



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 134 OF 2012

(Being an appeal from the judgment, ruling and order of Hon. Olenge – P. M. Kajiado delivered on 19th July, 2012 in Kajiado PMCC No. 306 of 2009)

GERALD KIBAGE THEURI.....APPELLANT

VERSUS

UNIKEN ENTERPRISES.....RESPONDENT

JUDGMENT

1. The Appellant, Gerald Kibage Theuri had sued the Respondent, Uniken Enterprises in the lower court claiming damages. The Appellant's claim was that his motor vehicle was damaged in a Road Traffic Accident on 3rd July 2009 due to the negligent manner that the Respondent's motor vehicle was being driven.

2. The claim was denied by the Respondent. The defence blamed the accident as having been wholly and/or substantially caused by the Respondent's driver. He particularized the Respondent's driver's negligence. There was no reply to the defence.

3. The Appellant called three witnesses. The Appellant testified (PW1). His evidence was that his motor vehicle was being driven by his son at the material time. The motor vehicle valuer, PW1 John Muriuki produced the motor vehicle assessment report which gave the cost of repairs as Ksh 327,236/= and the pre-accident value of the motor vehicle as Ksh 150,000/=. The motor vehicle was considered as a write off with a salvage value of Ksh 45,000/=. The motor vehicle assessor charged Ksh 6,000/= for preparing the report and a further Ksh 5,000/= for court attendance.

4. The Respondent did not adduce any evidence.

5. Judgment on liability was entered at 40% against the Appellant and 60% against the Respondent. This apportionment on liability was adopted from PMCC Kajiado No. 303 of 2009 which emanated from the same accident.

6. In PMCC Kajiado No. 303 of 2009, the driver of the Appellant's motor vehicle John Theuri Kibage testified. His evidence was that he wanted to turn right and slowed down and indicated to the right. He was then hit from behind by the Respondent's motor vehicle. PW3 Cpl. Mohamed Yusuf gave evidence which also blamed the Respondent's driver for driving carelessly. He produced a police abstract which reflected that the Respondent's driver was charged with the offence of careless driving, pleaded guilty and was convicted and sentenced to

pay a fine of Ksh 10,000/=. The Defendant did not adduce any evidence. In his judgment, the trial magistrate apportioned 40% contribution to the plaintiff therein on grounds that the plaintiff's motor vehicle was defective at the time of the accident.

7. The Appellant was aggrieved by the apportionment of liability and appealed to this court. Principally, the appellant's grounds of appeal is that the said apportionment of liability was against the weight of the evidence.

8. The appeal was canvassed by way of written submissions which I have duly considered.

9. It is not in dispute that the driver of the Respondent's motor vehicle was convicted of the offence of careless driving. What does this portend for the Respondent? A conviction for a charge of careless driving does not bar the convicted person from raising the issue of contributory negligence. (See for example **DILIP ASAL v HERMA MUGE & ANOTHER [2001] eKLR**).

10. The evidence of the Appellant's driver shows that he was driving at 80 kph and he slowed down and indicated to the right but he was hit while he was turning. This evidence is not controverted by any other evidence as no evidence was adduced by the Respondent.

11. The trial magistrate blamed the Appellant's motor vehicle for being un-roadworthy, hence the apportionment of liability. It is observed that in RMCC 303 of 2009 wherein liability was apportioned, no motor vehicle inspection report was produced by any of the three witnesses who testified therein.

12. The record of appeal in PMCC 303 of 2009 which was prepared by the counsel for the same Appellant herein does not include any inspection report in the list of documents. The inspection report was however included in the list of documents in the appeal herein relating to PMCC 306 of 2009. The said inspection report (*certificate of examination and test of motor vehicle VT MV-982247*) reflects the pre-accident defects as worn out tyres. In the circumstances of this accident is difficult to understand how these defects contributed to the accident.

13. The Appellant denied the particulars of negligence attributed to his motor vehicle. These particulars include, *inter alia* driving at an excessive speed, failing to put on his indicators and failing to take evasive action. There is very little the Appellant could have done in the circumstances of this case.

14. With the foregoing, my view is that contributory negligence of 10% by the Appellant is reasonable. There was no cogent evidence to support the 40% contributory negligence by the Appellant.

15. Consequently I enter judgment for the Appellant at Ksh 116,200/= less 10% contribution which comes to a total of Ksh 104,580/= plus costs and interest.

16. The appeal has merits and is allowed to that extent. The Respondent to meet 90% of the costs of this appeal.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 6th day of May, 2015

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JUDGE