REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 26 OF 2011

NAWAZ ABDUL MANJI………...……………..…...APPELLANT

VERSUS

FRANCIS KIPTOO CHEBET…….…..RESPONDENT

(Being an appeal from the original judgment and decree of G. A. Mmasi, Senior Resident Magistrate, in Eldoret CMCC No. 561 of 2004 delivered on 27th January 2011)

JUDGMENT

1. The appellant is aggrieved by the judgment of the lower court dated 27th January 2011. The appellant had sued the respondent for special damages of Kshs 306,950. The appellant claimed that on 8th May 2001, the respondent negligently drove a pick-up truck registration number KTU 506 which rammed into the appellant's saloon registration number KAK 296C. The learned trial magistrate found that the appellant failed to prove liability. The suit was dismissed. Each party was to bear its costs.
2. The appellant has challenged those findings through a memorandum of appeal dated 7th February 2011. There are five grounds of appeal. They can be condensed into three. First, that the learned trial magistrate fell into error by holding that the case was not proved on a balance of probabilities; secondly, that she failed to apportion liability between the appellant and the respondent; and, thirdly, that she erred in her findings on proof of damages.
3. The appeal is contested by the respondent. The respondent submitted that liability and claim for special damages were not proved. The respondent contended that the burden of proof was always on the appellant. The respondent submitted that the appellant lacked standing to bring the claim on behalf of his insurer. The respondent had submitted in the lower court that the suit was statute barred; and, that the ownership of the pick-up truck remained a mystery. I was implored to dismiss the appeal.
4. On 27th October 2015, the court directed that the appeal be determined by way of written submissions. The appellant filed submissions dated 28th October 2015. The respondent's submissions were filed on 15th March 2016. I have considered the memorandum of appeal, the record of appeal, the pleadings in the lower court, the evidence and the rival submissions.
5. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v*

Brown [1970] EA 1, Mwanasokoni v Kenya Bus Services Ltd [1985] KLR 931.

6. The appellant filed a *further amended plaint* dated 13th May 2009. The appellant (PW3) testified that on 8th May 2001 he was driving his motor vehicle KAK 296C along Eldoret-Nairobi Road. When he reached the St Mathew Cathedral area, he saw a pick-up truck KTU 506 attempting to overtake another vehicle. He braked and tried to move to the extreme left. The pick-up collided with his vehicle causing extensive damage.
7. Police came to the scene, took measurements and removed the vehicles. The appellant lodged a claim with his insurers, Kenindia Assurance Company. He was paid Kshs 250,250. He produced the discharge voucher (exhibit 3). He bought the salvage at Kshs 100,000. He said he spent more than Kshs 100,000 in repairing it. He testified that he filed this claim on behalf of the insurance company. He blamed the respondent for attempting to overtake when it was unsafe.
8. PW4, police officer Ayub Pache, never visited the scene. He relied on records made by his colleagues PC Juma and PC Kiptum. He blamed the driver of the pick-up truck for the accident. On cross-examination, he conceded the documents did not apportion blame; and, that no driver was charged with a traffic offence. All that the records indicated was that the pick-up swerved to the right.
9. PW2 was an administrator with the insurance company. He said the appellant's vehicle was insured for Kshs 400,000. He instructed Mr. Bhatt (PW1) to carry out an assessment of the damage to the appellant's vehicle. The damage was assessed at Kshs 298,813.60. As the pre-accident value was Kshs 375,000, the company wrote off the vehicle. The insurer paid the appellant Kshs 250,250 on 26th June 2007. The amount was made up as follows: Kshs 375,000 less the salvage value of Kshs 100,000; and, less the excess insurance of Kshs 18,750.
10. PW1 said that since the repair costs exceeded 50% of the pre-accident value, he advised the insurer against repairs. He produced the assessment report (exhibit 1) and photographic evidence (Exhibit 1 (d) (e) and (f)). His professional fees were Kshs 6,850. He was paid on 31st October 2001. He produced the invoice (exhibit 2).
11. Francis Kiptoo (DW1) conceded he was driving the pick-up truck KTU 506. He said that at St Mathews Cathedral, the vehicle ahead of him stopped suddenly. He swerved to the right. He ran onto the path of the appellant's vehicle leading to the collision. He denied he was speeding or not keeping his distance. He said he was doing a speed of 30 to 40 Kph. He said he did not own the pick-up truck. he testified that it was owned by one Chebor Kiplagat.
12. DW2, a pedestrian, confirmed that the pick-up truck swerved to the right to avoid hitting the vehicle ahead of it. It ran into the path of the appellant's vehicle. He said the accident occurred in the middle of the road. He confirmed that the damage to the appellant's vehicle was as per the photographs produced in court by PW1.
13. A number of issues arise from that evidence. I will deal first with the element of negligence. From the evidence of PW3, DW1 and DW2, I entertain *no* doubt that the accident occurred when DW1 swerved to the right to avoid hitting the car ahead of him. He left his lane and entered into the path of the oncoming traffic; and, collided with the appellant's vehicle. Doubt is completely removed by the photograph at the bottom of page 91 of the record. It is taken at the scene and shows the position of the pick-up truck and the appellant's vehicle. DW1 claimed he was doing a speed of about 30 to 40 Kph. I doubt it very much. If the brakes were not defective, he should have been able to slow down the pick-up, control it and avoid the accident. The evidence points to a driver who was either speeding; woolgathering; or, not keeping his distance.
14. I have then reached the inescapable conclusion that DW1 was 100% liable for the accident. The learned trial magistrate did *not* deal at all with the element of *negligence*. She devoted a lot of time to proof of *ownership* of the pick-up truck. Paragraph 2 of the *further amended plaint* stated that the defendant was the owner of the pick-up truck. The learned trial magistrate found, correctly, that since the defendant had denied ownership of the vehicle, the *burden of proof* of that fact fell upon the *appellant*. DW1 conceded that he was *driving* the pick-up truck at the time of the accident. He said the vehicle was owned by *Chebor Kiplagat*. I agree that there was *no* cogent evidence proving the owner of the vehicle. The owner was not sued either.
15. However, the driver (the respondent) was sued. At paragraph 4 of the *further amended plaint*, particulars of *negligence* of the *driver* or *agent* are *particularized*. It was open to the appellant to sue the driver or owner of the vehicle or both. The driver testified as DW1. He conceded he was driving the pick–up truck at the material time. I have already found he was to blame *wholly* for the

accident. With great respect to the learned trial magistrate, failure to prove *ownership* of the vehicle was *not* fatal to the suit against the *driver* of the offending vehicle. The driver, who was the principal tortfeasor, was a party and is liable for negligence.

16. The learned trial magistrate found that Kenindia Asssurance should have been named as the plaintiff. Paraphrased, that the appellant could not maintain the suit on behalf of Kenindia Assurance. The court found as follows-

> *"The plaintiff admits that he has been compensated to the tune of Kshs 250,000 by his insurance company…….., it is clear that the plaintiff has not held himself out as claiming on behalf of the insurers, he is claiming on his own behalf and yet he has already been compensated. In this case Kenindia Insurance should have been the plaintiff and not the insured"*

17. Again with respect, the learned trial magistrate failed to take into account two important matters. First, paragraph 9 of the *further amended plaint* dated 13th May 2009 expressly pleaded that *"the plaintiff was compensated by Kenindia Assurance Company Limited under the terms of policy of insurance between the plaintiff and the said insurance company and this claim is brought in exercise of the insurer's right of subrogation"*. A copy of the policy was produced by PW2 (exhibit 4).

18. Secondly, in exercise of its subrogation rights, the insurer is *entitled* to sue in the *name* of its insured. This becomes necessary because of privity of contract with third parties or convenience of establishing liability. I find that the claim was properly brought in the name of the insured for the benefit of the insurance company; and, that it was immaterial that the insurance company was not named as the plaintiff. See Pankaj Shah v Charles Kaharuka, Nairobi, High Court, Civil Appeal 246 of 2006 [2009] eKLR. As I have stated, the *further amended plaint* disclosed that this was an action in furtherance of subrogation rights.

19. That takes me to the claim of special damages. It is trite that special damages must be specifically pleaded; and, strictly proved. See Kampala City Council v Nakaye [1972] E.A 446. In the *further amended plaint*, the special damages pleaded were Kshs 306,950. The amount is itemized in paragraph 5 of the further amended plaint. From the evidence of PW2, it would seem the arithmetic was as follows: the appellant was paid Khs 250,250; the salvage was worth Kshs 100,000; the excess insurance was Kshs 18,750; and, the assessor was paid Kshs 6,550. In the *further amended plaint*, the loss is particularized as follows: Kshs 300,000 being the value of the vehicle; plus Kshs 6,850 as assessors fees; and, Kshs 100 for the police abstract making a total of Kshs 306,950.

20. From the evidence of the appellant (PW3) he purchased the salvage for Kshs 100,000. He spent about Kshs 100,000 to repair it. This can only mean that the respondent should not be punished with the insured value of the appellant's vehicle. In any event, the pre-accident value was Kshs 375,000 as per the report of M. D. Bhatt dated 23rd May 2001. When you deduct the salvage value, the net loss to the appellant was only Kshs 275,000. Because of excess insurance, the appellant was only paid Kshs 250,250. PW2 produced the payment voucher for Kshs 6,550 paid to the assessor (exhibit 6). No receipt for the police abstract was produced. The total special damages strictly proved were thus Kshs 256,800 only.

21. This accident occurred on 8th May 2001. The claim was first presented to court on 6th May 2004. It was filed within *three years*. I am unable to hold, as urged by the respondent in the lower court, that the claim was statute barred. Furthermore, the statement of defence dated 23rd June 2004 never pleaded such a defence. It is not also true, as submitted by the respondent in the lower court, that there was no reply to the defence. At page 21 of the record, there is a reply to defence dated 23rd November 2004. In any case failure to file a reply does not render the claim otiose: the filing of a defence meant there was joinder of issues. See Joash Nyabicha & another v Kipkembe Limited & another, Kisumu, Court of Appeal, Civil Appeal 302 of 2010 (unreported), Peter Kanithi v Aden Guyo Haro, Nairobi, High Court Civil Appeal 307 of 2008 [2014] eKLR.

22. The upshot is that this appeal is allowed. The judgment and the decree of the lower court are set aside. Liability is now entered against the respondent at 100%. The respondent shall pay to the appellant special damages of Kshs 256,800 only. Interest shall apply from the date of *this* decree. Costs follow the event and are at the discretion of the court. I will grant the appellant costs in the

lower court; and, also in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 5th day of April 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Omboto for Mr. Songok for the appellant instructed by Nyaundi & Tuiyott Advocates.

Ms. Adhiambo for Ms. Kipseii for the respondent instructed by Ledisha J. K. Kittony & Company Advocates.

Mr. J. Kemboi, Court clerk.