REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 42 OF 2008

CHARLES OCHARO MOMANYI…..……APPELLANT

VERSUS

UNITED MILLERS LIMITED…..... RESPONDENT

(An appeal from the judgment and decree of Hon. CHRISTOPHER YALWALA (Resident Magistrate) dated and delivered on the 18th day of March, 2008 in the Original OyugisSRMCCC No. 161 of 2006)

JUDGMENT

1. The appellant herein, Charles Ocharo Momanyi, was the plaintiff before Oyugis Senior Resident Magistrate's Court in Civil Suit No. 161 of 2006. His claim against the respondent, as captured in the plaint filed on 21st August 2006, was that he was at all material times to the suit the owner of motor vehicle registration no. KAR 147W which was on 4th May 2004 being driven along Kisumu –Oyugis road when at Sikri Trading Centre, the respondent's motor vehicle registration number KAK 995Z, which was being driven negligently, hit the appellant's said motor vehicle thereby damaging it extensively.

2. The appellant listed the particulars of negligence as follows:

a. Driving at a speed which was too fast in the circumstances.

b. Failing to keep any or any proper lookout or to have any or any sufficient regard to the other road users on the said road and in particular the Plaintiff's said motor vehicle Registration Number KAR 147W Toyota Hiace.

c. Failing to exercise or to maintain any or any sufficient or adequate control of the said motor vehicle Registration Number KAK 995Z.

d. Driving an unroadworthy motor vehicle without any or any effective brakes or breaking system.

e. Abruptly without any indication and/or warning running into the said plaintiff's motor vehicle.

f. Driving on the wrong side of the road on the face of an oncoming traffic.

g. Failing to take any effective measures to prevent the said motor vehicle from running onto the side of the plaintiff's said motor vehicle.

h. Failing to stop, to slow down, to swerve, or in any way so to manage, control the said motor vehicle so as to avoid the said accident.

3. The appellant therefore claimed special damages of Kshs. 454,350/= being liquidated damages for loss of user and cost of repairs among other expenses attendant to repairing his said motor vehicle.

4. The appellant further pleaded that the respondent's driver was, following the said accident, charged and convicted for the offence of careless driving contrary to Section 49 (1) of the Traffic Act in Oyugis traffic case No. 319 of 2004.

5. In its defence filed 14th September 2006, the respondent denied the appellant's claim in its entirety and instead, contended that if any accident occurred, then the same occurred due to negligence on the part of the appellant's driver in driving its motor vehicle Reg. No. KAR 147W.

6. A trial then ensued before the lower court in which only the appellant testified and at the close of the trial, judgment was entered for the appellant in the sum of Kshs. 290, 650/= less 50% contribution together with costs and interest. It is this judgment of the trial court that has given rise to the instant appeal in which the appellant has basically challenged the trial court's findings on liability as follows:

1. The learned Trial Magistrate having arrived at the assessment of the material damages, he was very wrong to have decided that the Appellant herein was only entitled to half of the damages.

2. The Learned trial Magistrate was very wrong to have held that the Appellant contributed to the accident when there was no evidence to that effect.

3. The Learned Trial Magistrate wrongly and unlawfully relied on the two cases namely OYUGIS SRMCCC NOS. 40 and 41 of 2005 which cases did not affect the Appellant herein.

4. The Learned Trial Magistrate ignored the un-rebutted evidence of the Appellant and reached a wrong decision.

5. The Learned Trial Magistrate's judgment was against the weight of evidence and was based on extraneous facts.

7. When the appeal came up for hearing on 28th February 2017, parties agreed to canvass it by way of written submissions which they subsequently filed and which I have perused.

Appellant's submissions.

9. The appellant argued that the trial court erred in apportioning liability at 50% between the parties while relying on some two files being Oyugis SRMCC Nos. 40 and 41 of 2005 which were produced by the respondent as exhibits yet the appellant was not a party in those two files wherein the parties entered into a consent on liability. It was therefore the appellant's case that the trial magistrate had no factual basis for holding that liability be shared equally among the parties.

9. According to the appellant, there was ample evidence on record to the effect that his motor vehicle was parked and stationary at a bus stage when the respondent's motor vehicle Reg. no. KAK 995Z lost control and rammed into it. He maintained that under those circumstances the respondent should have been held wholly liable for his claim for special damages.

