REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Appeal 159 of 1992

1. JOHN KIPKOECH

2. KIPKEMBOI ARAP SONGOK.....APPELLANTS

AND

SULEIMAN KARUGA NJOROGE.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Eldoret (Lady Justice Walekhwa) dated 6th day of March 1988

IN CIVIL CASE NO. 3 OF 1988)

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JUDGMENT OF THE COURT

Suleiman Karuga Njoroge (the respondent) sued John Kipkoech (the first appellant) and Kipkemboi arap Songok (the second appellant) in the superior Court to recover damages which he claimed to have suffered as a result of a collision which occurred along Kisumu/Kapsabet road on 10th June, 1985 involving the respondent's matatu registration number KTY 673 (KTY 673) and the second appellant's Isuzu lorry registration number KUS 833 (KUS 833), which was at the material time being driven by the first appellant in the course of his employment with the second appellant. There was also a third vehicle registration number KTX 861 (KTX 861) on the scene, but not involved in the actual collision, whose owner no-one seems to know, and is not a party to these proceedings.

The first appellant was driving KUS 833 from Kisumu going to Kapsabet when at some point along that road after negotiating a corner he saw KTX 861 stationary ahead of him but facing the general direction of Kapsabet. On the other side of the road, directly opposite KTX 861, KTY 673 had also stopped facing the direction of Kisumu but on its correct side of the road.

According to his own testimony, although it was KTX 861 that was on his path, the first appellant, having apparently lost control, took a deliberate decision to ram into KTY 673. He justified this decision on the ground that he had seen some people standing around KTX 861 and he was anxious to save their lives. The respondent's driver did not give evidence at the trial because he had ceased to be employed by the respondent and his whereabouts were not known. It is however pertinent to note that following the accident, he had been charged with obstruction before the Kapsabet Resident Magistrate's Court and was acquitted. The driver of KTX 861 was also charged with the same offence and was convicted on his own plea of guilty. The record of proceedings in the case against the respondent's driver in the Resident Magistrate's Court at Kapsabet (Traffic Case No 479 of 1985) was admitted into evidence at the trial of

the action and made part of the record. The Judge relied very heavily on the evidence before the Magistrate to supplement the evidence adduced before her at the trial. The judge held that both the drivers of KUS 833 and KTX 861 were to blame for the accident and apportioned liability between them at 75% and 25% respectively. She awarded the respondent damages in the sum of Shs 484,050/- made up of:

(a) Pre-accident value of the vehicle less salvage	Shs 128,000/-
(b) Abstract Report	Shs 1,050/-
(c) Loss of user for first 2 years	Shs 255,500/-
(d) Loss of user for a further 2 years	Shs 99,500/-
Total	Shs 484,050/-

The appellants have now appealed to this Court against the Judge's finding on the issue of liability and the award of the sum of Shs 355,000/- for loss of user over a period of 4 years.

On the issue of liability, Mr Aggarwal, for the appellants, submitted that the Judge's finding that the first appellant was negligent was wrong in view of the fact that there was no eye-witness to the accident and also that it was based on the evidence given before the Kapsabet Court at the trial of the respondent's driver. In our view, looking at the evidence of the first appellant, without more, the Judge could not have come to any other conclusion than that he was substantially to blame for the collision. As regards the evidence before the Kapsabet court, we cannot see the basis of Mr Aggarwal's complaint as its reception was perfectly proper and no objection seems to have been raised by anyone. This ground of appeal has no substance at all and we reject it.

We now come to the award for loss of user. In awarding this hefty sum of Shs 355,000/-, under this head over a period of 4 years, the Judge remarked:

"A period of 4 years was sufficient for the plaintiff to have gotten on to his feet and recovered from the effect of the accident."

Mr Aggarwal submitted that this award was unjustified because there was evidence before the Judge that the vehicle could have been repaired at a cost of Shs 112,873/35 within a matter of 8 weeks. The pre-accident value of the vehicle was estimated at Shs 138,000/- but no estimate was given as regards its salvage value which the Judge guessed to be Shs 10,500/-. The respondent was under a duty in law to mitigate his damages and if he was to be awarded any amount for loss of user, it should have been limited to the period it would have taken him to get his vehicle back on the road acting with a reasonable degree of diligence. The reason he gave for failing to repair the vehicle was that it was under a third party insurance cover and that he had some other loan to pay which he had to attend to before he could repair the vehicle.

The Judge awarded the respondent Shs 128,000/- representing the pre-accident value of the vehicle having deducted a nominal sum of Shs 10,000/- as salvage value, on the basis that the vehicle was a complete write-off, although as we have already said it was not. But having rewarded the respondent with this sum, we can see no justification in logic and law why he should in addition be awarded an additional amount for alleged loss of user. The vehicle was not a write-off and remains unrepaired purely on account of deliberate inaction on the part of the respondent. The respondent had no intention of repairing the vehicle and in those circumstances, he was not entitled to recover anything for loss of user. That award therefore was made in error and must be set aside in its entirety.

The final amounts awarded by the Judge under various heads were not adjusted to reflect the apportionment of liability. There was no appeal against the award of Shs 1,050/-. The sums awarded for loss of user have been set aside. This leaves the sum of Shs 128,000/- in respect of pre-accident value of the vehicle. This has to be reduced by 25% to Shs 96,000/-.

The result is that this appeal succeeds and is allowed by setting aside the award of Shs 355,000/- in respect of loss of user; and, by reducing the sum awarded in respect of pre-accident value for the vehicle from Shs 128,000/- to Shsh 96,000/- with interest at court rates from the date of judgment in the Superior Court. We also grant the appellants one half of their costs of this appeal.

Dated and delivered at Nakuru this 30th day of September, 1994.

JE GICHERU

JUDGE OF APPEAL

RO KWACH

JUDGE OF APPEAL

PK TUNOI

JUDGE OF APPEAL