



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: COCKAR, C.J. KWACH & SHAH, J.J.A.)

CIVIL APPEAL NO. 116 OF 1995

BETWEEN

PWANI WINES & SPIRITS MERCHANTS LIMITED...APPELLANT

SHOKA TINGAAPPELLANT

AND

HASSAN SAIDI NGONJA1ST RESPONDENT

ANNA NJOKA KAMBO2ND RESPONDENT

(Appeal from a judgment and Decree of the High Court of Kenya at Mombasa (Justice Wambilyangah) dated 14th day of July, 1994

IN

H. C. C.C NO. 720 OF 1991)

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court (Wambilyangah, J) delivered at Mombasa on 14th day of July, 1994.

On 3rd of December, 1990 at about 1.30 p. m. (not 7.30 p. m. as stated in plaint) the first appellant's motor vehicle registration number KUV 732 (an Isuzu Canter hereinafter referred to as "the Canter") was being driven by the second appellant (hereinafter to as "Mr. Tinga") along Mombasa/Malindi Road some few kilometres from Mombasa.

The canter was involved in a road accident with motor vehicle registration number KWF 928, a Toyota Corolla Saloon (hereinafter referred to as "the Toyota"). Just before the collision the Canter was following a motor bus and a 'Matatu'. The motor bus had entered a Bus bay and the 'matatu' was in the process of slowing down or had slowed down as the bus had entered the bus bay. The Canter was being followed by another 'matatu'. The Canter was on its way to Mombasa.

According to Mr. Tinga, there was no oncoming vehicle, that is from Mombasa side and that he attempted

to overtake the bus and the slowing down 'matatu'. Whilst he was in the process of so overtaking the Toyota driven by Mrs. Anna Njoki Kambo (the second respondent-hereinafter referred to as Mrs. Kambo") suddenly came onto main road (Mombasa/Malindi Road) from a side murram road without stopping and collided into the Canter some six feet into the road on the overtaking side of the Canter, that is on right side of the road if one was travelling to Mombasa.

It is not in dispute that the Canter was on the major road and that the Toyota was on the minor road. What was in dispute before the learned judge in the superior court was the point of impact which as per Mr. Tinga was on the tarmac road some 6 feet into the road and which as per Mrs. Kambo was on the murram road, some two feet inside the murram road.

Mrs. Tinga had stated in the superior court that the Toyota was stationary on the murram road, when hit by the canter.

The learned judge considered the differing versions but unfortunately he did not go at length into why he accepted Mrs. Kambo's version as opposed to Mr. Tinga's version. The learned judge simply said:

"I have considered the rival contentions on this aspect and do not attach any credence to the version presented by the 2nd defendant. The version of the 3rd defendant is more reasonable logical and easily cogent. The one presented by the 2nd defendant is fantastic and does not account for the human nature in the situation".

We are afraid that the learned judge, with respect, fell into error when he simply brushed aside the version of Mr. Tinga as fantastic. As a first appellate Court, we are entitled to reappraise the evidence but we would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if (a) it appeared that he had failed to take account of particular material to an estimate of the evidence or (b) that his impression based on the demeanour of a material witness was inconsistent with the evidence in case generally. See Ephantas Mwangi & Another vs. Dancan Mwangi Wambugu [1982-88] 1KAR 278.

It is necessary for us to go into the evidence which was before the learned judge. The plaintiff himself said that the Toyota had suddenly come from a minor murram road without stopping before entering the major road. The private investigator called on behalf of the first appellant (one Mr. Mangat who was a former Chief Inspector in police with 12 years of traffic work experience and then a private investigator) was on the scene of accident almost immediately after the accident. His evidence as regards the point of impact remained largely unchallenged and is suggestive of correct interpretation as regards point of impact. The gouge marks in road, the debris and the location of damage to Toyota are all indicative of the fact of the point of impact being about 6 foot into the road, on tarmac. The sketch plan and the photographs clearly show that the Toyota must have been on the tarmac and that is why the damage was on the part right of the Toyota.

The private investigator's assessment of the situation was in our view faultless but the learned judge did not even refer to such assessment in the judgment. This is where there is a serious misdirection on the part of the judge.

The learned judge misdirected himself when he said:

"between her (Mrs. Kambo) and the 2nd defendant (Mr. Tinga) she had a right of way".

Mr. Ochwa Okoth for Mrs. Kambo eventually conceded before us the fact that the accident occurred on the tarmac and not on the murram road but argued that Mrs. Kambo was not bound to look to her left side before entering the major road as her only concern was any vehicles coming from Mombasa direction as she was proceeding to Malindi. That cannot be and is not correct. The highway code clearly points out and this is also a matter of prudence that anyone entering a major road must give way to the traffic on the major road. Mr. Okoth interpreted that rule (rule 36 of the highway code) to say that that would apply only to situation where there was a vehicle approaching from the right or off side of the driver entering a major road. That cannot be so. The Highway code (rule36) says:

“At a road junction, give way to traffic on the major road. If in doubt give way”.

Reference is to traffic on major road and not to traffic on a part of the major road. Therefore the learned judge fell into error when he said that Mrs. Kambo had a right of way.

The learned judge with respect, failed to consider at all the plaintiff’s (second appellant’s) evidence which put the blame largely on Mrs. Kambo. Similarly he failed to consider the evidence of Mr. Tinga in any depth and the same observations would apply to appraisal by the learned judge of the evidence of Mr. James Mogogo Gaitho (D. W. 2) and that of Mr. Rasoni Katana who put the blame largely on Mr. Kambo. The evidence of Mr. James Mogogo Gaitho does not stand scrutiny as it has now been conceded by Mrs. Kambo’s advocate that the accident occurred on the tarmac.

Our own appraisal of the evidence is that Mrs. Kambo was more to blame for the accident than Mr. Tinga as she entered a major road from a minor road without stopping.

However, Mr. Tinga is not entirely blameless. He overtook vehicles at T – junction and he was driving at a speed which in all circumstances of the case was little high. The highway Code (Rule 29) says:

"29. Do not overtake at or near-

a corner or bend;

a road junction;

a pedestrian crossing “

Mr. Tinga should not have attempted to overtake at a T junction. His blame is not insubstantial. We cannot subscribe to Mr. Anjarwalla’s blame attribution, that is 20% to Mr. Tinga and 80% to Mrs. Kambo nor can we subscribe to Mr. Okoth’s blame attribution, that is 80% to Mr. Tinga and 20% to Mrs. Kambo Mr. Pandya’s equal appointment of blame is also little out of place.

Considering all factors we hold Mr. Tinga 40% to blame and Mrs. Kambo 60% to blame. On the issue of quantum of damages Mr. Anjarwalla challenged only the figure of shs. 200,000/= awarded by the learned judge for loss of earning capacity. The plaintiff (Mr. Nganja the first respondent) is a tailor. He was however employed as a loader. After the serious injury accident he went through he was still employed by the first appellant. He earned a minimum basic wage of Shs. 1700/=. That was bound to go up. His employability elsewhere after the accident is greatly reduced. The figure of shs.200,000/= under this head of damages is not so high as to merit or warrant interference by this court.

This appeal is therefore allowed and the decree of the superior court is hereby set aside as regards liability to the extent we have pointed out. There will therefore be judgment for the plaintiff (first respondent) in the sum of Kshs. 815,600/= jointly and severally against the appellants and the second respondent, the liability of the appellant being 40% and that of the second respondent being 60%. The judgment will carry interest as ordered by the superior court, for clarity we would point out that specials of Shs. 1600/= will carry interest @12% per annum from date of suit and balance will carry interest @12% per annum from the date of judgment in the superior court.

The appellants have had a substantial success in this appeal. The second respondent will pay two-thirds of the appellant’s and the first respondent’s costs here and in the superior court. The appellants will pay one-third of the first respondent’s costs in this court and in the superior court. These are our orders.

Dated and delivered at Mombasa this 19th day of January, 1995.

A.M. COCKAR

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR