REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 519 OF 2005

AKAMBA PUBLIC ROAD SERVICES LIMITED

MULILI YUTA KINGOKU……..……APPELLANTS

VERSUS

JACINTA NDINDA MUTISYA

MOHAMED SHEIKH OMAR BINDAAHMAN

SAID ABDALLA…….....……RESPONDENTS

(Appeal from the original judgment and decree of Hon. Mrs. C.W. Meoli (SPM) delivered on 23rd June, 2005 in Milimani Commercial CMCC No. 6852 of 2003)

JUDGMENT

1. The 1st Respondent sued the Appellants and the 2nd and 3rd Respondents in Milimani Commercial CMCC No. 6852 of 2003 seeking recovery of damages arising from a collision of motor vehicle registration numbers KYG 236 and KAB 229W alleged to have occurred on 10th August, 1997.

2. The trial magistrate heard the matter and found the driver of motor registration number KYG 236 wholly liable and entered judgment in the following terms:-

i. *General damages Kshs. 1.5 million.*
ii. *Special damages KShs. 40,287/=.*

3. Aggrieved by the trial court's decision the Appellant filed this appeal on lengthy grounds which can be summarised to; whether the trial court applied the right principles in assessing liability and damages.

4. From the grounds of appeal, two issues fall for this court's determination that is; whether the trial court properly analysed the evidence on record in arriving at its finding on the issue of liability and whether the trial court relied on the correct principles in assessing damages.

5. This being a first appeal, this court is under duty to re-evaluate the facts afresh, assess the same and make its own independent conclusions. See ***Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.***

6. In making her decision on liability, the trial magistrate held the opinion that the 1st Respondent's evidence was unshaken during cross-examination and that the mere fact that the driver of motor vehicle registration number KAB 229W was convicted did not absolve the 2nd Appellant from liability in the light of the unchallenged evidence of the 1st Respondent. She also made a finding that the Police Officer (PW3) was not an eye witness and could not credibly say that the driver of KAB 229W was liable. It was the trial courts further finding that the Appellants having attributed liability to the 2nd and 3rd Respondents, they ought to have proved that fact in a credible manner. That the 1st Respondent led direct evidence as to culpability which evidence could not be dislodged by hearsay evidence led by PW3.

7. It was the Appellants' submission that the 1st Respondent's evidence was controverted by her own evidence and that of PW3, that the 1st Respondent contradicted herself as to the circumstances that led to the accident; that she on the one hand stated that she had fallen asleep at the time of the accident and on the other stated that she was awake. It was further submitted that the police abstracts revealed that the 4th Respondent had been convicted of careless driving and that the trial court should have been guided by the police abstract. It was submitted that there was no objection to PW3's production of evidence therefore the trial court was wrong in holding that his evidence was hearsay. The Appellants also took issue with the trial court's decision to allow the production of the medical report by non-maker.

8. The 1st Respondent's submissions on the other hand were that her evidence was unchallenged and remained uncontroverted. It was contended that the trial court was right in holding PW3's evidence to be hearsay since the maker of the documents was not availed yet he was only on transfer and there was no indication that there was difficulty in tracing him. It was further submitted that no evidence was tendered to link the 3rd and 4th Respondents to liability therefore the claim of indemnity could not stand. It was finally submitted that the findings of the traffic case was not binding to the trial court.

9. Evidence on liability was led by the 1st Respondent and PW3. It was the 1st Respondent's testimony that motor vehicle registration number KYG 236 in which she was travelling was being driven at a high speed. That while overtaking a lorry, it collided with KAB 229W head on. On cross-examination, the 1st Respondent stated that the driver of KAB 229W was also speeding and did not have regard to other road users but attributed negligence to the driver of KYG 236. PW3 on the other hand stated that the driver of KAB 229W was charged following the occurrence of the accident. He produced a police file and two police abstracts in evidence (P. Exhibit 22, 23 (a) and (b)).

10. The Appellant, the 2nd and 3rd Respondent called no evidence.

11. PW3 was of no help to court. He was not the investigating officer. The Appellants lament that liability was not apportioned between them and the 3rd and 4th Respondents yet the 4th Respondent was convicted. The issue of applicability of a conviction in a traffic case was discussed in **Chemwolo & Another v. Kubende (1986) KLR**. The Court of Appeal had this to say:-

> ***" ...it was not correct for the learned judge to refer to Mr. Chemwolo's conviction because section 47 A of the Evidence Act (Cap 80) declare that where a final judgment of a competent court in criminal proceedings has been declared any person to be guilty of a criminal offence, after the expiry of the time limited for appeal, judgment shall be taken as conclusive evidence that the person so convicted was guilty of that offence. It follows that in the civil proceedings which are contemplated, Mr. Chemwolo's conviction will be conclusive evidence that he was guilty of carelessness..."***

12. This however does not preclude the convicted person from raising contributory negligence. See page 498 where it was stated:-

> ***"...it was not for the trial judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. 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 to careless driving for their respective types of carelessness..."

To my mind therefore a conviction in a traffic case is not binding on a civil proceeding where evidence is produced and tested . In the present case, the proceedings of the alleged traffic case were not produced in evidence. A statement from PW 3 could not be taken to be proper evidence of the existence and conclusion of a traffic court case.

13. I warn myself that the trial court saw the witnesses testify before it and observed their demeanor. At the end of it, that court decided to believe the 1st Respondent testimony as having been persistent and unshaken during cross-examination. The court disregarded the evidence of PW 3 as being mere hearsay. Indeed PW 3 admitted that he was not the Investigations officer. He played no part in the investigation of the subject accident. He only produced the police file in court but could not positively testify on any entry therein. The information that was in the police file was not put to the 1st Respondent during her testimony to either test her unshaken testimony, deny or admit what was in the police file. I do not think that the trial court fell into any error in arriving at its findings.

14. The other issue is that there was no evidence called by the Appellant to either controvert or deny the evidence of the 1st Respondent. If there had to be any contribution as alleged by the Appellant, nothing would have been easier than to call its driver to testify and support the allegations in the defence. As it were, the 1st Respondents evidence remained unchallenged and uncontroverted PW 3's evidence to the contrary notwithstanding. His evidence was only significant to the extent that an accident had occurred involving motor vehicle Registration Nos. KYA 236 and KAB 229W. As to how the accident occurred, the unshaken evidence of the 1st Respondent in my view was far superior and reliable than an untested evidence contained a police file. Accordingly, I see no basis to fault the trial court.

15. The Appellants lamented that the medical report relied on by the trial court was not produced by the maker. Section 34 (1) of the Evidence Act allows for admissibility of such evidence where the maker is dead or cannot be traced. In this case, the maker of the medical report was said to be dead and PW 2 who produced the same indicated that she had worked with him. To my mind, the report was admissible and the court could draw an inference from the contents of the report. The trial court therefore did not err in relying on the same.

16. As regards quantum, principles to be applied by this court in assessing damages were laid in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** wherein the Court of Appeal observed that:-

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)"***

17. A reading of the trial court's decision on damages reveal that the court evaluated the doctor's evidence on the 1st Respondent's injuries. It assessed the authorities cited noting that damages awarded in some were beyond its pecuniary jurisdiction and that some were old cases. The court also considered the 1st Respondent's disability as assessed in the medical report and awarded a conventional figure of Kshs.1.5 Million. On my part, I do not find anything to suggest that the trial court applied wrong principles or acted on any misapprehension of facts. In the end, I see no reason to interfere with the decision on damages. Special damages were also pleaded and proved and I shall not interefere with it.

18. Accordingly, I find the appeal to be without merit and the same is hereby dismissed with costs to the 1st Respondent.

Dated, Signed and Delivered at Nairobi this 8th day of May, 2015.

…….....…….

A MABEYA

JUDGE