REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 34 of 2005

HUSSEIN OMAR FARAH…….....……APPELLANT

AND

LENTO AGENCIES…….....……RESPONDENT

(Appeal from the decision and decree of the High Court of Kenya at Nairobi (Mwera, J) dated 31st October, 2003

in

H.C.C.C. NO. 104 OF 1997)

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JUDGMENT OF THE COURT

HUSSEIN OMAR FARAH, **the appellant, appeals to this Court against the judgment of the High Court of Kenya at Machakos *(Mwera, J)* given on 31st October, 2003, by which that court dismissed with costs the appellant's suit in *Machakos HCCC NO. 104 of 1997* and entered judgment against him on a counterclaim by *LENTO AGENCIES,* the respondent, in the sum of Shs.12,051, 120.00 together with costs and interest.**

The accident the subject matter of the suit occurred at about 6.00 a.m. on 18th October, 1995, along Mombasa-Nairobi Road near Kambu Bridge some two kilometers from Kambu Trading Centre. It involved the appellant's motor vehicle registration number KSL 799 Fiat lorry attached to a trailer and the respondent's motor vehicle registration number KAG 402 B Mitsubishi Prime Mover also attached to a trailer. Both vehicles were carrying some oil products and were moving from Mombasa towards Nairobi. It was the appellant's case at the trial before the superior court that his motor vehicle KSL 799 was hit from behind and on the rear part of the trailer ZA 6724. On the other hand the respondent's driver *Simon Gathua (DW1*) testified that the driver of KSL 799 had stopped beside the road just before Kambu Bridge with one part of the truck on the road and the other off the road on the grass verge and when he indicated that he was about to overtake KSL 799 at a distance of about 200 metres to the bridge its driver suddenly and without any signal or indication got back into the road. The two trucks moved parallel side by side for a short distance before KSL 799 hit KAG 402B and its trailer ZB 5228 pushing them off the tarmac. By impact they overturned and fell on their right.

Before the trial a statement of agreed issues was filed. The pertinent issues were:

1. Was the suit accident caused by the sole negligence of the appellant's driver or by the sole negligence of the respondent's driver?

2. Did either the appellant's driver or the respondent's driver contribute to the accident? If yes, what was the percentage of the contribution?

3. Is the doctrine of *res ipsa loquitor* applicable?

4. Quantum of special damages.

In his reserved judgment the learned trial Judge expounded the first issue by posing the question: Which of the two litigants was to blame for the accident? The learned Judge found that the appellant's truck bore marks or damages in its right side while that of the respondent had them on its left, beginning from the rear. He further held:-

"***The plaintiff had specifically pleaded that the KSL was hit from the rear. The defendant denied this and instead it was pleaded that the plaintiff's driver suddenly swung to his right into the road when the defendant's lorry was safely passing by. This pleading was not traversed by way of reply on the part of the plaintiff (see 6 or 9 CPR). For not so traversing that pleading in the counter-claim, the same is deemed to have been admitted. It was said earlier that a reply to defence and defence to the counter-claim was not filed.***

Accordingly, in spite of the intention to prosecute the driver of KAG, which prosecution was not backed by availing witnesses and the charge was dismissed, leaves this Court with no alternative but to conclude that when the driver of KAG was lawfully and properly overtaking KSL the latter's driver suddenly got into the road and the collision took place. The defendant's driver testified to backup the pleading which the plaintiff did not deny or rebut."

The learned trial Judge then held that the appellant's driver had solely by his negligence caused the accident and the appellant's suit was rejected and the counterclaim allowed in full.

The appellant was aggrieved by this decision and appeals against it and has set out in the memorandum of appeal a total of thirteen grounds. These were basically that the learned Judge erred in finding that the appellant had not traversed the defence and amended counterclaim dated 17th April, 2002, thereby overlooking and failing to consider the reply to defence and defence to the counterclaim filed on 12th November, 1997 in light of *Order VIA rule 6* of the Civil Procedure Rules; that the learned Judge erred by failing carefully or at all to consider the evidence adduced by the parties by reason of his erroneous finding that there was no traverse of the defence and amended counterclaim and that it was an error for the learned Judge to fail to determine whether or not there was contributory negligence on the part of any or both drivers and the percentage thereof, if any. It is further stated in the memorandum of appeal that the learned Judge erred in finding that the appellant did not lose fuel as a result of the accident and that he ought to have found that the respondent did not prove that he had suffered loss of Shs.12,051,120/=.

This is a first appeal from a trial by the High Court. Therefore, this Court must reconsider the evidence, evaluate it and make its own conclusions though bearing in mind that it has neither seen nor heard the witnesses and appropriately allowing for that. If the trial court failed on some relevant point to consider some particular circumstances, this Court would not feel bound to accept the Judge's finding of fact: *SELLE V ASSOCIATED MOTOR BOARD CO. LTD [1968] E.A. 123 at page 126* and *PETER V SUNDAY POST [1959] E.A. 424 at page 429.*

We turn to consider the submission on the main ground of appeal. The learned Judge in his speech which we have reproduced above simply held that the appellant was guilty of negligence for failing to traverse the pleading in the counterclaim. He appreciated that there was an intention by

the police to prosecute the respondent's driver but the charge of careless driving was dismissed for failure to avail witnesses. The learned Judge concluded that as the respondent's driver (DW1) had testified to back up the pleading which was not denied or rebutted he must be guilty of negligence. Thus, by operation of the rules of procedure the learned Judge avoided to decide the main issue before him: i.e. which of the two parties was to blame for the accident and to what extent, if any?

Again, as the parties had framed the issues for determination in the suit, the trial court could only pronounce judgment on the issues arising from the proceedings. The appellant's case as pleaded was, as rightly pointed out by the learned trial Judge, based on alleged negligence on the part of the respondent's driver (DW1) and the particulars in that regard were that he drove without due care and attention; drove at an excessive speed; failed to maintain any or any effective control over the said vehicle and hitting ZA 6728 from behind; and driving carelessly. The amended defence and counterclaim aver, inter alia, that the appellant's driver wholly caused the accident or substantially contributed to it by his grossly negligent driving in:-

"***3.(f) Confusing the defendant's driver by signaling him to pass and then suddenly and without any reason swerving to his right and immediately in the part of the defendant's vehicle in a state of panic and thereby colliding with the defendant's vehicle which was safely passing."***

The amended defence and counterclaim was filed in the superior court on 19th August, 1997. A reply to defence and defence to the counterclaim was filed on 12th November, 1997. In it the appellant stated, inter alia, that:-

"***1. The plaintiff joins issue with the defendant on its defence save where the same consists of admissions or where otherwise pleaded.***

2. The plaintiff denies that his driver was guilty of any or any contributory negligence and puts the defendant to strict proof.

3. The doctrine of re ipsa loquitur is irrelevant.

4. The plaintiff refers to paragraph 5 of the counterclaim and pleads that:

5. (a) The defendant is not entitled to any relief its driver having been the sole cause of the accident.

(c) There has been no "agreed" salvage value.

(d) The claim for special damages does not lie in the premises.

(e) ***Denies the particulars of special damages and puts the defendant to strict proof."***

However, the respondent on 23rd April, 2002 lodged defence and amended counterclaim but did not amend paragraph 3(f) which we have already reproduced herein above. As the respondent did not amend para 3(f) thereof, there was no need for the appellant to traverse it once again having filed a reply to the defence and defence to the counterclaim. Again, the amendment having been allowed and the terms imposed had been complied with, the action ought to have been continued as though the amendment had been inserted from the beginning. Thus, in the circumstances, the parties were bound by the original pleadings. See *The Supreme Court Practice 1999 Vol. 1 p 382, paragraph 20/8/11*. There was no justification, therefore, for the learned Judge to hold that the appellant had failed to traverse the defence and the amended counterclaim. With the greatest respect to the learned Judge, it must follow that he had erred in totally ignoring the reply to defence and defence to the counterclaim filed by the appellant. Moreover, his conclusion is not sustainable in view of what is manifest in the record of the evidence. We think that the learned Judge's omission had in the circumstances occasioned the appellant grave injustice.

The appellant's driver testified that the collision occurred because when the trucks were driving head to head, the respondent's driver turned to his side and hit the appellant's lorry. But, the former testified that it was the appellant's driver who suddenly got into the road and the collision occurred. The collision is a fact and a certainty but the question still remains whether the accident occurred because the appellant's truck swerved as it was being overtaken or because its driver suddenly got into the road?

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of *BARCLAY – STEWARD LIMITED & ANOTHER VS. WAIYAKI [1982-88] 1 KAR 1118,* this Court said:-

"***The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."***

The Court said further:-

"***The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame."***

In BAKER V MARKET HARBOROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LTD [1953] 1 WLR 1472 at 1476, Denning L.J. (as he then was) observed inter alia as follows:-

"***Everyday, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them…….. "***

See also WELCH V STANDARD BANK LTD [1970] EA 115 at 117 and SIMON V CARLO [1970] EA 285. It cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame……..."

The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame.

Both parties have claimed special damages arising from the accident. The appellant had pleaded Shs.2,006,943.40. However, the respondent has specifically disputed the claim of Shs.33,603.40 being the value of the spilled fuel on the ground that the respondent cannot be blamed for the loss of the oil because the oil got spilt in the second accident which was self involving and had occurred 200 metres away from the original scene of the accident. With respect, we do not agree. It is impossible in the circumstances of this case to say that there were two accidents. There was in fact one collision only and the damages caused are consequent upon that collison. The series of events and the resultant damages have their origin in one accident which was the main causation. We are, therefore, satisfied that the appellant had proved this limb of damages.

The respondent also challenged the claim for Shs.850,000/= for repair costs. *Patrick Mambo (PW3),* a motor assessor of some considerable repute, testified that on examination of the motor vehicle KSL 799 and trailer ZA 6728 he formed the opinion that it was uneconomical to repair

them but as the appellant was unable to buy another truck and trailer he recommended repairs to be carried out using second hand materials. One such part was an old cabin to be bought from Muema Motors. Consequently, he assessed the total repair costs at Shs.850,000/-. It is apparent from the judgment of the learned Judge that there was an error on his part when he held that the old cabin had caused Shs.850,000/=. With due respect to him, this claim which had been specifically pleaded had in fact been strictly proved.

In the event, we allow the appellant's appeal, set aside the orders dismissing his claim by the learned trial Judge and substitute therefor a judgment in his favour in the sum of Shs.2,006,943.40 with costs and interest. The decretal sum will be on a 50% liability basis.

We now move to the respondent's counterclaim which the appellant has asked us to dismiss on the ground that it had not been proved. However, we would disagree. Having considered and evaluated the evidence we are satisfied that there was evidence, both oral and documentary, upon which the learned trial Judge could properly and reasonably find as he did that the respondent had proved that at it was entitled to Shs.12,051,120/= as pleaded in the counterclaim. However, the award shall be reduced by 50% owing to proved contributory negligence. To that limited extent the appeal against the counterclaim stands dismissed.

As the appellant has succeeded in having the damages substantially reduced, we award him half the costs of the appeal. These shall be our orders.

DATED and DELIVERED at NAIROBI this 28th day of April, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR