



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GITHINJI, AGANYANYA & NYAMU, JJ.A.)

CIVIL APPEAL NO. 203 OF 2003

BETWEEN

MOTREX LIMITEDAPPELLANT

AND

- 1. AKAMBA PUBLIC ROAD SERVICES LIMITED1ST RESPONDENT**
- 2. JOHN NTHEU NDUNDA2ND RESPONDENT**

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ang'awa, J.) dated 2nd July, 2003

in

H.C.C.C. NO. 1824 OF 2000)

JUDGMENT OF THE COURT

This is an appeal against the judgment of the superior court (Ang'awa, J.) awarding special damages of Shs.832,816.35 in favour of the respondent against the appellant being the cost of repairs of the respondent's bus which collided with the appellant's lorry/trailer along Nakuru/Eldoret road.

On 24th May, 1999, **Akamba Public Road Services Ltd.** (Akamba) the respondent filed *Civil Suit Nairobi H.C.C.C. No. 1092 of 1999* against **Motrex Ltd.** (Motrex). Akamba averred in the plaint, *inter alia*, that on 21st November, 1997 along Nakuru/Eldoret road Motrex's driver negligently drove, managed

Motrex's lorry/trailer Registration No. KAJ 330G – 2B 6669 causing it to violently collide with Akamba's bus Registration No. KAN 043G thereby causing extensive damages to the bus. The particulars of negligence pleaded included stopping/parking the lorry on the road, failure to give any warning to other motorists and “*blocking the left lane of the road immediately after a bend thereby failing to give other motorists reasonably expected to be on the road any sufficient time to avoid colliding with motor vehicle*”.

On 7th November, 2000 Motrex filed a corresponding suit against Akamba – *Nairobi H.C.C.C. No. 1824 of 2000* relating to the same accident alleging that the accident was caused by negligence of the Akamba's bus driver. The particulars of negligence pleaded against Akamba's driver included driving at an excessive speed, failure to have proper look out; failing to stop, slow down, swerve or brake in order to avoid the accident and driving without due care and attention.

Motrex claimed Shs.4,684,514/= comprising, *inter alia*, Shs.1,079,41/= being the cost of repairs and Shs.3,600,000/= being loss of user at 400,000/= per month for nine (9) months.

Both Akamba and Motrex filed respective defences denying negligence.

Before the hearing date, the two suits were consolidated on the application of Akamba. Motrex called two witnesses at the trial, namely, **Peter Ngui Musyimi** (PW2) who gave evidence relating to the accident and **Justus Munyao Chungu** (PW2) who gave evidence relating to the cost of repairs.

Akamba on its part called five witnesses, namely, **John Theri Ndungu** (DW1), the bus driver who gave evidence relating to the accident, **Joseph Kiamichi** (DW2) a police officer who produced the police accident investigation file; **John Okeyo Alum** (DW3) who prepared a report of the accident for the insurer of the Akamba bus, **Samuel Makundi Malua** (DW4) a mechanic foreman at Akamba workshop who gave evidence relating to cost of repairs of the bus and **Peter Kammani** (DW5) who produced a computer print out of the cost of spares..

At the trial, some documents were produced by consent without calling the maker. These documents include sketch plan of the scene by the Eldama Ravine police station, Investigation report by Zakache Security Services Ltd. and police accident file.

The following evidence emerged from the evidence and the reports. On 22nd November, 1997 in the afternoon, **Martin Mutisya Musyoka** was driving Mortex lorry trailer along Eldoret/Nakuru road towards Nakuru. He was in the company of **Peter Ngui Musyimi**, the turnboy. On reaching Burnt Forest it started raining and it continued raining until the lorry reached Timboroa at about 5 p.m.

At Timboroa, the road though a tarmac road was muddy and slippery. The mud was deposited on the road by lorries which were ferrying logs from the nearby forest. There was a sharp bend and as the lorry was

climbing a steep hill it got stuck and stopped on the left lane towards Nakuru. It could not move forward. According to the statement of the bus driver, he placed life savers and tree leaves at the front and back. He also deployed some young men to control the traffic to avoid accidents.

At about 12.30 a.m. the Akamba bus heading to Kampala, Uganda from Nairobi being driven by John Theri Ndungu reached Timboroa. After passing Timboroa market, it was drizzling and misty and as he was driving down hill at left-ward bend, he suddenly saw the stationary Motrex lorry/trailer. He braked the bus but it swerved, skidded and finally hit the lorry head on. Both vehicles skidded and rested on the right lane towards Eldoret. They were blocked by guard rails from rolling into the steep valley. Some of the passengers in the bus sustained various injuries.

The bus driver claimed that the accident occurred on his correct lane and that there were no life savers on the road or other warning signs to indicate that there was a stationary vehicle.

On the other hand, the driver of the lorry in his statement and the turn boy in his evidence blamed the bus driver for the accident claiming that the bus was moving at a high speed and that the driver failed to slow down when stopped.

The trial judge made findings of fact, *inter alia*, that the road was wet and slippery; that the lorry was unable to go uphill and stopped in the road; that the road bent slightly, that there were guards rails on both sides of the road and, that, although other vehicles had difficulties getting through this section no other accident occurred between 5 p.m. and midnight. The trial judge concluded:

“I find that the plaintiff was to blame for this accident. Their motor vehicle lorry trailer caused an obstruction. Time was 5 p.m. It was still daylight. A triangle and tree branches is said to have been placed on the road and the traffic directed. The driver should have sent word thereafter to the police to attend to the scene. This section of the road was unique as the vehicle was going uphill at a bend and where guard rails were along the road. The road was compounded further by mud that caused the vehicle to slip due to the slippery road.

