



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 125 OF 2014

RICHA ELVIS.....APPELLANT

VERSUS

MOHAMED IBRAHIM.....RESPONDENT

J U D G M E N T

1. On the 28/7/2010 along Nairobi – Mombasa Highway, it was pleaded in the plaint filed in the lower court, there occurred an accident involving motor vehicle Registration No. KAX 134U, hauling motor trailer ZD 1109 and a motor vehicle Registration No. KBD 731Y.
2. The plaintiff was the owner of KAX 134U/ZD 1109 while the defendant owned KBD 731. As a consequence of the accident the plaintiffs’ motor vehicle was damaged hence he sued for the recovery of special damages in the sum of Kshs.2,573,600.00 and loss of use at Kshs.210,000.00 per month. The plaintiff’s suit was founded on the tort of negligence based on the allegations that the accident was solely caused by the negligence of the defendant or his driver in the manner of driving and controlling the motor vehicle Registration No. KBD 731Y. The doctrine of RES IPSA LOQUITOR was also invoked by the plaintiff to prove his claim against the defendant.
3. To the plaint, the defendant filed a statement of defence in which the defendant denied ownership of the motor vehicle KBD 731Y, the occurrence of the accident, the manner it was alleged to have occurred together with the blame on him and all the particulars of negligence and loss pleaded and then the blame was then placed on the plaintiff’s driver with the particulars therefore being given. The defence of inevitable accident was equally invoked to the effect that the accident occurred despite due care and diligence and could not have been avoided. The defendant maintained that he was entitled to contribution from the plaintiff. To that defence a reply was filed whose gist was to reiterate the fact that the plaintiff suffered loss and to deny the particulars of negligence attributed to the plaintiff. With the plaint, there was filed a list of documents which included police abstract, motor vehicle Assessors’, Reports, documents evidencing ownership of the two motor vehicles and Certificates of examination and tests of the two motor vehicles.
4. The defendant equally filed a list and supplementary list of documents which included; a pro-forma invoice for the purchase of motor vehicle KBD 731Y, certificate of examination and test of the motor vehicle, police abstract and an investigation report attaching several photographs and other documents.

Evidence by the parties at trial

5. At trial, the plaintiff did call three witness besides himself. The three witnesses were:-

6. No. 69584 PC Martin Kiterie, PW 2, who is named in the two police abstracts as the investigating officer. He visited the scene moments after the accident and found the two motor vehicles on fire. He talked of five bodies at the scene being victims of the accident and one was that of the driver of KBD 731Y. To him the driver of KBD 731Y, Elijah Mwarura Mwambili was to blame for the accident because ***“he lost control while going downhill and when returning to the road swerved to the right side”***. He produced the police abstract and the police file. In cross examination he said that the police file showed the positions of the motor vehicles after the accident with KBD being on the road while KAU was off the road.

7. That piece of evidence followed that by the plaintiff, PW 1 who went to the scene some hours after the accident. His evidence shed little light on how the accident occurred and must be seen to have been only material for the assessment of damages, and to prove his ownership of the motor vehicle.

8. PW 3, Mohamed Hassan Shika Noor, gave evidence as the person who sold the motor vehicle to the plaintiff who had not been paid the price in full but declared to have had no interest in the motor vehicle except that he waited to be paid the balance of purchase price.

9. The 4th witnesses, George Henry Mkara was the loss adjuster who inspected and assessed the motor vehicle KAU 143U at Samburu Police Station and prepared a Report dated 10/9/2010. He placed the costs of repairs at Kshs.2,055,500 (spares Kshs.1,755,500 and Labour Kshs.300,000) and a pre-accident value of Kshs.2,100,000 and came to the opinion that the motor vehicle presented a constructive total loss with a salvage value of Kshs.400,000/=.

10. He however found the trailer to be reparable at a cost of Kshs.101,500.00. He produced the assessment reports as exhibits 1 & 2 and receipts as exhibits page 9 & 10. For his attendance in court he charged Kshs.3,000 and produced a receipt as exhibit P12. On cross examination the witness said that he used the conventional way used in assessment of motor vehicles and that any other assessor would come with a figure more or less the same as his.

11. With the four witnesses the plaintiffs case was closed and the task then shifted to the defendant to also prove his defense by leading evidence. The defendant called one Patrick Njenga Kimoya an insurance investigator. The witness said that they visited the scene some 23 days after the accident. In his evidence, it was not him but another investigator who visited the scene. He said that he did interview the investigating officer together with one police officer only identified as Mining and came to the opinion and conclusion that it was KAX 134U which was attempting to overtake an unknown motor vehicle and thereby caused the accident.

12. In cross examination the witness conceded that the finding by the investigating officer would be more accurate than the word of the officer called Mining. This finding blaming the driver of KAX 143U for the accident was also based on the visit to the scene by an investigator whose details and identity was not revealed and who was never called to give evidence.

13. In a reserved judgments, the trial court in coming to its finding on liability between the parties said:-

“To come to a proper finding, I have to weight the evidence given by each side. I propose to start with the evidence of the Defendant. The Plaintiff (new defendant) called only one witness. That witness was not an eye witness. Nor did he tender any direct evidence as to the causation of the accident. His evidence was at best be classified as hearsay, in as much as what he testified about was not information he received first hand by either sight, hearing or any other method of perception. Thus the evidentiary value of DW 1’s evidence is as good as if no witness was called by the defence. On the side of the Plaintiff, again no eye witness was called to give direct evidence of which driver was on the wrong. However, their saving grace comes in the testimony of PW 2, the investigations Officer. That was as close as the entire case came to getting the evidence of an eye witness. The said police Officer said that by the time he got to the scene, the accident had occurred, but he could read clearly the registration numbers of the vehicles. That the 2 vehicles were a flame. He conducted investigations and

concluded that the driver of Motor vehicle KBD 731Y was to blame.

In my view this witness is more credible as he arrived at the scene shortly after the accident had occurred and he was able to piece together how the accident had occurred. Unlike all other witnesses, he found the vehicles in their original position immediately after the accident. All the other witnesses did not have that benefit. Coupled with what he saw at the scene, he investigated the accident and came to the conclusion that the Defendant's driver was the cause of the accident. He produced an abstract to support his evidence. From the above observations, I am persuaded that the Defendant's driver, and by extension due to vicarious liability, the Defendant, must see the blame.

As usually happens, accidents do occur due to negligence of one driver or even both drivers. In the latter case, the best a Court can do is to rely on the evidence of witness to apportion liability. Apportionment of liability is not an exact science. It depends on evidence, but even that evidence may be appreciated differently by different minds. In this case, I am tempted to give a 100% liability, but with the observations I have made, I apportion a nominal liability of 10% on the part of the Plaintiff. The Defendant shall bear 10% liability”.

14. It is that finding the appellant now challenges on the 4 grounds of Appeal contained in the Memorandum of Appeal dated 13/10/2014.

Analysis and determination

15. This being a first appeal, the court proceeds by way of retrial and is duty bound to reassess the entire evidence adduced and come to own conclusion while always taking into account that it did not get the benefit, enjoyed by the trial court, in seeing and hearing the witnesses testify. In addition an appellate court should be hesitant to interfere with the trial courts' findings on evaluation of facts unless the findings are not supported by any evidence or if the finding pervert the evidence and the notions of justice.

Finding on liability

16. In her written submissions and the oral ones offered to court, Ms.Kagura has forcefully argued and submitted that where there is no evidence of how an accident involving collision of two motor vehicles occurred, then the court should find both equally to blame. Reliance was put on the court of Appeal decision in JIMNAH MUNENE WACHARIA VS JOHN KAMTU ERERA for that proposition of the law.

17. The question that begs an answer is whether on the record availed it is clear that at the close of the trial before the trial court there was or there was no cogent evidence as to exactly how the accident occurred.

18. It is acknowledged by both sides that the driver to the two motor vehicles lost their lives in the accident. However the police abstracts issued to both sides name some two people HASSAN ABDULLAH and JAVAN MAMBO having survived the accident. None of the parties ever sought to hear their story neither were they called to testify in court. That left the evidence of PW 2, the police investigating officer who visited the scene soon after the accident to be weighed against the evidence of DW 1 a private investigator who did not visit the scene but relied on the account of an unnamed investigator who visited the scene some 23 days later.

19. The trial court did evaluate the two pieces of evidence and chose to believe the police investigating officer and considered the evidence of DW 1 as worthless.

20. In my view the trial court, as a trier of facts had the duty and right to consider the rival evidence tendered to prove the existence of a fact and come to own conclusion. That conclusion should not be slightly and freely disturbed by an appellate court merely because that latter court could have reached a

different conclusion.

21. I do find that the burden on the Respondent, as plaintiff before the trial court was to prove his case on a balance of probability and not at a higher level.

22. I am unable to find any reasons to disturb the trial courts finding on liability. I refused to disburse it with the consequence that I disallow the appeal and dismiss the same with costs.

23. Although the Respondent has made submissions on the head of loss of earnings at the rate of Kshs.210,000.00 per month, I do find as the trial court did find that there was no evidence of how much the Respondent earned and to this court those are damages capable of computation with precision and were never so computed. The same could not succeed and the trial court was perfectly entitled to disallow that claim as it did.

24. The upshot is that the appeal fails and it is hereby dismissed with costs to the Respondent.

Dated and delivered at **Mombasa** this **13th** day of **June 2017**.

HON. P. J. O. OTIENO

JUDGE