REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.17 OF 2012

MULTIPLE HAULIERS (E.A.) LTD ……APPELLANT

VERSUS

EVERLINE OSORE ……1ST RESPONDENT

ROSE KENJU ……2ND RESPONDENT

MOSES MACHARIA ……3RD RESPONDENT

J U D G M E N T

1. On 5th November 2005, Everline Osore (**the 1st Respondent**) was a fare paying passenger in motor vehicle registration KAQ 138N when it was involved in an accident with motor vehicle KAQ 480Y along Kisumu – Busia Road. She sustained some injuries and successfully filed suit for damages against The Appellant and the 2nd and 3rd Respondents. This Appeal is against the decision of the Lower Court which found the Defendants jointly and severally liable at 100% and made an award of ksh.130,000/= General Damages and ksh.3,600/= in Specials.
2. On the fateful day, the 1st Respondent, who is a business lady and a farmer intended to travel to Ugunja and so she boarded motor vehicle registration KAQ 138N. The journey came to a sad end when an accident occurred just before they had reached Rangala Bridge. Although she told Court that she did not know exactly how the accident occurred, it was her evidence that the vehicle she was travelling in was driving at a "normal" speed. Presumably it was not doing a high speed.
3. The 1st Respondent sustained injuries to her face and legs and was treated at Busia District Hospital. The medical report prepared by Dr. Charles Andai (PW3) gave more details of the injuries she suffered. There was a cut wound to her forehead, a blunt injury to her chest, back right, shoulder and right knee. She also had stab wounds on both knees.
4. P.C Nganyi Erick (PW2) was at the time material of the Accident attached to Ugunja Police Station. He took over the investigation of the accident from Sgt Mbeda and PC Simiyu. He told Court that the driver of the "matatu" in which the 1st Respondent was traveling died while undergoing treatment at Busia District Hospital. He also confirmed that the 1st Respondent was travelling in the other vehicle. Upon the completion of investigations, a public inquest (being inquest No.4 of 2006) was conducted in which C.A.S Mutai, the Senior Resident Magistrate found that the deceased driver of motor vehicle KAQ 138N was to blame for the accident.
5. That was all to the evidence because the 2nd and 3rd Respondents neither entered Appearance nor filed Defence and the Appellant did not call evidence. It seems to me that it is the estate of the 3rd Respondent which should have been sued in his stead because he had died from fatal injuries sustained in the accident.
6. Upon considering the evidence, the Learned Trial magistrate concluded as follows:

> "**PW1 didn't know who was to blame. Whilst the 3rd defendant didn't say anything about the accident which occurred by collusion. I find that the audience before court does of lay blame any of the defendants specifically. The defendants were mean to what happened. Its fact that the plaintiff was aware passenger she had no control and management of the two motor vehicles. The Defendants have not blamed each other or her. I will hold that the defendants jointly and severally liable at 100%."**

He then made an award of ksh.130,000/= in General Damages and Specials of ksh.3,600/=. This Appeal is against the Learned Magistrate's finding on liability.

7. The Appellant asked this Court to depart from the finding of the court that it too was to blame for the accident. That this was against the weight of evidence which blamed the accident on Moses Macharia.
8. For the 1st Respondent, her Counsel submitted that having proved that she was travelling in motor vehicle registration KAQ 130N,the question as to who was to blame and to what extent is a matter between the owners of the involved motor vehicles. That since neither of the Defendants called any evidence to disprove negligence, the Learned Trial magistrate was entitled to arrive at the conclusion he did. Counsel asked me to be persuaded by the finding of Okwengu J (as she then was) **Nrb Civil Appeal No.226 of 2003 Ol Donyo Farm land –vrs- Margaret Wangechi Ndogo & another** [2010] e KLR in which she held,

> "**The fact of collision involving two motor vehicles having been established, both the appellant and the 2nd respondent were in possession of evidence relating to how the accident occurred. Each was under a responsibility under Section 112 of the Evidence Act to avail the evidence relating to the circumstances of the accident in order to disprove negligence against him.** "

The Learned Judge had quoted with approval the words of **Denning LJ in Baker vs Market Harborough Industrial Co-op. Society Ltd [1953] 1 WLR 1472** in which he said,

> "**Everyday, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them**…."