10. The appellant further stated that it is the respondent's driver who was charged and convicted with the offence of careless driving contrary to Section 49 (1) of the Traffic Act Cap 403 Laws of Kenya, which according to him, was further proof of the respondent's blameworthiness.

11. The appellant's case was that the circumstances under which the accident occurred were such that the

appellant could not in any way be held to have contributed to it in any manner whatsoever.

12. The appellant prayed that the appeal be allowed with costs and that the judgment of the lower on liability be set aside and be substituted with an order that the special damages awarded to the appellant be paid in full.

Respondent's submissions

13. The respondent argued that the trial court was justified in finding that liability be shared equally by the parties because none of the drivers of the two motor vehicle testified in court and as such, the court had no evidence to rely on in determining what could have transpired during the accident.

14. The respondent relied on the decision in the case of **Hussein Omar Farah vs Lento Agencies Civil Case No. 34 of 2005 [2006] eKLR** wherein it was held inter alia, that if there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame.

15. The respondent maintained that it had produced 2 files being Oyugis SRMCC No. 40 and 41 of 2005 in which the plaintiffs/claimants who were passengers in the appellant's said motor vehicle recorded a consent on liability with the respondent herein at 50%:50%.

16. It was the respondent's contention that the mere fact that its driver was charged and convicted of the offence of careless driving did not mean that appellant's driver was blameless.

17. The respondent urged this court to uphold the trial court's findings and dismiss he instant appeal with costs.

Evidence

18. This is a first appeal and the court is under an obligation to re-evaluate and re-analyze the evidence tendered before the lower court with a view to arriving at its own independent finding but while bearing in mind the fact that it neither saw nor heard the witnesses testify. **See Selle vs Associated Motor Boat Company 1968 E.A. 123**.

19. PW1, Charles Ocharo Momanyi, the appellant herein was the only witness who testified before the trial court. His testimony was that on 10th May 2004 he received a call from his driver who informed him that his motor vehicle Reg. No KAR 147W had been involved in an accident at Sikri area. He produced a copy of the police abstract as Pexhibit 2 and court proceedings in respect to the traffic case proceedings wherein the respondent's driver one Jeremiah Ochieng Ogado was charged and convicted for the offence of careless driving following the accident as Pexhibit3. He also produced receipts for a total of Kshs. 202,050/= in support of his claim for special damages as Pexhibit 4.

20. The respondent did not call any witness before the trial court but was by consent allowed to produce the evidence tendered before Oyugis SRMCC No. 40 and 41 of 2005.

Analysis and determination

21. Upon considering the record of appeal and the parties' respective written submissions, I note that this appeal is mainly centered on the trial court's findings on liability since the appellant was clear, in his submissions, that he does not find any fault in the trial court's award of Kshs. 290,650 for special damages.

22. That being the case, I will narrow down the issue for determination to be, whether the trial court was justified in finding that each party was equally to blame for the accident.

23. According to the respondent, there was no evidence of any eye witness to the accident upon which the court could make a finding on which party was to blame for the accident.

24. The appellant, on the other hand argued that the traffic case proceedings in which the respondent's driver was convicted for the offence of careless driving provided sufficient proof that the respondent was 100% liable in negligence for the accident. Which brings me to the question on whether the proceedings in the traffic case provided sufficient proof of the respondent's sole liability for the accident. The proceedings are clear that the respondent's driver was charged and convicted of the offence of careless driving contrary to Section 49(1) of the Traffic Act on his own plea of guiltythe particulars being that he lost control of the respondent's vehicle and hit the appellant's vehicle.

25. Section 47A of the Evidence Act provides as follows:

> **A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.**

26. In my humble opinion, what the foregoing provisions mean is that once a conviction becomes conclusive by virtue of the aforesaid provision, the issue whether or not the convict was guilty of the offence cannot be subject of a subsequent inquiry. It does not necessarily mean that that person is 100% liable in negligence. Courts have on many occasions held that the decision to charge one and not the other person with the offence of careless driving is usually at the discretion of the police and the mere fact that one of two drivers is charged does not necessarily mean that the other driver is not liable at all. Whereas the person convicted of a criminal offence cannot, where the circumstances under section 47A of the Evidence Act aforesaid prevail question that conviction, the issue of contributory negligence is always open to the party despite the conviction.This is he position that was taken in the case of **Robinson vs. Oluoch [1971] EA 376**wherein it was held: -

> ***"Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent; but that is a very different matter from saying that a conviction for an offence involving negligence driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. Accordingly, the judge was right in not striking out the defence as a whole."*** See also **Queens Cleaners and Dryers Ltd vs. East African Community and Others [1972] EA 229.**

27. In the case of**David Kinyanjui & 2 Others vs. Meshack Omari Monyoro Civil Appeal No. 125 of 1993,** the Court of Appeal held that a conviction does not close the door to a defence on liability, as the issue of contributory negligence is open to the defendant. However, in **Francis Mwangi Vs. Omar Al-Kurby Civil Appeal No. 87 of 1992** the same Court was of the view that a conviction is conclusive evidence of negligence but does not rule out the element of contributory negligence and therefore where both the Appellant and the Respondent do not give evidence but there is evidence of conviction, there is nothing on record to show in what way, if at all, the Respondent contributed to the accident.

28. In**Philip Keptoo Chemwolo & Mumias Sugar Co. Ltd vs. Augustine Kubende [1982-88] 1 KAR 1036 at 1039-1040** the Court of Appeal stated:

> ***"It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to***

the conclusion that not even prima facie case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case...It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party's conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages".

29. What the foregoing means is that whereas a conviction *per se* does not close the door to plea of contributory negligence, where there is a conviction and both parties do not adduce evidence, there would be no evidence on record in respect of contribution by the person who was not convicted.

30. In the instant case, therefore, and going by the decisions in the above cited cases and the provisions of the Evidence Act, I find that the trial court was justified in holding that the drivers of both parties were liable for the accident in equal proportions as none of them tendered any evidence in court to prove negligence.The appellant was under a duty to tender evidence of the respondent's negligence at the trial instead of merely relying on the traffic case proceedings. Under the above circumstances, it is clear to me that the trial court's finding that there was no oral evidence to show which driver was to blame for the accident was not without basis.My finding is that the circumstances under which the accident occurred were such that there was a collision between two motor vehicles in which case one cannot say that the appellant's driver was absolutely free from any blame. I therefore find that the trial court did not err in finding that there was no direct evidence to show how the accident occurred in view of the fact that both parties did not adduce any evidence at the trial and consequently the finding on liability at 50% in favour of the appellant was merited and I hereby uphold it.

31. On the issue of whether or not the trial court erred in relying on the two similar cases being Oyugis SRMCC No. 40 and 41 of 2005, in which liability was agreed at 50% to 50%, I am unable to make any comment or findings on the legality or otherwise of relying on the said cases because they did not form part of the record of appeal. Be that as it may, the finding of the trial court on liability based on the previous cases was a finding of fact which this court in its appellate jurisdiction, cannot interfere with. This was the position in in the case of ***Mwangi v Wambugu, [1984] KLR 453 wherein it was held***:

"A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

32. The trial court also found that since the appellant did notfile a reply to the respondents defence and plea for contributory negligence, then in terms of the provisions of **Order VI Rule 9 (1) of the Civil Procedure Rules (old)** the appellant can be deemed to have admitted the contributory negligence against his driver in the said defence. I do not agree with this interpretation of the provisions of **Order VI Rule 9(1) of the Civil Procedure Rules** more so in light of the provisions of Articles 159 of the Constitution which provides that courts dispense of substantive justice rather than focusing on procedural technicalities. My view is that the failure to file a reply to defence is a procedural technicality which should not be allowed to blur or overshadow theappellant's claim and the fact that an accident did occur involving the two motor vehicles.

33. In a nutshell and for the above reasons, I uphold the trial court's findings on both liability and quantum and find that the instant appeal is not merited. I therefore dismiss the appeal with no orders as to costs.

34. The appellant will however have the costs of the trial court together with interest thereof.

Dated, signed and delivered in open court this 19th day of July, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

- N/A for the Appellant
- N/A for the Respondent
- Omwoyo court clerk