REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, OMOLO & PALL, JJ.A.

CIVIL APPEAL NO. 47 OF 1997

BETWEEN

ALFARUS MULI.....APPELLANT

AND

LUCY M. LAVUTA ..... 1ST RESPONDENT

DODHIA STORES.....2ND RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Machakos (Mr. Justice J.L.A. Osiemo) dated 24th November, 1995

in

H.C.C.C. NO. 48 OF 1993)

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JUDGMENT OF THE COURT

We think there is no merit in the appeal and the crossappeal with regard to liability and the apportionment thereof between the appellant, Alfarus Muli, and the 2nd respondent, Dodhia Stores. The evidence adduced before the learned judge of the superior court (Osiemo, J) clearly showed that motor vehicle registration No. KJP 663 collided with another motor vehicle registration No. KZM 720. The 1st respondent, Lucy Lavuta, was a fare-paying passenger in vehicle registration No. KJP 663 which was being used by the appellant as a "matatu" plying the route between Nairobi and Machakos. KZM 720 was a lorry belonging to the 2nd respondent. The 1st respondent was sitting on the front seat with the driver employed by the appellant and it was common ground in the superior court that the vehicle of the appellant was following that of the 2nd respondent. It was in those circumstances that the two vehicles collided and it was agreed that the 1st respondent was injured during the collision. She sued the drivers of the appellant and the 2nd respondent in negligence, alleging that either both or one or the other of them was negligent. The appellant's driver, who has since died, blamed the accident on the 2nd respondent's driver; the 2nd respondent's driver, in turn, blamed the accident on the driver of the appellant. Having seen and heard such witnesses as were brought before him, the learned judge held that the appellant's driver was 80% to blame while the driver of the 2nd respondent was 20% to blame. The appellant appeals against that finding against his driver and the 2nd respondent has cross-appealed against the finding of 20% negligence slapped upon their driver.

We listened to Mr. Muli, for the appellant, and Miss Njuguna, for the 2nd respondent. We also listened to the 1st respondent whose advocate was said to be sick and could not attend the hearing. The 1st respondent herself told us to proceed and dispose of the matter.

The apportionment of liability is an exercise in judicial discretion based on the evidence before a judge. The 1st respondent, as the plaintiff, proved that the two vehicles did in fact collide. Vehicles, when properly driven on the road, do not run into each other and from the act of collision alone, a judge would be perfectly entitled to infer negligence on the part of one or the other of the drivers or on the part of both of them. For this Court to disturb a finding of negligence by the superior court, it would have to be shown that there was absolutely no evidence, or that the evidence which was there, could not possibly support such a finding. Neither Mr. Muli for the appellant nor Miss Njuguna for the 2nd respondent was prepared to assert that there was no evidence before the judge to support a finding of negligence or that the evidence could not possibly support such a finding. The same consideration must apply in respect to the apportionment of liability and on that point, Miss Njuguna expressly conceded that there was evidence from which the learned judge could make the sort of apportionment that he did make. True, the learned judge did not give any reason or reasons for his apportionment, but had he been minded to do so, he would no doubt have found reasons in the evidence before him. Accordingly, we find that the appeal and the cross-appeal in respect of liability and the apportionment thereof are without any merit and we dismiss them.

The appellant and the 2nd respondent also appealed against quantum of damages awarded by the learned judge, particularly in respect of the Shs.84,960/- which were given as lost earnings. The 1st respondent was a school teacher and she was 52 years old at the time of the accident. When giving evidence in court, she said she had to retire from her teaching job because she could no longer cope with it due to the injuries she had sustained. In her plaint, however, she did not claim any lost earnings and even in her evidence in court, she merely gave to the learned judge her monthly salary and the fact that she would have been entitled to retire at the age of 55, but opted to retire at the age of 52. She did not tell the judge that she had lost something by opting to retire at 52 instead of retiring at 55. In any case, as we have said, the 1st respondent's claim did not allege any lost earnings and we agree with Mr. Muli and Miss Njuguna that the learned judge was in error in awarding to the 1st respondent the sum of Shs.84,900/-. Neither the appellant nor the 2nd respondent challenged before us the awards of Shs.400,000/- as general damages for pain, suffering and loss of amenities, and Shs.40,785/- as special

damages. The former award was, in all the circumstances of the case, reasonable, while the latter was proved as required by law.

Accordingly, we allow the appeal and the cross-appeal on quantum of damages to the extent of setting aside the award of Shs.84,960/-. The appeal and the cross-appeal succeed to that limited extent. We order that each party shall bear its own costs of the appeal, and the cross-appeal. Those shall be our orders.

Dated and delivered at Nairobi this 26th day of September, 1997.

R.O. KWACH

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR