



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 163 OF 2009

1. BOLPAK TRADING CO. LTD.....1ST APPELLANT

2. ERNEST GAKURE NG'ANG'A.....2ND APPELLANT

VERSUS

1. SAMUEL MUTURA MBURU

2. DAVID KIBURU MACHARIA.....RESPONDENT

(Appeal against the original judgment and decree of Hon. Mr. A.O. Aminga (RM) in Limuru SRMCC No. 381 of 2007 delivered on 10th March, 2009)

JUDGMENT

1. The Appellants have filed this appeal on the following grounds:

- a) The learned magistrate erred in fact and in law in finding the 4th defendant 30% liable in the face of the evidence presented before the court.
- b) The learned magistrate erred in fact and law in finding that the driver of the matatu (2nd appellant) failed to take full safety measures including completely stopping the motor vehicle in view of evidence presented to the court.
- c) The learned magistrate erred in law and in fact in failing to find that the 4th defendant (2nd appellant) had exercised all reasonable caution to avoid the accident including slowing down and swerving.
- d) The learned magistrate erred in law and in fact in failing to find that there was no immediate reason or danger to warrant stopping of the motor vehicle by the 2nd appellant in view of the evidence before the court.
- e) The learned magistrate erred in law and in fact in failing to find that the plaintiff had not proved his case against the 1st appellant.
- f) The learned magistrate erred in law and in fact in failing to find that the 2nd respondent was 100% liable for the accident.

2. The 2nd respondent has on his part filed a cross appeal on the following grounds:

- a) the learned magistrate erred in law and fact by apportioning liability at 70:30 between the 2nd respondent and the appellants respectively.
- b) the learned magistrate erred in fact and in law in finding the 2nd respondent substantially to blame for the accident.
- c) the learned magistrate erred in law and in fact in completely disregarding the evidence tendered by the 2nd respondent's witnesses.
- d) The learned magistrate erred in law and in fact in failing to find that the 2nd appellant solely caused and or immensely contributed to the accident.
- e) The learned magistrate erred in law and in fact in failing to find that the 2nd appellant was reckless, negligent and in breach of traffic laws.
- f) The learned magistrate erred in fact and in law by relying on extraneous issues not pleaded nor canvassed at the hearing.
- g) The learned magistrate erred in law and fact by failing to consider the submissions and authorities made on behalf of the 2nd respondent.
- h) That the learned magistrate reached a wrong decision in law and in fact, contrary to the weight of evidence before him.

3. It is clear from the grounds above that the contested issue on the judgment is liability. I shall therefore focus on the same.

4. The first Respondent who testified as PW1 was a passenger in motor vehicle registration number KAU 483 N (herein referred to as the Nissan Matatu). It was his evidence that the road has potholes at the point where the accident occurred. That the collision occurred on the lane being used by the matatu and that motor vehicle KAA 138 H (herein referred as the lorry) hit the matatu on the left rear side. He is also on record as having stated that he would not disagree that the driver of the lorry was avoiding a pothole. It was his further evidence that the driver of the matatu swerved off towards the left to avoid a head on collision and went off the road. That the lorry hit the Nissan and both vehicles landed on a ditch. He was clear in his evidence that the accident would have been a head on collision had the matatu driver not swerved to the far left side of the road.

5. PC Joseph Gatheca who testified as PW2 was the investigating officer. He told the court that he received a call on this mobile phone from one Ernest Gakure (4th defendant) who informed him about the accident. He investigated the matter and recorded statements from witnesses at the scene. He drew a sketch plan of the scene and in his evidence, there are two potholes on the left side facing Njabini. He further told the court that the accident occurred on the left side in the direction the matatu was headed. He blamed the driver of the lorry for the accident. According to him, the accident was not caused by the condition of the road. That he took the statement of the plaintiff and in that statement he did not blame the driver of the Nissan matatu for the accident. He recorded the statement of James Kimani Mendi who stated that the driver of the lorry was swerving to avoid potholes.

6. The 2nd Appellant testified as DW1. It was his evidence that he saw the lorry at about 500 meters ahead when it suddenly started swaying and he slowed down. The lorry stopped swaying but suddenly crossed over to his lane, he flashed the headlights to warn the lorry driver and he swerved to the extreme left to avoid a head on collision, but the lorry hit him on the driver's right side mirror to the rear. The matatu was thrown to the ditch while the lorry fell on its side on his left lane facing Nairobi. That there had been no potholes where the accident occurred but he latter saw potholes on the opposite lane near where he had seen the lorry start swaying. He had slowed down when he first saw the lorry swaying. That the lorry regained control and went back to its lane before crossing over to his lane for a second

time. He confirmed that he saw the lorry swaying before going back to its lane and latter crossed over.

7. Bernard Kamau Mwangi gave evidence as DW2. He was the lorry turnboy and was on duty in the lorry. He was sitting in the driver's cabin. He testified that the road condition was very bad, it had several potholes and the lorry driver had to criss-cross the road. That their driver was attempting to avoid a pothole when the Nissan approached and since the pothole was wide, the lorry had to veer to the right side to avoid the pothole. According to him the driver of the Nissan was to blame for failing to slow down when he saw the driver of the lorry veering while avoiding the pothole.

8. DW3, James Kimani was travelling in the lorry. He told the court that the lorry attempted to avoid a big pothole in the middle of the road when the accident occurred. That the point of impact was on the left lane which the lorry was using.

9. In their submissions, the Appellants averred that the burden of prove lies with the 1st Respondent. Section 107, 108 and 109 of the Evidence Act was cited in this respect. It was submitted that the 1st Respondent failed to discharge his duty of proving the alleged negligence on the part of the Appellants and as such his case against the Appellants ought to have succeeded in the Trial Court and this Appeal ought not to be allowed. He cited the cases of **Eastern Produce (K) Ltd v. Christopher Atiado Osiro High Court Eldoret** and **Civil Appeal No. 43 of 2001** and that of **Statpack Industries -vs- James Mbithi Munyao Civil Case No. 152 of 2003** where the courts highlighted that proof of negligence was necessary in establishing liability. The Appellant also cited the cases of **Sammy Ngigi Mwaura -vs- John Mbugua Kagai & Another Eldoret HCCC No. 44 of 1997** where the Court of Appeal held that a mere collision of two vehicles or a vehicle and a person by itself without proof of negligence is insufficient to establish liability.

10. The 1st Respondent on his part cited the case of **Donoghue vs Stevenson (1932) A.C 562** and submitted that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of duty owed to him. It was further submitted that there must be a duty of care whose breach is the direct cause of damage, injury or loss to the claimant. In support of this contention the case of **Dwa Estate Limited -vs- Daniel Ariyo Osieko Civil Appeal No. 559 of 2005** was relied on. The 1st Respondent averred that both the drivers were to blame. He argued that the driver of the lorry did in fact cross-over to the lane of Nissan matatu consequently colliding into it and that the driver of the Nissan despite having seen the lorry failed to act in any way to prevent the accident. He has supported the apportionment of liability as determined by the trial court.

11. On the part of the 2nd Respondent it was submitted that the driver of the Matatu had a duty, on noticing that the lorry was swaying, to immediately move aside and let the lorry pass. That by proceeding with the journey despite noticing the unstable lorry ahead, he was negligent. He has relied on the cases of **United India Insurance Company Limited -vs- East African Underwriters (Kenya) Limited (1985) KLR** where the Judge stated that:-

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case.

He also relied on the case of Mbogo -vs- Shah & Another (1968) E.A 93 in which the court outlined the circumstances under which an Appellate Court may interfere with a decision of the trial court. He urged the court to dismiss the Appeal.”

12. The court has considered both the Appeal and the submissions made by the respective parties. This being a first Appeal, this court is minded of the fact that its under a duty to re-evaluate the evidence adduced in the subordinate court both on points of law and facts and come up with its findings and conclusion. See the case of **Selle -vs- Associated Motors Boat Company Limited (1968) EA 123**. The Appeal and the cross Appeal are both on the issue of liability and in particular whether the trial court erred in apportioning liability at 70:30. What has emerged from the evidence is that there was an accident

involving the lorry and the Nissan matatu. The two vehicles were driving in the opposite direction when the driver of the Nissan saw an oncoming lorry swaying. It was at a distance of 500 meters. He slowed down and swerved to his extreme left to avoid a collision but the lorry hit the Nissan matatu on the driver's right side mirror to the rear.

13. It has also emerged that there were potholes on that section of the road where the accident occurred and though PW2 suggested that the potholes could not have caused the accident, the evidence of PW1, DW2 and DW3 points to the fact that the potholes caused the accident as the driver of the lorry was trying to avoid them. On cross-examination, the plaintiff is very clear that the collision occurred on the lane being used by the Nissan Matatu and the only reason for blaming the matatu driver was his failure to move out of the road in time inspite of having seen the lorry at distance of 200 meters.

14. The investigating officer PW2 blamed the driver of the lorry for the accident and this was informed by the statements that he took from the passengers who were in the lorry and the matatu. According to his investigations, the point of impact was on the lane that was being used by the Nissan matatu meaning that the driver of the lorry left his lane and encroached on the lane that the matatu was being driven on. According to his evidence, nobody blamed the driver of the Nissan matatu for the accident, and even the plaintiff in his statement, he did not. The court notes that on cross-examination, the plaintiff stated that he could not recall whether in his statement to the police, he did not blame the driver of the Nissan. In my view, for him to do so while in the witness box, it must have been an afterthought.

15. Considering the evidence in its totality, the more probable conclusion that this court can arrive at, is that, the accident occurred on the lane that the driver of the Nissan matatu was using. Am persuaded by the evidence of PW2 and though it was suggested that he was known to the DW1 before the accident, no evidence was placed before the court to prove that their relationship, if any, affected the outcome of the investigations. PW2 is on record as having stated that he recorded statements from passengers who were travelling in both vehicles.

16. In my opinion, the evidence of DW2 did not aid the defence case but its very useful to this court. In his evidence, he stated that the driver of the lorry had to criss-cross the road and the accident occurred when he was attempting to avoid a pothole which was very wide and that the lorry driver had to veer to the right side to avoid the pothole. According to him the only reason for blaming the driver of the matatu was his failure to slow down when the driver of the lorry veered while avoiding the pothole. He admitted that he was talking to DW3 while facing each other as they were negotiating about the price of the luggage that they were transporting for DW3. He stated that he could not clearly see the road ahead. In view of his evidence in chief, there is a very high possibility that the driver of the lorry veered off his lane and collided with the driver of the matatu on his lane. Both DW2 and DW's evidence was not consistent yet they were both passengers in the same vehicle and they claimed to have been alert when the accident occurred.

17. Having made the analysis aforesaid, I find and hold that the driver of the matatu was not to blame for the accident. He did what a reasonable driver could have reasonably done in the circumstances of the case by slowing down and swerving off to the left to avoid the accident but unfortunately it did happen. I therefore allow the appeal and dismiss the cross appeal. The judgment of the trial court dated 10th March 2009 is hereby set aside and it is replaced with an order dismissing the 2nd respondent's suit against the Appellants. The cross – appeal is hereby dismissed. Costs of the Appeal and that of subordinate court are awarded to the Appellants.

It is so ordered.

Dated, signed and delivered at Nairobi this 11th day of July, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... *for the 1st Appellant.*

..... *for the 2nd Appellant.*

..... *For the 1st Respondent.*

..... *For the 2nd Respondent.*