



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE NO 413 OF 1990

MANSUKHAL BHOJA SHAHPLAINTIF

VERSU

SALMIN MOHAMED YUMAN1ST DEFENDANT

HARRISON MULI NGOKA.....2ND DEFENDANT

JUDGMENT

Mansukhal Bhoja Shah trades under the firm name or style of Amalgamated Agencies EA and in that capacity he owned a motor vehicle Reg No KXM 342, an Isuzu lorry. That vehicle, according to the evidence adduced before me was bought new in 1986, though no evidence was led as to the price at which it was bought. On the 27th September, 1988 the vehicle was involved in an accident with another vehicle Reg No KZD 178. The accident took place along the Thika-Nairobi Road near Juja at about 6.30 am. The plaintiff's vehicle KXM 342 was being driven by the plaintiff's employee called Paul Njoroge (PW2). The other vehicle KZD 178 was then owned by Salmin Mohamed Yuman, the 1st defendant, and was at the time of the accident being driven by Harrison Muli Ngoka, the 2nd defendant.

According to the plaintiff his vehicle was damaged beyond repair and as the plaintiff thought the accident was occasioned by the negligence of the 2nd defendant, the plaintiff instituted this action against both defendants claiming from them damages. The plaintiff's action was instituted on the 25th June, 1990, and on the 30th August, 1990, the two defendants filed a joint defence in which the 2nd defendant denied that he was negligent as alleged or at all, and the defendants in turn alleged that the accident was occasioned by the negligence of PW2 or that PW2 very substantially contributed to the occurrence of the accident. Issues were thus framed and a trial became inevitable. The trial opened before me on the 27th July, 1992 and the plaintiff called a total of four witnesses. None of the defendants called any evidence. The plaintiff's first witness was Sgt Johnson Shildo (PW1) of Juja Police Station. He produced Juja Police Station traffic file No TCR 655/88 (Exh 1) which shows that following the accident (whose occurrence was admitted in the pleadings), the 2nd defendant was prosecuted on a charge of careless driving contrary to section 49(1) of the Traffic Act, was convicted of that charge but was given a conditional discharge under section 35(1) of the Penal Code. The plaintiff relies on that conviction as part of his allegation that the accident was occasioned by the negligence of the 2nd defendant.

PW2 gave his version of how the accident occurred. The road from Thika to Nairobi is divided into two lanes. There is a separate road for vehicles from Nairobi to Thika. PW2 says he was driving in the inner lane and that the 2nd defendant was following him. PW2 was going up-hill and he appeared to say the 2nd defendant wanted to over-take him. The 2nd defendant could have safely done so on the outer lane which was unoccupied. The 2nd defendant's vehicle, however, rammed into the back of PW2's vehicle,

pushed PW2 off the road and PW2 ended up in a ditch. In cross-examination, Mr Musinga for the defendants suggested to PW2 that when PW2 saw the 2nd defendant moving to the outer lane to overtake him, PW2 also moved to the outer lane and thus caused the accident.

PW2 denied this suggestion and the only evidence available to me on the point is that of PW2. There is no reason on the record or anywhere else which discredits PW2's evidence. If anything, that evidence is supported by the fact that it was the 2nd defendant who was convicted of the charge of careless driving. I accept the uncontradicted evidence of PW2 and I find and hold that the accident was caused by the sole negligence of the 2nd defendant and that PW2 was not in any way negligent and did not contribute to the accident in any manner. Accordingly, my answer to issue No 1 in the "Statement of Issues" is:-

"The accident referred to in paragraph 4 of the plaint was caused by the negligence of the 2nd defendant as alleged in the said paragraph and paragraph 5 of the plaint. Neither the plaintiff nor PW2 contributed to the accident in any way."

Issue No 2 framed by the parties asks whether the plaintiff's vehicle was damaged and whether the plaintiff suffered loss if there was such damage.

PW2 himself said his lorry was damaged. Somchand Bhoja Shah (PW4), the brother of the plaintiff who was also managing the business with the plaintiff stated in his evidence that their vehicle became a write-off and they used the salvageable parts to repair their other vehicles.

The plaintiff called Mr Jasbir Singh Chotaori (PW3) who is a qualified mechanical engineering graduate and who described himself as a loss assessor and adjuster. He examined the plaintiff's vehicle on the 26th October, 1988 and apart from his evidence, he also produced his report (Exh 2). The effect of his evidence was that having examined the damage to the vehicle and taking into account what it would have cost to repair such damage, he came to the conclusion that it would be uneconomical to repair the vehicle and that the same should be written-off. I do not think I need to go into the details of the damaged parts of the vehicle. These are set out in PW3's written report and I did not understand Mr Musinga to contend that the vehicle was not damaged as stated by PW3. PW3 stated that as at the time of his assessment, a similar new vehicle would cost Shs 850,000/=. The plaintiff's vehicle was two years old and he estimated its pre-accident value at between Shs 520, 000/= and Shs 530,000/=. The parts which were required to repair it would have cost something in the region of Shs 480, 000/= and there then would be labour charges, and some hidden damage which would only be detected after the vehicle had been dismantled. PW3 estimated labour charges in the region of Shs 40,000/=. In these circumstances, he concluded that it would be uneconomical to repair the vehicle. There is no other evidence to contradict that of PW3, and if I may be allowed to say so, he is obviously some sort of expert in his line of operation. Mr Musinga did not in any way discredit the evidence of PW3. Though photographs of the vehicle showing damage were not produced, I do not think they would have added anything much to the plaintiff's case. I accept PW3's evidence and I find and hold that the vehicle of the plaintiff was damaged beyond repair. I also find and hold that its pre-accident value was as stated by PW2 and that the salvage value of the same after the accident was between Shs 80,000/= and Shs 90,000/=.

Accordingly for the loss of the vehicle, I award to the plaintiff Shs 530,000/= less Shs 90,000/= Shs 440,000/=. The plaintiff claimed Shs 4,000/= as towing charges and a further Shs 100/= as fee paid for police abstract on the accident. Mr Pandya for the plaintiff conceded these two sums were not proved. I reject them.

The plaintiff also claimed interest at 18% on the value of the vehicle from the time of the accident to the date when the suit was filed, ie a total of shs160,325/=. On the authority of *Savannah Travel & Tours Ltd v Highways Ltd and another* [1978] KLR 262, it is clear that interest on the assessed value of the lost item is recoverable from the date when the loss occurred. In the end Mr Pandya conceded that interest should be at court rates, unless there was a rate agreed by the parties. Mr Pandya also conceded that interest must be on the pre-accident value less the salvage value. The plaintiff is accordingly entitled to interest at 14% per annum on the sum of Shs 440,000/= with effect from the 27th September, 1998 to the 25th June 1990 when the suit was filed. That is a period of one year and nine months and according to my calculation the

total interest due would work at Shs:

$440,000 \times 21 \times 14 = \text{Shs } 107,800/=$

12 100

Accordingly, I now enter judgment for the plaintiff against the defendants jointly and severally as hereunder:-

1. Damages representing the value of lost vehicle Shs 440,000
2. Interest on that sum (as damages)

from the 27th September 1988 to 25th June 1990 Shs 107,800

Total Shs 547,800

As these damages are in the nature of special damages, I award to the plaintiff interest at court rates on the total sum awarded with effect from the date when the suit was filed. I also award to the plaintiff the costs of the suit. I believe the other issues not specifically dealt with have been awarded in the judgment. These are my orders in the case.

Dated and delivered at Mombasa this 2nd day of September 1992.

R. S.C OMOLO

JUDGE