REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. E040 OF 2024

CROWN PETROLEUM KENYA LTD .....

APPELLANT

VERSUS

FELIX JUMA MAKHUMBIRI .....

RESPONDENT

(Being and appeal from the judgment of Hon. Y. I. Khatambi (PM) delivered on 12th April 2024 in Naivasha CMCC No. 550 of 2017)

JUDGMENT

1. The Appellant challenges the trial court's decision that found it 100% liable for a road traffic accident involving motor vehicles KBQ 032E, KBR 425T/ZF 0051, and KCC 092D/ZE 9464, and awarded the Respondent Kshs 207,550 in damages. This appeal is confined to the finding on liability, as the award on quantum was not contested.
2. Through an order issued by this court (differently constituted) on 4th November 2024, directions were issued for the consolidation of this appeal with four (4) other related appeals, being Naivasha HCCA E037, E041, E042 and E076. In the said directions, this matter was identified as the lead file. This means that this court's verdict on the

issue of liability, in this matter, will apply in all the related files pursuant to the consolidation.

3. The mandate of this court, is well settled. As was held in ***Selle vs. Associated Motor Boat Co.*** **[1968] EA 123**, this court is required to re-evaluate, re-analyze, and reconsider the evidence presented before the trial court afresh while bearing in mind the fact that the trial court had the advantage of seeing and hearing the witnesses.

4. Similarly, in ***Abok James Odera t/a Odera & Associates vs. John Patrick Machira*** **[2013] eKLR** the Court of Appeal emphasized that an appellate court should not interfere with findings of fact unless the trial court acted on no evidence, misapprehended material evidence, or applied wrong legal principles.

5. With the above principles in mind, I will now turn to consider the appeal.

6. The main issue for determination is whether the trial court erred in finding the Appellant 100% liable for the accident.

Respondent's Evidence

7. The Respondent (PW1), testified that he was a lawful fare-paying passenger aboard motor vehicle Reg No. KBQ 032E when the Appellant's vehicle KBR 425T/ZF 0051, which was travelling behind them violently rammed into KBQ 032E from the rear thus causing loss of control that resulted in KBQ 032E colliding with another motor vehicle KCC 092D/ZE 9464. The Respondent sustained injuries as a result of the accident.

8. PW2, **PC Rodgers Wafula**, confirmed that the accident involved the three vehicles and produced relevant police documents.

Appellant's Evidence

9. The Appellant called two witnesses as follows: -
10. DW1, **Peter Nderitu**, visited the scene several days after the accident and confirmed that the scene had been interfered with and the accident motor vehicles removed. He produced a sketch plan based on approximation and admitted lack of independent witness statements. He relied on information from the Appellant's driver.
11. **DW2,** PC Josephat Makau confirmed that he was not the investigating officer, did not visit the scene on the material date of the accident and relied on secondary documents. He further confirmed that the police file lacked independent witness statements and that liability had not been apportioned by the police.

Submissions

12. A summary of the Appellant's submissions were that PW1's evidence was uncorroborated and that the documentary evidence, which included the police file, sketch maps and covering report indicated that KBQ 032E was overtaking. The Appellant noted that the point of impact was at the centre of the road and attributed the accident to the negligence of the driver of KBQ 032E.

13. The Appellant faulted the trial court for disregarding documentary evidence and added that the Respondent did not prove negligence as required by Sections 107–109 of the Evidence Act.
14. The Respondent, on the other hand, submitted that PW1 was the sole eyewitness, and that his account was credible and unshaken. He contended that DW1 and DW2's evidence was hearsay, speculative, and reconstructed.
15. It was the Respondent's case that failure to call the Appellant's driver attracts an adverse inference under Section 119 of the Evidence Act. He maintained that the sketch maps, prepared days later, could not outweigh direct testimony and that the trial court correctly applied the law. Reference was made to the decision in ***Richa Elvis vs. Mohammed Ibrahim*** **[2017] eKLR** where it was held that: -

> ***"To come to a proper finding, I have to weigh the evidence given by each side. I propose to start with the evidence of the Defendant. The Plaintiff (new defendant) called only one witness. That witness was not an eye witness. Nor did he tender any direct evidence as to the causation of the accident. His evidence was at best to be classified as hearsay, in as much as what he testified about was not information he received first hand by either sight, hearing or any other method of perception. Thus the***

evidentiary value of DW 1's evidence is as good as if no witness was called by the defense."

Analysis and Determination

16. Having noted that the sole issue for determination is whether the trial court arrived at the correct decision on liability, I find that this court will be required to determine if the Respondent discharged the burden of proof expected in civil cases. Under Sections 107–109 of the Evidence Act, the Respondent bore the burden of proving negligence on a balance of probabilities. However, once he established that the Appellant's vehicle rammed into the rear of the vehicle in which he was a passenger, the evidential burden shifted to the Appellant.
17. Courts have taken the position that if the proved facts raise a prima facie inference that the accident was caused by the defendant's negligence**,** the case will be decided for the plaintiff unless the defendant provides an adequate explanation to displace that inference. This is the position that was reaffirmed in ***Nandwa vs. Kenya Kazi Ltd*** **[1988] KLR 275** where the Court of Appeal held that: -

"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if, in the cause of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the

defendant, the issue will be decided in the plaintiff's favour unless the defendant's evidence provides some answer adequate to displace that inference."

18. In the present case, the Appellant provided no adequate explanation on how the accident happened. Most importantly, it did not escape this court's attention that the Appellant did not call the driver of KBR 425T/ZF 0051, the person with first-hand knowledge of how the accident occurred. The failure to call the Appellant's driver, as a witness, is even more baffling considering that DW1, the Investigator, confirmed that he relied on the information given by the Appellant's driver.
19. The trial court rendered itself as follows when analysing the parties' evidence: -

"PW1, was present at the scene, his account of the events were that motor vehicle registration number KBR hit motor vehicle registration number KBQ from the rear. The defence failed to address the issue of whether or not KBQ was overtaking KBR before the accident. PW2, stated that he could not tell whether the accident occurred as a result of motor vehicle registration number KBQ overtaking. He did not blame either of the vehicles and reiterated that an inquest was on going. DW1, a police officer from the same police station as PW2,

stated that motor vehicle registration number KBQ was moving behind KBR, KBQ overtook a fleet of vehicles, in order to avoid a head on collision the driver attempted join his lane, as a result he was hit by motor vehicle registration number KBR. KBQ slid, turned around and was hit by motor vehicle registration number KCC. The evidence on record clearly demonstrates the fact that PW2 and DW2 were not the investigating officers and they never visited the scene of the accident. They both relied on police records. I have read through the investigation diary, which indicates that the driver of KBQ was overtaking a fleet of vehicle, on sensing danger from an oncoming vehicle, he applied emergency brakes which caused the vehicle to make a 360 turn, side brushed against KBR and later side brushed KCC which was on the opposite lane. The covering report indicates that the driver was either overtaking or skidded after applying brakes resulting in a collision with the oncoming vehicle proof that the maker was uncertain. The report further confirms that two witnesses who were passengers in KBQ confirmed that the vehicle was hit from the rear by a trailer heading in the same direction which according to the said

officer confirmed that KBQ was hit while trying to avoid an accident.

I expected the defence to avail the driver of motor vehicle number KBR and inspection reports for all the vehicles that were involved in the accident in order to established the point of impact based on the damage caused. Moreover the officers were neither investigating officers nor did they visit the scene. Their evidence was mainly hearsay and was contradictory. DW2 on the other hand relied on material placed before him by the driver of motor vehicle number KBR and the investigating officer, he never questioned occupants in the other vehicles, moreover he visited the scene a few days after the accident. In light of the foregoing the court is inclined to rely on the evidence of the plaintiff who was present at the scene and witnessed the accident. Consequently, the court find that the driver of motor vehicle registration number KBR controlled the vehicle at an excessive speed in the circumstances; he hit KBQ from the rear causing it to move to the opposite lane where it was hit by KCC.

The defence urged the court to apportion liability at 50:50 in the alternative. I have considered the case law presented by the

defence in support of this position. I note that the same is inapplicable for reason that the plaintiff herein was a passenger in motor vehicle registration number KBQ as such the defendant failed to demonstrate how he contributed to the accident. The defendant blamed the driver of motor vehicle registration number KBQ but failed to enjoin the driver and/or owner as a party to this suit.

The defendant failed to demonstrate how motor vehicle registration number KCC contributed to the accident. I make this finding noting that the evidence points to the fact that motor vehicle registration number KBR hit KBQ from the rear causing it to move to the opposite lane where it was hit by KCC. It is worth noting that KCC was on its rightful lane and it was the duty of the defendant to prove negligence on the part of the third-party driver. Consequently, the suit against the 3rd party is dismissed.

The court finds that the driver of motor vehicle registration number KBR 425 T controlled the vehicle in a negligent manner resulting in the accident. The driver is held 100% liable. The defendant is held vicariously liable for negligence on the part of his driver."

20. From the above extract of the trial court's judgment, it is clear that the said court did a balanced and in-depth analysis of the evidence and arrived at the correct decision based on the evidence from the parties' witnesses.

21. I find that PW1's evidence was direct, credible, and unshaken. He was the only witness who saw the accident unfold first-hand as opposed to DW1 and DW2 whose evidence was compromised by late visit to the accident scene when the same had already been tampered with. DW1and DW2 also placed reliance on hearsay evidence from the Appellant's driver who was not called as a witness.

22. PW1, on the other hand, remained consistent and underwent stringent cross-examination without material contradiction. In ***Kirugi vs. Kabiya*** **[1987] KLR 347**, the Court of Appeal held that hearsay, speculative, or reconstructed evidence cannot outweigh direct eyewitness testimony.

23. My view is that the failure, by the Appellant, to call its driver as a witness is quite telling as it creates an impression that his evidence may not have been favourable to the Appellant's case. This is the position that was taken in the oft-cited case of ***Bukenya vs. Uganda*** **[1972] EA 549**, where the court held that where a party fails to produce a material witness, the court may draw an adverse

inference that the evidence of such a witness would have been unfavourable to its case.

24. In the recent case of ***Kariuki vs. Stanley Muchiri*** **[2021] eKLR**, the High Court reiterated that a party who withholds the driver in a road accident case does so at his own peril.
25. It is instructive to note that the Appellant placed heavy reliance on sketch maps and covering reports. I however observe that the said documents were drawn several days after the accident, prepared by officers who did not witness the accident, were based on information from third parties and the by makers who did not apportion liability.
26. In ***David Kaige vs. Attorney General*** **[2020] eKLR**, it was held that police abstracts and reconstructed reports cannot supersede direct evidence unless supported by independent testimony.
27. Similarly, in ***Peter Kanithi Kimunya vs. Aden Guyo Haro*** **[2014] eKLR**, the Court of Appeal stressed that sketch maps are only guides and do not, on their own, prove negligence.
28. For the reasons that I have stated hereinabove, I find that the trial magistrate properly relied on the testimony of a credible eyewitness, considered the limitations of reconstructed evidence, noted the absence of the most vital witness for the defence and applied correct legal principles. The trial court also noted that even though the Appellant blamed the driver of KBQ for causing the accident, it did not include the owner of the said KBQ in the

case for purposes of apportionment of liability between its vehicle and KBQ. In the same vein, the Appellant did not tender any evidence to prove negligence on the part of the third party's vehicle, KCC. In ***Kiema Mutuku vs. Kenya Cargo Hauling Services Ltd*** **[1991] 2 KAR 258**, the Court of Appeal held: -

> ***"There is as yet no liability without fault in the law of torts and a plaintiff must prove some negligence against the defendant."***

29. I therefore find no misdirection or misapprehension of evidence, and no basis for this court's interference with the trial court's finding on liability. It is my position that the finding of 100% liability is supported by the record and remains sound.
30. I am further guided by the following decisions where the courts found that a passenger travelling in a vehicle cannot be held responsible for an accident: -
    i) ***David Kabesa & another vs. Harriet Kemunto Mokua*** **[2020] eKLR**. The High Court agreed with the trial court that as a passenger, the respondent could not have contributed to the accident, and upheld liability against the driver.
    ii) ***Kean Transporters Limited & another vs. Anastacia Wangeci Njogu (as administrator of the Estate of Charles Njogu Ngugi)*** **[2017] eKLR**. When discussing a fatal accident where the deceased was a passenger, the court held that

having been a passenger in a vehicle that was hit from the rear, the deceased could not have contributed in any way to the occurrence of the accident.

iii) ***Rosemary Mwasya vs. Steve Tito Mwasya & another*** **[2018] eKLR**. The Court of Appeal affirmed that the deceased, being a passenger, had no control over the manner in which the appellant drove and managed the accident vehicle, and therefore could not be blamed.

31. Quantum was not challenged and I therefore find that the award of Kshs 207,550 remains intact.
32. Having re-evaluated the evidence and the law, I am not persuaded that the Appellant discharged the evidential burden to dislodge the Respondent's direct and credible account.
33. As I have already indicated at the beginning of this judgment, the verdict in this matter, on the issue of liability, shall apply to all the related matters, being Naivasha HCCA E037, E041, E042 and E076.
34. I agree with the trial court's finding that the Respondent proved negligence, against the Appellant, on a balance of probabilities.

Disposition

35. Accordingly, I make the following final orders: -

a) The appeal is dismissed in its entirety.

b) The finding that the Appellant is 100% liable for the accident is affirmed.

c) The award of Kshs 207,550 stands.

d) Costs of the appeal shall be borne by the Appellant.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 19TH DAY OF MARCH, 2026.

HON. W. A. OKWANY
JUDGE
19/03/2026

FOR APPELLANT Miss Mwangi
FOR RESPONDENT Ms Keberenge
COURT ASSISTANT Karani
30 days stay of execution granted
File closed