I find the defendants in this case were not to blame nor did they contribute to the accident. I would assess liability against plaintiff at 100%”.

The superior court awarded Shs.832,816/55 to the respondent being the cost of repairs and dismissed the appellant’s suit.

There are four grounds of appeal, thus:

- “1. The learned trial Judge erred in law and in fact by finding that the Appellant had not proved its case on a balance of probability.**
- 2. The Learned trial Judge erred in law and in fact by finding that the appellant was 100% to blame for the accident in question thus arriving at a wrong decision on liability.**
- 3. The Learned trial Judge erred in law and in fact by failing to find that the Appellant had done all that a reasonable driver could have done to warn other motorists and imposed a higher duty on the appellant than is normally required and hence arrived at a wrong decision.**
- 4. The Learned trial Judge erred in law and fact by awarding the respondent special damages that were not proven both in law and fact and hence arrived at wrong decision”.**

Mr. Ngome, learned counsel for the appellant argued grounds 1, 2 and 3 together and submitted that the superior court found the appellant liable solely because its driver did not call police officers to guide traffic at the scene, and, that in the prevailing circumstances, the respondent's driver was negligent in driving at a speed of 60 – 65 KPH and by failing to see life savers.

Regarding ground 4, Mr. Ngome submitted that the respondent merely produced computer generated list of cost of repairs without giving concrete evidence of such costs of repairs.

Both Ms. Omondi and Mr. Rimuyi for 1st and 2nd respondents respectively supported the findings of the superior court.

As the first appellate court, we have a duty to re-consider the evidence, evaluate it and draw our own conclusion while appreciating that we do not have the advantage, like the superior court had, of seeing and hearing the witnesses.

The primary facts were not in dispute. It was common ground that the appellant's lorry/trailer stalled and stopped when going uphill towards Nakuru; that there was a blind bend at the scene; that the accident occurred at night at about 12.30 a.m.; that it had been raining before the accident; that the road was wet, muddy and slippery; that there were steep depressions on both sides of the road; that there were guard rails on either side of the road; that there was no space for swerving on both sides of the road; that the lorry/trailer was parked in such a way that there was enough space for vehicles going towards Eldoret to pass; that the road is busy; that many vehicles to and from Eldoret had passed albeit with difficulty before the accident; that there was mist and visibility was poor at the time of the accident; that when the driver of the bus applied brakes, the bus swerved, skidded and collided with the stationary lorry/trailer.

The evidence of Peter Ngui Musyimi – that life savers and tree leaves had been placed on the road and that there were people guiding the traffic was disputed. The evidence of the bus driver that the bus was moving slowly was similarly disputed. The superior court failed to make findings of the disputed facts.

The police after investigations concluded:

“According to the evidence adduced from witnesses, it was noted that the accident occurred due to slipperliness of the road and mud brought by lorries which were ferrying logs from the nearby forest. Also it was a rainy season (Elnino)”.

The investigating officer recommended that the police file be closed without charging either driver with any traffic offence saying if there was no rain and had the road been dry he could have charged the driver of the lorry/trailer with the offence of obstruction.

It is clear from the above analysis that the direct cause of the accident was the condition of the road and the weather and not the obstruction caused by the lorry/trailer. It is evident that the condition of the road and the weather which made the bus to swerve and skid upon application of brakes was the cause of the collision. It is probable that if the visibility was good and the road dry the bus could have passed the lorry

without any accident.

The lorry was not deliberately parked in the road. It stuck as it was going uphill due to the condition of the road. However, we appreciate that the lorry indeed caused an obstruction at a blind bend which was dangerous to other road users. Again, it is probable that the driver of the bus could not have braked the bus causing it to swerve and skid had there been no obstruction. There was evidence that the trailer was empty and that it got stuck at about 5 p.m. According to the statement of **PC. David Gatiba**, the two vehicles were towed to Timboroa Police Station pending inspection. Thus, it was possible to have towed the lorry/trailer at least from the dangerous bend before the accident happened. The owners of the lorry/trailer did not explain why the lorry was not towed before the accident.

There was also evidence that other vehicles had passed the scene without any accident. The evidence of **Peter Ngui Musyimi** – the lorry’s turn boy that the bus was travelling at a speed was credible. The bus driver testified that the bus was moving at a speed of 60 – 65 KPH. We have come to the conclusion that the bus was moving at excessive speed in the prevailing circumstances and that the bus driver contributed to the accident to some degree.

On our own analysis of the evidence, we apportion liability at 70% against the lorry driver and at 30% contributory negligence against the bus driver.

We are satisfied that the 1st respondent proved the special damages of Shs.832,718/55.

In the result, we allow the appeal to the extent that the finding of the superior court that the appellant is to blame for the accident to the extent of 100% is set aside. We substitute therefor a finding that the appellant is to blame for the accident to the extent of 70% and the 1st respondent to the extent 30%.

The special damages Shs.832,816/55 is correspondingly reduced by 30% to Shs.582,972 with half the costs of the suit and counter-claim.

We give half of the costs of this appeal to the appellant.

Judgment accordingly.

Dated and delivered at Nairobi this 25th day of March, 2011.

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR