



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPLICATION NO 2580 OF 1979**

**PETER KIMANI KARUGO..... APPLICANT**

**VERSUS**

**JIMMY MURIU .....RESPONDENT**

**JOSEPH K CHEPKOWNY .....RESPONDENT**

16.1.84

Mr Mahandia for plaintiff

Mr Kuria Njau for Mr Kagiri for defendant

**JUDGMENT**

In this claim and counter-claim for damages arising out of a traffic accident in which the suit against the 2nd defendant was withdrawn, the plaintiff's evidence is that at the material time he was driving his lorry KKH 659 carrying maize from Nakuru to Nairobi. He had passed Gilgil and was near Kenya Co-operative Creameries (KCC) when he overtook a tractor and then came back to his side of the road. Because his lorry was overloaded he was driving at a steady speed of 38 mph. After a short distance he saw two motor vehicles (hereafter m/vs) coming from the opposite direction – the front m/v being about 50 metres away. He then saw a Peugeot 404 overtaking the front m/v which was a lorry. The Peugeot after overtaking cut in front of the lorry. There was a big pot hole in front of the Peugeot and so after cutting in the Peugeot slowed. The lorry it had overtaken came out into the middle of the road to overtake it (or to avoid hitting into it?). In doing so the near front side of that lorry hit the rear offside of the Peugeot. The lorry then came across the road and its front off side hit the plaintiff's lorry between its middle and rear offside.

The impact broke the rear axle of the plaintiff lorry which stopped at the place where it was hit because the axle had come off. But the lorry's rear part was pushed off the road and it over turned as it now had no rear axle. The other lorry KVB 550 stopped near the middle of the road while the Peugeot came to stop a little off the road. Both these motor vehicles were facing Gilgil direction.

The evidence of the driver (DW 1) of the defendant's lorry KVB 550 was that he was following the Peugeot matatu and was about 20 feet behind it when he saw about 70 yards away a lorry following a tractor coming from the opposite direction. Then he saw the matatu turning to its left towards the bush. DW 1 braked but his lorry touched the matatu. DW 1 then added that the matatu suddenly stopped in front of him. That was not consistent with his earlier statement that the matatu was turning to its left towards the bush. Then DW 1 saw the other lorry come and hit into the front bumper of his lorry on the right side near the wheel. The other lorry was trying to overtake the tractor whose driver was warning the former to slow down. The tractor was not hit. The accident took place when the other lorry was still overtaking the tractor. The other lorry overturned about 50 metres from the point of impact because its rear wheels had come off with the differential. His own lorry had stopped at the spot where the accident had taken place. The other lorry was travelling at a high speed.

The evidence of DW 1 did not impress at all as being credible or reliable. When he was travelling only 20 feet behind the Peugeot matatu it is more likely that his attention was devoted more at the m/v he was following than at the tractor coming from the opposite direction and particularly to such an extent that he also noticed its driver warning the lorry behind it. How could he judge the speed of the oncoming tractor as being about 25 (he could not state whether he meant kph or mph and admitted that he did not know what either denoted). How could he emphatically assert from the position he was in behind the Peugeot that the oncoming lorry following the tractor was travelling at a high speed? He maintained that the accident happened when the other lorry was overtaking the tractor. In that case how could that lorry miss crashing into the Peugeot which was only 20 feet in front

of his, the defendant's, lorry and had stopped suddenly.

DW 1 insisted that his lorry was damaged a little at the front and in the middle on hitting the peugeot matatu. Time and again he denied that the front left side of his lorry had hit the matatu when in order to avoid hitting into it he had moved out to his offside. He denied that any damage had been caused to the front rear or left side of his lorry. Yet all the evidence produced including the policemen's (PW 1's) and the photographs of the defendant's lorry show that it had sustained damage on both the front wings and the areas around and involving both the front head lights. If the front rear or left side of his lorry did not hit into the Peugeot matatu then how did it get damaged? Again DW 1 insisted that he was never at any stage overtaken by the matatu peugeot. Yet the defence witness (DW 1) who was the driver of the peugeot matatu confirmed the evidence of the plaintiff that prior to the accident he had overtaken the defendant's lorry it was going very slow and it was after he had overtaken it that he for the first time saw the tractor only about 30 yards away coming from the opposite direction.

Finally during cross-examination DW 1 said that he had stopped immediately at the point of impact on the left side of the road as one faced Nakuru. He confirmed that the police found his lorry at the place where he had stopped it. The plaintiff on the other hand had maintained that the other lorry had stopped in the middle of the road after the accident. The plaintiff's evidence is corroborated by that of the inspector of police (PW 1) who had arrived at the scene and had drawn the sketch map of the scene. The inspector's evidence was that the defendant's lorry was almost in the middle of the road. He produced the sketch map of the scene (Ex 1) that he had drawn any stretch of imagination have pulled the defendant's lorry lengthwise almost half across the middle yellow lane.

It is quite clear that the two collisions occurred because the peugeot matatu had braked (either stopped or slowed) suddenly in front of the defendant's lorry which had then in order to avoid crashing into the peugeot matatu had swerved to its off side. That is what took the off-side of the defendant's lorry across the road into the path of the plaintiff's oncoming lorry. The defendant's lorry could not avoid hitting into the rear offside of the Peugeot matatu with its front near side. Thereafter its front offside struck the oncoming plaintiff's lorry, now passing the peugeot matatu somewhere on its offside near the rear wheel in a way so as to wrench off its rear wheels including the differential.

It is also quite clear that the defendant's lorry must have been following the peugeot matatu very closely to account of DW 1's failure to stop the lorry in time and in consequence his taking the avoiding action to his offside. In his evidence in chief DW 1 when describing about seeing the tractor coming from the opposite direction said that he was about 20 feet behind the peugeot matatu. DW 1's evidence was unreliable but I have already pointed out that he must have been quite close to the peugeot matatu when the latter braked suddenly. Had he been at a greater safer distance behind the matatu DW 1 would have easily managed to stop his lorry in time.

What caused the Peugeot matatu to brake so suddenly? The plaintiff's evidence (during crossexamination) was that the matatu was about 70 yards away when he overtook the tractor. The matatu at that time was behind the other lorry. Earlier in his examination in chief he had explained that after he had overtaken the tractor the oncoming vehicles were about 50 metres away when he saw the peugeot overtaking the lorry in front of it. The peugeot after overtaking cut in front of the lorry and then slowed down because there was a big pot hole in front of it. It is significant that even DW 1 had said that when he first saw the tractor it was about 70 yards away and the lorry was following it.

DW 4 the driver of the Peugeot matatu, said in his examination in chief that it was after he had overtaken DW 1's lorry that he for the first time saw the tractor coming from the opposite direction with the lorry following it. The tractor at that time was about 30 yards away. He said this on two occasions. That would appear to confirm the plaintiff's evidence that it was when the other lorry was about 50 metres away that the peugeot started overtaking it. I accept that and I am satisfied that the oncoming traffic being only 30 yards away when the peugeot completed overtaking the lorry, the Peugeot then must have cut in front of the lorry in order to avoid crashing into the oncoming traffic. The plaintiff, I am satisfied, spoke the truth on this issue also.

DW 4 said that it was when the oncoming lorry despite warnings started overtaking the tractor that he braked suddenly in order to avoid collision. That was the only avoiding action he had taken. He denied that there were any pot holes in the road at the scene of the accident or that he had slowed because of them. To my mind DW 4 has not spoken the truth on these two points either. If he had braked to avoid colliding with the oncoming laden lorry travelling in the matatu's lane while overtaking the tractor only about 30 yards away then to my mind he would also have swung a little to his near side as clearly it was not dangerous to go off the road. After all the peugeot landed safely about 5 feet off the road (the inspector's evidence) from the force of the following lorry's angular impact at its rear offside. DW 4 did not say that his avoiding action had included turning the peugeot towards its near side. The mere action of braking with no other avoiding action in the circumstances when the oncoming lorry is only about 30 yards away is not quite consistent with avoiding a head-on collision.

A more important piece of evidence was that relating to the potholes. DW 4 had denied categorically that there were any pot holes at the scene of the accident or that he had stopped because there were pot holes in the road in front of his matatu. But the inspector of police (PW 1) said that the road at the scene and around there was full of pot holes. He therefore confirmed the evidence of the plaintiff on the existence of the pot holes in the road at the scene.

I am satisfied that there were pot holes in the road at and around the scene of the accident.

DW 4 was not a truthful witness and did not hesitate in changing his evidence when it suited him. In his examination in chief he had maintained that it was after he had overtaken DW 1's lorry that he saw the oncoming tractor about 30 yards away. That was the first time he saw it.

During cross-examination when he realized that that would amount to dangerous driving he changed the story and said that he had overtaken DW 1's lorry about  $\frac{1}{2}$  a mile or  $\frac{3}{4}$  of a mile before the scene of the accident. If that was so why did he fail to

notice immediately the oncoming tractor from that distance away instead of seeing it for the first time when it was only 30 yards away? All the witnesses had agreed that the road on either side of the scene was straight. During cross-examination he said that when he braked his car stopped on its own side in the main road. By that time the oncoming lorry had already overtaken the tractor but it had not moved back to its own side of the road. He said that the oncoming lorry did not hit his car (which had stopped on its correct side in the main road). He did not know why it had not entered into his car. When pressed on this point instead of admitting that the oncoming lorry after overtaking the tractor had moved back to its own side he went to the extent of claiming that the lorry following his matatu had pushed it out of the road and that was why the oncoming lorry did not hit into this matatu.

DW 4 was not a witness of credibility. I do not accept his account of why he had to brake his car suddenly after overtaking DW 1's lorry. Having carefully considered all the evidence before me on this point I am satisfied that DW 4 braked his car in order to slow it down because of the pot holes in the road in front of him which he must have noticed for the first time only after he had cut in in front of DW 1's lorry. On balance I accept the evidence of the plaintiff as being a true account of how the two accidents took place. I find that the plaintiff had overtaken the tractor when the defendant's lorry was about 70 yards away with the Peugeot matatu following it. When the distance between the approaching vehicles was about 50 metres the Peugeot matatu started overtaking DW 1's lorry. During and after overtaking it, DW 4, its driver, must have noticed the proximity of the plaintiff's lorry and so he cut in in front of the defendant's lorry which he had overtaken. After he cut in DW 4 must have for the first time noticed the pot holes in the road. That caused him to brake suddenly and slow down the Peugeot as stated by the plaintiff. I do not accept the defence version that the Peugeot had come to a complete standstill when it was hit from behind because in that event the damage to it would have been much heavier than what DW 4 had described in his statement as "it was not damaged much there" when referring to the rear right side of the Peugeot. In consequence of DW 4 cutting in and braking suddenly in front of the defendant's lorry the latter's driver DW 1 swerved to the offside that is his wrong side of the road. His lorry hit into both the Peugeot and the plaintiff's oncoming lorry. I am satisfied that the plaintiff's lorry was at the time travelling in its correct side of the road. As between the plaintiff and the defendant, being mindful of all the evidence and facts, I am satisfied on balance that the defendant's driver, DW 1 was 100 per cent liable for the accident and that there was no negligence on the part of the plaintiff.

I must, however, point out that it is unfortunate that the defendant had not deemed it necessary to take out third party proceedings against DW 4 the driver of the Peugeot matatu. In my view the substantial cause of the accident was the dangerous driving of DW 4. He started overtaking the defendant's lorry when the oncoming traffic was only about 50 metres away. Then after cutting in in front of the defendant's lorry he braked suddenly and slowed his vehicle to a speed which forced DW 1 to take avoiding action. Unfortunately DW 1 swerved to his off side and went into his wrong side of the road and that is why I have found him solely responsible for this accident as between the plaintiff and the defendant.

Both the plaintiff and the 1st defendant gave evidence of the damage to their respective vehicles, the repair charges involved and the loss of business suffered by either on account of his lorry becoming immobilized. I have carefully considered the same and I accept the evidence of both the plaintiff and the defendant on the quantum of damages.

I find that the plaintiff's lorry was rendered unroadworthy for 3 months and that the repair charges to it came to Kshs 25,610.70. I also find that in consequence of his lorry having been rendered unroadworthy following the accident the plaintiff suffered a loss in his business of Kshs 68,040. The total damages suffered by the plaintiff therefore amount to Kshs 94,100.70. I give judgment for the plaintiff for Kshs 94,100.70 with interest and costs. The interest shall be at court rates from the date of the filing of the suit till payment of the decretal amount in full.

**A M COCKAR**

**JUDGE**

**16.1.86**

Read out in the presence of Mr Mahandia and Mr Kuria Njau

**A M COCKAR**

**JUDGE**

**16.1.86**