REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 8 of 2009

MULTIPLE HAULIERS ….....APPELLANT

VERSUS

PATRICIA ANYANGO ….....1ST RESPONDENT

ROSE NJOKU KUNJU ….....2ND RESPONDENT

MOSES MACHARIA ….....3RD RESPONDENT

JUDGMENT

The appellant's Memorandum of Appeal dated 27th January 2009 has eight (8) grounds. The relevant grounds which the parties dwelt on when arguing the appeal are:-

a) **That the learned trial Magistrate erred both in law and in fact in holding that the appellant was 70% liable while the 2nd and 3rd respondents who never entered any appearance nor defend themselves 30% liable when there was totally no credible evidence to apportion liability as such.**

b) The learned trial Magistrate erred in law and in fact assessing damages at Kshs. 300,000 which was inordinately high, excessive and unreasonable given the circumstances that the plaintiff / 1st respondent failed to prove the injuries she sustained beyond balance of probabilities.

The brief facts of this appeal are that PW! - Patricia Anyango was a fare paying passenger aboard motor vehicle Registration Number KAQ 138 N matatu which was travelling along Kisumu – Busia road. At an area called Kangala the same was involved in an accident where it was hit by motor vehicle registration KAQ 480Y belonging to the appellant. As a consequence of the said accident the respondent sustained serious bodily injuries namely:-

a) Blunt injury to the chest

b) Deep cut wound the left lower limb

c) Deep cut wound to the right upper limb

d) Dislocation of the left knee

e) Loss of three (3) teeth

The respondent aborted after the accident and after instructing her advocate.

On cross examination by the appellant's counsel the respondent blamed the accident on the driver of the lorry.

PW2 P. C. Jonathan Noangili produced the P3 form as well as the police abstract. He was not the investigating office. He told the court that he cannot tell who was to blame for the accident.

The appellant called one **Moses Waruinge Ndangu** to testify on its behalf. He was the lorry conductor. He told the trial court that the matatu was overtaking a pick up near a junction going to Siaya. He said that the accident occurred on the left side of the road. He blamed the matatu driver for overtaking at a corner.

The issues to determine was cut out clearly by both the appellants as well as the respondents counsels during their oral submissions. These are the question of liability and quantum.

On liability the only eye witnesses were the 1st respondent herein and DW1 the lorry conductor. PW2 the police officer did not witnesses the accident neither did he carry out the investigation.

PW1 told the court during her examination in Chief and whole blaming the lorry driver that:-

“He was driving badly. The trailer was travelling in a zig zag manner”.

She further said that although she felt unconscious after the accident she witnessed the same.

PW2 told the trial court :- **“According to the abstract the lorry rammed veered off the road and rammed the matatu that was parked off the road”.**

This testimony is complete departure from that of PW1. According to PW1 the motor vehicle, that is, the matatu she was travelling in was moving. How could it be that PW2 who was not even at the scene or had any records like the sketch plan prove that the same was stationery"

In fact DW1 confirms my above observation when he said:-

“My driver was driving on the left hand side of the road heading to Kisumu. The Nissan matatu and pick up was heading to Busia. It was a head on collusion with the matatu. The accident occurred on the left side of the road”.

My observation therefore is that both vehicles were in motion. None of them was stationery contrary to PW2 testimony. Who was then to blame for the accident" The appellant has argued that it should have been the matatu driver since the police indicated in their abstract (PEXH2) that they intend to prefer charges against him and not the lorry driver.

Apparently, no charges were preferred against him. The investigating officer did not attend court to say why he failed to do so. Does this imput guilt on the part of the matatu driver"

Civil cases as the rule is are proved on a balance of probabilities. It is not possible at this juncture to establish the blame worthiness of the matatu driver based on the police abstract.

In fact PW2 told the court that:- **“According to the abstract the lorry rammed veered off the road and rammed the matatu that was parked off the road”.**

I have carefully scanned through the same and I have not found such comments. I think this are his own opinions which I shall not buy.

Further the traffic police failed to produce any sketch maps or plans of the accident area. This would have ordinarily given the court an independent opinion and perhaps arrived at a decision which was not eschewed towards the respondent.

The upshot of my finding is that from the evidence of both PW1 and DW2 both vehicles were in motion. The scene of the accident was a sloppy area and there was a corner. PW1 said that the lorry driver was over speeding and driving at zig zag manner. She went further to say that **“it had lost control and the driver was trying to apply brakes without success”.**

This was of-course her own opinion. She was not inside the lorry's driver cabin to verify the same.

The lorry conductor DW2 on the other hand said that the matatu driver tried to apply emergency brakes. Again he was not in the said vehicle and cannot therefore verify this.

My findings from the entire evidence is that it is difficult to establish who was actually negligent or who actually caused the accident. Both witnesses laid their blame on each other. The independent witness who was to unravel the stalemate was PW2 the police officer. Unfortunately, they did not carry out any meaningful investigation.

It has always been heard as a “Rule of the road” that :-

“The rule of the road is that when two vehicles are approaching each other from opposite direction, each must go “on the left or near side of the road for the purposes of allowing the other to pass. Failure to observe this rule is a prima facie evidence of negligence”(Charlesworth & Peray on negligence 8th Edith page 202).

I do find therefore that both drivers failed to avoid the accident. As observed above failure by the police to draw any sketch plans or maps was a negligent on their part as it would have given the court an independent piece of evidence.

The trial court unfortunately fell into the trap of PW2 testimony. I have discredited the same and need not add more.

Consequently on liability I shall find both the lorry driver and the matatu driver equally blameworthy. I shall thus set aside the 70% and 30% liability found by the trial court and find that they both share liability at 50% each.

On quantum I do disagree with the submissions by the appellant's counsel that the injuries suffered by the respondent were soft tissue in nature. I reckon that she lost 3 of her teeth beside other injuries. These are not soft tissue injuries.

In the premises I shall not disturb the quantum of Kshs. 300,000 arrived at by trial court. The same is fair and reasonable.

Ultimately therefore the appeal succeeds particularly on the issue of liability. The quantum shall remain the same. Both the appellant and the 2nd and 3rd respondent shall share liability on a 50:50 basis and consequently the quantum of Kshs. 300,000 in similar manner. The appellant shall get half of the costs of this appeal.

Dated, signed and delivered at Kisumu this 5th day of December 2012.

H. K. CHEMITEI

JUDGE

In the presence of:

Ojuro Advocate for the Appellant

Mwamu for Neriko Advocate for the Respondent

HCK/aao