9) This being a first Appeal the court is called upon to consider the evidence afresh and draw its own conclusion bearing in mind that it did not have the opportunity to see or hear the witnesses. The court is not bound to follow the trial court's findings of fact if it appears that the said court failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of the witness is inconsistent with the evidence in the case generally **Selle v Associated Motor Boat Company [1968] EA 123.**

10) As this Court had mentioned earlier, none of the Defendants tendered any evidence. What had been proved by the Claimant was that on 5th November 2005 she was a passenger in motor vehicle KAQ 138N when it was involved in an accident with motor vehicle KAQ 480G. That as a result of that accident she sustained some bodily injuries. She was nevertheless candid enough to admit that she did not know how the accident occurred.

11) The Appellant herein asked this Court to find that, on the basis of the evidence of PW2 and the outcome of the public inquest that followed, the 3rd Respondent was solely to blame for the accident. It would therefore be opportune for this Court to consider the evidence of PW2. On liability the witness testified,

"The driver of the matatu was to blame for the accident. In the public inquest was opened and closed. The inquest No.4 of 2006. This is the order which I took to produce as PExhibit 7."

he further stated,

"**The driver of the matatu was solely to blame for the accident. "**

12) Although he was the investigator of the accident and blamed the driver of the matatu, he never placed before Court the evidence or material that made him to arrive at that conclusion. Was the Learned Magistrate to believe him without a factual basis? I think not so because the witness ought to have placed before Court the facts that persuaded him to blame the 3rd Respondent. The Court ought to have been placed in a position where it could objectively assess those facts so as to either agree or disagree with the conclusion of the witness.

13) What is to be said of the public inquest? What was placed before Court and produced as an Exhibit was the recommendation of the Learned Magistrate. That is reproduced in its entirety below:-

"**23/3/06**

Before Mr C.A.S Mutai

Ag: SRM

The driver of motor vehicle KAQ 138N Toyota Hiace apparently was to blame for the accident but he unfortunately died as a result of the said accident hence there(sic) is nobody to blame for the said accident.

Reasons aforestated I do order the file closed, as a public inquest will not serve any purpose."

14) Would this have probative value? The purpose of the inquest was to establish whether anyone bore criminal liability of the deaths that occurred in the accident. The Court was expected to give an opinion as to whether there had been commission of a Traffic offence by some known person or persons. The view of the Learned Magistrate was that the Deceased driver of motor vehicle registration KAQ 138N was to blame for the accident. For some reason it was only the short ruling that was produced as an exhibit. The ruling, however, was without any reasons. What was placed before the Trial court hearing the running down matter was an opinion of a Court of concurrent jurisdiction. There was no knowing whether the evidence before the Inquest Court had been tested in cross-examination. There was no way the Trial Court could on its own evaluate the material that was placed before the Inquest Court because the proceedings before that Inquest Court were not tendered in evidence. There will be occasion, no doubt, when the proceedings and opinion of an Inquest Court will be of probative value in subsequent civil cases but in the circumstances of this case, the outcome of the inquest could not be relied on by the Magistrate to find on liability.

15) That would then mean that the following was proved , on a balance of probabilities,

a. that the Plaintiff was a lawful passenger in m/v KAQ 138N Isuzu when that vehicle was involved in an accident with motor vehicle KAQ 480Y.
b. that the Plaintiff sustained injuries as a result of the Accident.

No evidence was called by the Defendants and the holding of **Denning LJ in Baker** (supra) would be of apt application and it does no harm to repeat the speaking part of that decision,

"Everyday, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame and

> **sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them**…."

16) The Driver of the Appellant was alive but the Appellant chose not to call him or other evidence. The Appellant only has its to blame for the conclusion reached by the Learned Magistrate. There is nevertheless a holding by the Learned Magistrate that appears unclear. He held

> "**The Defendants have not blamed each other or her. I will hold that the Defendants jointly and severally liable at 100%."**

Having held that both were to blame, the logical conclusion would have been to hold the Appellant 50% liable on the other hand and hold the 2nd and 3rd Respondent 50% liable on the other. Only to that small extent does the Appeal succeed. No order on costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 10TH DAY OF NOVEMBER 2014.

IN THE PRESENCE OF:

KADENYI ……COURT CLERK

…….FOR APPELLANT

……FOR 1ST RESPONDENT

……FOR 2ND AND 3RD RESPONDENT