October, 2006 denying the occurrence of the accident but have pleaded in the alternative, and without prejudice, that if an accident occurred but which is denied, the same was wholly caused or substantially contributed to by negligence on the part of the 1st plaintiff. The particulars of negligence on the part of the 1st plaintiff are set out in paragraph 5(A) of the Plaint.

The defendants denied the particulars of negligence attributed to the 1st defendant (Appellant). The particulars of special damages and injuries are denied and the defendants are put to strict proof thereof.

All the other particulars set out in the Plaint are denied but the jurisdiction of the court is admitted. The matter had proceeded exparte after the plaintiffs obtained interlocutory judgment but the proceedings were set aside and the defendants were given leave to file their defence and defend the suit.

At the hearing, the first Appellant/1st Plaintiff testified as PW2. He told the court that he was driving motor vehicle KAJ 962H on 4th December 2004 along Mombasa road. That there was a lorry KAK 295G which was being driven from the opposite side when its driver swerved into the road without giving way thus causing the accident. As a result of the accident, he sustained injuries and was taken to St. James Hospital then Mater Hospital where he was admitted for 10 days. He was examined by Dr. Okello who testified as PW3 who prepared a medical report for him.

The 2nd Appellant gave evidence as PW2. She was travelling in motor vehicle KAJ 962H together with the 1st Respondent. It was her testimony that the lorry suddenly appeared and an accident occurred. She was taken to mater hospital where she was admitted for 4 days. She was examined by Dr. Mark who prepared a medical report for her.

Dr. Okoth Okero testified as PW3. He examined the first Respondent and prepared a medical report for him. He assessed the degree of permanent capacity at 20%. He also examined the 2nd Respondent who was involved in the same accident and also prepared a medical report for her. He charged them Kshs.1500 each for the preparation of the report and kshs.5000 each for court attendance.

PC Elvis Nakhusi testified as PW4. He confirmed that the accident was reported on 4th December, 2004 at Embakasi police station. He produced a copy of the sketch plan and the Police Abstract for the accident.

On the part of the Appellants, a Lawrence Bogongo Onyancha testified as the only witness. He told the court that he was driving motor vehicle KAK 259G at the material time. He adopted as his evidence in-chief, his witness statement filed in court on the 14th August, 2012.

After the conclusion of the matter, the learned magistrate entered judgment for the Respondents on liability at 100% and awarded damages to the Respondents which judgment the Appellants herein have challenged in appeal vide the Memorandum of Appeal filed on 27th November, 2012 wherein the following grounds have been listed:-

1) THAT the Learned Principal Magistrate erred in fact and in law in finding the Appellants were wholly liable for the occurrence of the accident despite there being evidence that the 1st Respondent was intoxicated while driving at the material time.

2) THAT the Learned Principal Magistrate erred in law in failing to evaluate and/or consider a driver's duty of care while driving along a Highway at night and on approaching intersection.

3) THAT the Learned Principal Magistrate erred in wholly basing his finding on hearsay evidence and relying on a contested entry on an occurrence book made by a party who was not at the scene of the accident and who was not called as witness.

4) THAT the judgment on liability is against public policy.

5) THAT the Learned Principal Magistrate erred in law in failing to consider the evidence of the 2nd Appellant and the Appellant's submissions AND more particularly a driver's reciprocal duty of care on the Highway.

6) THAT the Learned Principal Magistrate erred in fact in finding that the 2nd Appellant was at the material time obligated to use an acceleration lane while joining Enterprise Road.

7) THAT the Learned Principal Magistrate erred in awarding special damages when none had been proved.

8) THAT the Learned Principal Magistrate erred in deciding the matter as if it was founded on the

"no fault principle."

9) THAT the Learned Principal Magistrate misdirected himself in failing to evaluate the evidence adduced in court and the Pleadings filed the parties.

10) THAT the Learned Principal Magistrate erred in failing to dismiss the Respondents' case which was marred with inconsistency as to the date of the alleged accident and cause thereof.

11) THAT the Learned Senior Resident Magistrate erred in both fact and law in awarding general damages in favor of the Respondents which was highly excessive in the circumstances and awarded without any basis.

At the hearing of the Appeal, counsel for the Appellants submitted that the Respondents were bound by the plaint and they were under an obligation in law to demonstrate that the 1st Appellant blocked or obstructed the motor vehicle that they were travelling in. It was submitted that it is not possible to block a motorist while at the same time driving at an excessive speed. It was further submitted that the 1st Respondent having admitted to have taken alcohol, was negligent in driving motor vehicle KAJ 962H.

The court was also told that the learned magistrate relied on an O.B that was not adduced in evidence in that PW4 in his testimony told the court that he joined Embakasi Police Station in 2009 but the accident occurred in 2004, that he never visited the scene yet he made the remarks that **"The scene is a black spot."**

That having admitted that he had taken alcohol, the 1st Respondent was under a legal duty to proof that the beer did not impair his judgment which he failed to do.

On his part, counsel for the Respondents cited Section 44 of the Traffic Act and submitted that the 1st Respondent had in his evidence confirmed that he was not drunk to an extent of being incapable of controlling the motor vehicle that he was driving. He told the court that the first Respondent was on the main road while the first Appellant was joining the same and therefore, the first Appellant had a duty of care to wait until the road was clear before he could do so and for that reason, he was to blame for the accident.

About the magistrate relying on the O.B, it was submitted that the contents of the same were entered by the investigating officer and that there is nowhere in the evidence that he favoured one driver at the expense of the other. It was also submitted that the investigating officer did not say that the first Respondent was intoxicated.

On special damages, the court was told that the same were pleaded in that leave to amend the Plaint was sought for and granted on the 19th June, 2006. That the award of general damages is not inordinately high as to be erroneous and the court was urged to dismiss the Appeal.

In his reply, counsel for the Appellants submitted on the causation of the accident and maintained that it was the first Respondent's duty to demonstrate that he was within legal limits to take charge of a lethal machine. On the O.B, he averred that it was not admitted in evidence and therefore the learned magistrate ought not have considered it as part of the evidence. That the first respondent blamed the driver of unmarked car that swerved on his lane and made him cause the accident which evidence the learned magistrate failed to reflect in his analysis of the evidence. He has urged the court to allow the appeal.

The court has considered the grounds set out in the memorandum of appeal and the submissions by both parties. In my view, the grounds of appeal can be collapsed into the following grounds.

(1) Whether the learned magistrate erred in law and in fact in finding the first appellant fully liable for the accident.

(2) Whether the learned magistrate erred in law and in fact in awarding special damages when none had been proved.

(3) Whether the learned magistrate erred in awarding general damages which were highly excessive in the circumstances of the case.

In considering the grounds listed hereinabove, it is important for this court to remind itself of the principles that should be considered by an appellate court when considering an Appeal on quantum of damages. Those principles were stated in the case of **KEMFRO AFRICA LTD t/a MERU EXPRESS SERVCES v AM LUBIA & ANOTHER (1987) KLR 27** where Kneller JA held:

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages."***

On the first ground of appeal as summarized by the court, it is not in dispute that the first respondent was driving on a highway whilst the first Appellant was joining the same. PW1 and PW2's evidence is that the lorry joined the highway without giving way thus causing the accident. The first Appellant in his statement that was adopted as part of his evidence in-chief admitted that on approaching the T-Junction around the Firestone offices on Mombasa Road, he turned the lorry into the acceleration lane, slowed down and after checking on the oncoming traffic, he carefully drove until the lorry was on the third lane of the Highway when he heard a minor bang. He blamed the first respondent for failing to slow down when he saw the lorry turning to the third lane. Secondly, because he seemed intoxicated and thirdly because the collision occurred on his lawful lane.

The court has considered the reasons why the first Appellant felt aggrieved for being held 100% liable for the accident. First, the first respondent admitted that he had taken some beer at the material time and to be specific, four beers. **Section 85** of the **Traffic Act Cap 403** is the relevant section to consider in this regard. It provides as follows:-

> ***"Any person who when driving or attempting to drive, or when in charge of a vehicle, other than a motor vehicle, on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both."***

The important part of that Section to the case before me is:-

> ***"to such an extent as to be incapable of having proper control of the vehicle."***

It has emerged from the evidence that the 1st Respondent admitted to have taken some beer. That being the case, he needed to go further in his evidence and satisfy the court that the influence the drink had on him if at all, did not affect his capability of having proper control of the vehicle. I did not see any evidence on record to that effect. All he told the court was that he did not know the alcohol limit. It was his further evidence that he had seen the truck before he hit it. He told the court that the truck was long and that half of it had turned and that his vehicle hit the truck on the rear tyres.

From my analysis of the evidence on record, what emerges is that the first appellant joined the highway without ascertaining that it was clear and safe for him to do so. Driving a long truck at the material time, he ought to have been reasonable enough and ensure that the road was clear enough so as to give himself time to join the road without obstructing the motorist who were on the highway and in that case, the first respondent herein. Though he told the court that he had already joined the highway and that he was joining the third lane, this does not absorb him from liability as he ought to have been more careful in changing lanes as he ought not to have done so, suddenly and simultaneously without ensuring that it

was safe to do so.

The first appellant is also not free from blame for failure to tell the court whether the beer he admitted to have taken, affected his capability of controlling the motor vehicle and thus his judgment as to the speed and duty of care to the other motorists. From what he told the court and the circumstances under which the accident occured, it is highly likely that the beer he had taken influenced him to some extent as to be incapable of having proper control of the vehicle. In the alternative, if the beer did not influence his judgment, then he was to some extent negligent in the way he drove and/or controlled the vehicle at the material time. I say this because, he has admitted having seen the truck before the accident happened. He also told the court that the truck was long and that half of it had turned and his car hit the truck on the rear tyres. From this bit of evidence and in my view, had the first respondent been more careful than he was, he would have avoided the accident.

On whether the learned magistrate erred in relying on the O.B extract, my take on that is that the contents of the O.B were entered by the investigating officer, who is a public servant, in the ordinary course of his duties. It was produced in evidence and the appellants did not object to its production. In that regard, the learned magistrate was right in considering its contents but he erred in failing to weigh the evidence therein and consider it alongside with the entire evidence that was adduced in the course of the trial.

The first respondent's evidence in cross examination made reference to a third vehicle, a taxi which is said to have swerved to his lane hence causing the collision. The particulars of that vehicle were not given to court and worse still, the owner of the said vehicle was not enjoined as a party to the proceedings and for that reason, the learned magistrate was right in disregarding that evidence.

Having reconsidered the evidence as hereinabove, I find and hold that both the first appellant and the first respondent were to blame for the accident. I hereby apportion liability at 70:30% in favour of the first respondent.

On whether the learned magistrate erred in making an award on special damages, it is noted that on the 19th June, 2006 when the matter came up for hearing, before Mrs. T.W.C. Wamae (Mrs.), Mr. Ireri counsel for the respondents applied to amend paragraph 6 of the Plaint under particulars of special damages and paragraph 8(a) to read a total of Kshs.366,290/=. However, from the exhibits that were produced in court, in support of special damages a total of Kshs.13,250 and Kshs.2500 respectively for the first and 2nd respondents were produced and the learned magistrate erred in failing to award that amount.

On general damages, for pain and suffering, this court has considered the injuries sustained by the Respondents as set out in their respective medical reports by Dr. Cyprianus Okoth Okere. According to his report, the first respondent sustained the following injuries:-

(1) Bruises on the forehead.

(2) Deep cut on the right ear.

(3) Deep cut on the right cheek.

(4) Comminuted fracture of the right femur. In his opinion the doctor stated that the plate that the first respondent had was to be removed at a cost of about Kshs.80,000. No evidence was however lead to this effect by either the first respondent himself or the doctor and therefore the learned magistrate was right in not making an award on it.

On the part of the 2nd respondent, she suffered the following injuries.

(1) Bruises on the forehead

(2) Deep cut on the nasal bridge.

(3) Deep cut on the tongue.

(4) Fracture of the left enetral incisor tooth.

This court has considered the submissions by the respective parties on quantum of damages and what the learned magistrate awarded in his judgment. I find no reason why I should interfere with the awards on general damages.

In the end, the appeal partly succeeds in the following terms.

(1) Judgment on liability delivered in the lower court for the respondents against the appellants at 100% is set aside and substituted with judgment on liability for the respondents against the appellants in the ratio of 70:30% in favour of the Respondents.

(2) Judgment on award of special general damages at Kshs.58,190 and Kshs.180,000 for the first and second respondents is hereby set aside and substituted with award of Ksh.13,500 and Kshs.2,500 respectively.

(3) The award of general damages made in favour of the respondents remain undisturbed but is subject to 30% contributory negligence.

(4) Each party will bear their own costs of the appeal.

Dated, Signed and Delivered at Nairobi this 2nd day of February, 2017

…….....

L. NJUGUNA

JUDGE

In the presence of

…… *For the 1st Appellant.*

……...*For the 2nd Appellant.*

……..*For the 1stRespondent*

……..*For the 2nd Respondent*