REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 85 OF 2012

(An appeal against the Judgment of Hon. D. M. Machage, Senior Resident Magistrate delivered on the 8th May 2012 in Mariakani SRMCC No. 166 of 2010)

KATHINI TITUS ……...…… APPELLANT

V E R S U S

1. ALMICDAD PARCEL SERVICES LIMITED ……... 1ST RESPONDENT

2. DONARD MWANGI KAMAU ……....……. 2ND RESPONDENT

JUDGMENT

1. The Appellant filed an action against the Respondent in Mariakani **RMCC 166 of 2010**. By that action Appellant sought compensation for injuries suffered when motor vehicle Reg. No. KBH 352V (**Canter**) and KBJ 766R (**Matatu**) collided. The case was dismissed with costs to the Respondent and the Appellant being aggrieved by that dismissal filed the present appeal.

2. As rightly submitted by the Respondent the duty of the first Appellant Court was clearly set out in the case of **SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT COMPANY LTD AND ANOTHER [1968]E.A. 123** where the Court stated-

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put, they are that this Court must consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account to particular circumstances or probabilities materially to estimate or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

3. With that duty in mind I will begin by considering the evidence adduced before the lower Court during the trial.

4. Appellant in evidence in chief stated that on 11th June 2010 she was a fare paying passenger in a matatu. She could not recall its Registration number but stated that vehicle which she was travelling in was packed when the canter collided with it. She was injured which led to her being treated at Mariakani Hospital and also being admitted at Pandya Hospital for five days. She produced hospital treatment

notes. She also was issued with a Police Abstract which she produced. She concluded her evidence in chief by describing the manner of driving of the driver of the Canter. She stated "**He was not careful on the road**."

5. On being cross examined she confirmed that she had fully recovered from her injuries.

6. PW2 was a Police Officer from Mariakani Police Station who confirmed in evidence in chief that the accident occurred on 11th June 2010 at Maji ya Chumvi area at 9.10am. The accident involved the Canter and the matatu. Passengers in both vehicles sustained injuries. The officer confirmed that the Appellant was one of the passengers that was injured. That the 2nd Respondent was charged with the offence of careless driving and was fined on conviction Kshs. 5,000/-.

7. The answer this officer gave to the only question put to him at cross examination was that he was not the investigating officer in respect of that accident but that he had in his possession in Court the police file.

8. The 2nd Respondent in evidence in chief stated that on 11th June 2010 while he drove a motor vehicle which he did not identify he found a slow moving jam at Maji ya Chumvi area. He saw a matatu vehicle overtaking but because he was too close to that vehicle and although he tried to swerve to give that vehicle way the body of the Canter that he was driving hit the matatu. This is how his evidence was recorded-

"There was a vehicle overtaking i.e KBJ 766R, the driver was overtaking, I was very close, I swerved left side to give him way to complete overtaking, the body of my vehicle hit the Mombasa Matatu, the propeller shaft exited and hit the tarmac forcing my vehicle to fall on the road."

9. 2nd Respondent confirmed that he pleaded guilty to the charge of careless driving he explained why he pleaded guilty by stating-

"I pleaded guilty to the offence. I said that is true based on the fact that it is my lorry which fell. I pleaded to the charge. But it is the other driver who was on the wrong and not me, he should not have overtaken other vehicle when I was approaching."

10. On being cross examined and on being questioned whether the driver of the matatu was charged with a traffic offence he retorted-

"He was not to blame. Yes, I pleaded guilty to the offence but I was not to blame."

11. The Learned Magistrate as stated before dismissed the Appellants claim. In his Judgment the learned Magistrate based his finding on his apparent knowledge about parties who appear before the Courts on charges of careless driving. This is what he stated-

"He was nonetheless charged with the offence of careless driving which offence he pleaded guilty to avoid wasting of time. I am aware that many drivers once they are charged with the traffic charge, they want to leave the courts, the earliest they can to proceed on with their daily lives, they don't even listen to the charge being read they only are under mistaken impression that they can get away with a fine move on. It is not enough for the PW11 to say that having pleaded guilty to the charge of careless driving charge it is itself an inference of wrong doing."

12. Learned Magistrate proceeded to fault the Appellant who was the Plaintiff in that action for failing to join the driver of the matatu as a co-Defendant. The Learned Magistrate concluded by stating that he was unable to know who was telling the truth between the Appellant and the 2nd Respondent. He further stated that he disbelieved the Appellant's evidence and in that regard stated-

"If indeed what the Plaintiff said that her motor vehicle, in which she was traveling in was parked off the road, that is it was not in motion when it was hit by an oncoming vehicle registration

number KBH 352V then it will have (sic) been hit head on by the oncoming vehicle ie both vehicles will (sic) have been damaged in the front part. But the 2nd Defendant said that his vehicle was hit at the tail end of his lorry by the vehicle in which she was traveling in and was damaged at the tail end of it. This in my view shows that what the Plaintiff is saying was not the true position. If theirs was following other vehicles from behind how could it be hit and others not."

13. The Learned Magistrate proceeded again to include his knowledge of road users in his judgment by stating as follows-

"I have also taken note of the fact that this accident involved a matatu and a lorry. The matatus behaviour of overtaking, overlapping and all its manner (sic) of ills is a common thing."

14. The Learned Magistrate in dismissing the Appellant's case found that the Appellant could not succeed because she had failed to join the driver of the matatu as a Defendant and because her evidence was not corroborated by independent evidence.

15. The Appellant's appeal was not directed at the quantum as assessed by the learned Magistrate when dismissing her case. In her appeal the Appellant presented the following grounds to her appeal –

1. **THAT the Learned Magistrate erred in law and fact by failing to appreciate the provisions of Order 1 Rule 9 of the Civil Procedure Rules.**

2. **THAT the Learned Magistrate erred in law and fact in failing to appreciate the provisions of Section 47A of the Evidence Act, Cap. 80 Laws of Kenya.**

3. **THAT the Learned Magistrate erred in law and fact by failing to appreciate the doctrine of *Res Ipsa loquitur* pleaded by the Appellant.**

4. **THAT the Learned Magistrate erred in law and fact by completely disregarding the Plaintiff's evidence and considering matters which were not pleaded and proved by the Respondent.**

5. **THAT the Learned Magistrate erred in law and fact in failing to appreciate that on the basis of the materials and evidence placed on record the Appellant had proved her case on a balance of probabilities as required by law in civil cases.**

6. **THAT the Learned Magistrate erred in all point of law and facts.**

16. The Appellant's learned Counsel did not submit on ground 3 and I will proceed to assume that that ground was abandoned. All the other grounds essentially relate to the learned Magistrate's appreciation of the evidence adduced at the trial. For that reason I shall proceed to deal with them wholesomely.

17. I will begin by stating that the Learned Magistrate's judgment should only have been based on the evidence presented before the Court. The Learned Magistrate erred to have used his personal knowledge in the judgment. This is unless the Learned Magistrate was taking judicial notice of certain facts as provided under Section 59 and 60 of the Evidence Act Cap 80. In my view the learned Magistrate erred for having discounted the conviction of the 2nd Respondent of the offence of careless driving. He rejected that conviction by stating that drivers who ordinarily face such an offence tend to plead guilty because of their desire to leave the Court. Whilst that may be true in some cases it is not a matter of general or local notoriety as required by Section 60(1)(0) of Cap 80 to justify judicial notice being taken. More importantly the 2nd Respondent in this evidence did not assign that reason as the basis for his plea of guilt. Rather he said he pleaded guilty because the vehicle he was driving 'fell'.

18. Similarly the learned Magistrate erred to have stated that because matatu vehicles ordinarily overtake and overlap, the driver of the matatu must have done the same. In my view the 2nd Respondent's evidence that the matatu driver overtook and caused the accident was afterthought and not believable.

This is because firstly the 2nd Respondent learned Counsel did not cross examine the Appellant or the Police Officer on whether the matatu driver overtook other vehicles. Indeed the Appellants stated in evidence in chief that the matatu vehicle was packed when the accident occurred. To buttress my finding that the 2nd Respondent evidence was an after thought I refer to the defence filed on behalf of the Respondents in the lower Court. In that defence the Respondents acknowledged that the matatu was packed when the accident occurred. They however contributed the said packing of the matatu as a contributory to the accident. This is what they pleaded in their defence-

"<u>ABSOLUTELY WITHOUT PREJUDICE TO THE FOREGOING AND IN THE ALTERNATIVE</u> the Defendants aver that if an accident occurred (which is denied) then the same was due to the sole and/or contributory negligence of the owner, agent and/or authorized driver and/or servant of motor vehicle registration No. KBJ 766R.

<u>PARTICULARS OF SOLE AND/OR CONTRIBUTORY NEGLIGENCE OF OWNER, AGENT AND/OR AUTHORISED DRIVER AND/OR SERVANT OF MOTOR VEHICLE REGISTRATION NO. KBJ 766R</u>

a. **Parking motor vehicle registration No. KBJ 766R on the road**
b. **Failing to heed the highway code and the traffic rules**
c. **Causing obstruction**
d. **Failing to have regard to the safety of other road users and in particular that of motor vehicle KBH 352V**
e. **Leaving motor vehicle registration No. KBJ 766R on the road unattended."**

19. Corollary my above finding is that the 2nd Respondent although in his pleadings blamed the accident to the alleged negligence of the matatu driver and in evidence stated that the said driver caused the accident by overtaking and hitting the canter's body the matatu driver was not joined as a third party in the proceedings by the Respondent. Third Party proceedings are regulated under the Civil Procedure Rules. Order 1 Rule 15(1) of the Civil Procedure Rules provides as follows-

"Where a Defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-

a. **that he is entitled to contribution or indemnity; or**

b. **that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the Plaintiff; or**

c. **that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the Plaintiff and the defendant and should properly be determined not only as between the Plaintiff and the Defendant but as between the Plaintiff and Defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit."**

20. Since the Respondents by their Defence blamed the matatu driver for the accident they ought to have applied to the Court for third party notices as per Order 1 Rule 15(1) to issue against that driver. Having failed to do so the 2nd Respondent allegation remained just that, allegations and no more. That is the reason why I reject that line of defence.

21. The Appellant relied on the conviction of the 2nd Respondent for the offence of careless driving to prove negligence on the part of the 2nd Respondent. In that regard the Appellant relied on the provisions of Section 47A of Cap 80. That Section was considered in the case of **<u>EVERLYNE SHIVACHI VS THARA TRADING LTD [2013]eKLR</u>** where the Court stated-

"A final judgment of a competent court in any criminal proceedings which declares any person 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 shall be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

22. In my view the 2nd Respondent's conviction on his own plea of guilt is also conclusive evidence that he was to blame for the accident. And since he did not join any other party in this action there is no other party before the Court that the Court can find liable of the accident. My finding might have been different had the 2nd Respondent joined another party. That was what was stated in the case **ROBINSON –Vs- OLUOCH [1971]E.A** where the Court stated-

"The Respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that 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, as Mr. Sharma would have us say, that a conviction for an offence involving negligent 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 subsequent civil proceedings. That is not what Section 47A states. We are satisfied that 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."

23. Since the 2nd Respondent did not join any other party who he alleged was to blame for the accident and bearing in mind that he was convicted for the offence of careless driving on his own plea of guilt I do find him liable for the accident. The accident occurred as a consequence of his negligence and he is therefore responsible for the injuries suffered by the Appellant and the 1st Respondent is vicariously liable. The Appellant's evidence contrary to the finding of the learned Magistrate was corroborated by the conviction of the 2nd Respondent.

24. It is because of the above finding that I make the following orders in

this Judgment-

a. **The dismissal of the Appellant's case is hereby set aside and substituted with an order that judgment be and is hereby entered for the Appellant for Kshs. 150,000/- in general damages and Kshs. 2,100/- in special damages with interest from the date of filing the lower case until payment in full.**

b. **The Appellant is awarded costs of the lower court case and costs of this appeal.**

DATED and DELIVERED at MOMBASA this 17TH day of JULY, 2014.

MARY KASANGO

JUDGE