In the High Court of Fiji

At Labasa

Civil Jurisdiction

Civil Appeal No.HBA 06 of 2013

Between: James Marimuttu

Appellant

And: Loreen Billings

Respondent

Appearances: Mr M.Sadiq for the appellant

Mr Vakaloma for the respondent

Date of hearing: 16th May, 2014

JUDGMENT

1. This is an appeal from a decision of the Magistrates' Court. The Magistrate dismissed the appellant's action for damages caused to his motor vehicle.

2. The appellant, in his statement of claim, stated that on 4th August,2010,the defendant negligently bumped his motor vehicle from the rear causing extensive damage.The appellant's driver had given a signal that he was turning to the left side.The statement of claim pleaded the conventional particulars of negligence against the respondent and claimed damages in a sum of $2300.

3. The respondent, in her statement of defence and counter-claim, admitted that she bumped into the rear of the appellant's motor vehicle, a taxi.She states that the accident was inevitable and occurred due to the dangerous or negligent driving of the appellant's driver.The appellant's driver suddenly stopped in the centre of the road over two white traffic lines on the middle of the road to take two ladies. The respondent stated that she did not have sufficient time to avoid bumping the rear of the taxi. To swerve to the left would be fatal, since her vehicle would be thrown off the road nor could she proceed on to the right, since a bus was coming from the opposite side. In order to avoid a head on collision with the bus, she allowed her vehicle to crash into the rear of the taxi.The

respondent counter-claimed for damages and stated that she will rely upon the doctrine of necessity and res ipsa loquitur.

4. *The grounds of appeal*

The appellant states that the Learned Magistrate erred in law and in fact:

1) *in holding that the accident was not caused by the Respondent's negligence when there was ample evidence and admission by the Respondent, particularly the followings:-*
   a) *The Respondent in paragraph 4 of her statement of defence admits that the vehicle she was driving bumped into the rear of the Appellant's motor vehicle.*
   b) *The Respondent admits paying a fine of $200.00 to the Land Transport Authority.*
   c) *The Respondent in cross-examination agreed that her motor vehicle bumped the Appellant's motor vehicle on the 4th August, 2008.*
   d) *The Learned Magistrate when analysing the evidence came to the conclusion that the Respondent's motor vehicle bumped the rear of the appellant's motor vehicle.*
2) *in holding that the Appellant's driver was driving the Appellant's taxi in the middle of the road when there was no supportive evidence.*
3) *in holding that the Appellant's driver was touting for passengers when there was no supporting evidence, particularly:-*
   a) *That no person was called by the Respondent to support that the Appellant's driver was touting.*
   b) *That the Respondent was familiar with the area and knows the people of Savusavu well and could have called any one.*
4) *in holding that a bus was coming from the opposite side when there was no supportive evidence, particularly the followings:-*
   a) *The Respondent never called the bus driver or any other person to support her evidence.*
   b) *The second witness of the Defendant namely* ***LINO NAILAGOVESI*** *in cross-examination said he assumed that an accident had happened and was not sure that it was Nagigi bus.*
5) *in failing to give any proper weight to the evidence of the Appellant and his witnesses.*
6) *That the verdict of the Learned Magistrate is unreasonable and cannot be supported.*

5. *The determination*

The first ground of appeal

5.1 The first ground of appeal takes issue with the lower court in holding that the accident was not caused as a result of the respondent's negligence, when there was

ample evidence and admission by the respondent that she bumped her vehicle onto the rear of the appellant's motor vehicle

5.2 The Learned Magistrate,in his judgment, stated that it was an agreed fact that the respondent's vehicle bumped the appellant's vehicle. He then, crystallised the issues for determination before him, namely whether the respondent was negligent in causing the collision and if so, what damages should be paid to the appellant.

The second ground of appeal

5.3 The second ground of appeal contends that the finding of the Learned Magistrate that there was no evidence that the appellant's driver was driving in the middle of the road was erroneous, as there was no supportive evidence.

5.4 On the contrary, I find that there was cogent evidence that the appellant's driver was driving in the middle of the road as provided in the sketch plan produced by PC Rupeni Raga. In cross-examination, PC Rupeni Raga stated as follows:

> *The two vehicles were in the middle of the half of the left side of the road.*
> *There are 2 solid lines in the middle of the road.*
> *Drivers must keep to the left side of the road while driving.*

5.5 The Learned Magistrate found that the sketch plan depicted that the "*distance between the middle of the road and* (the appellant's) *motor vehicle is about 1.4 metres which is greater than the distance between DW1's motor vehicle and the left side of the road.* The appellant was not turning left, but "*pulling the front end of his motor vehicle away from the left side of his road*".

The "*appellant was driving his motor vehicle in the middle of the road and pulling towards the white line in the middle of the road to drive forward. There is no indication that he was moving his motor vehicle towards the left side of the road*".

The third ground of appeal

5.6 The third ground of appeal states that the Learned Magistrate wrongly came to a finding that the appellant's driver was touting for passengers, when there was no supporting evidence.

5.7 The Learned Magistrate believed and accepted the respondent's evidence that the appellant's driver was touting for passengers that morning and stated that while "*driving in the middle of the left side of the road,* (he)*was waving his left hands and shouting to the two Indian ladies whether they wanted to be picked up or not.*

When they refused his offer the second time, he drove continued driving in the middle of the road and asking the two Indian ladies for the second time to be picked up. He then drove away without giving any thoughts about the other motor vehicles travelling behind him.

5.8 The Learned Magistrate found that the evidence of the appellant was:

> *riddled with inconsistencies making it difficult for me to believe his evidence. In his examination-in-chief, he informed the court that he saw two passengers walking on the left side of the road. He switched on his left traffic indicator before turning left to pick up the passengers. He contradicted his evidence when cross –examined by stating that he cannot pick any other passengers that morning because he was already contacted by telephone to pick up a passenger by the name of Nazim Hussein. There is no evidence that Mohammed Nazim was waiting at the scene of accident that morning. The only persons that were walking on the left side of that morning were the two Indian ladies.*

The fourth ground of appeal

5.9 The appellant urges that there was no supportive evidence to support the finding that a bus was coming from the opposite side, when the respondent did not call the bus driver and her witness was not sure that it was Nagigi bus.

5.10 The Learned Magistrate accepted the evidence of the respondent as corroborated by the second witness of the respondent that "*the option of driving onto the right side of the road was a bad choice because there was a bus travelling from the opposite side of the road*".

5.11 In my judgment, it was irrelevant whether it was Nagigi bus or any other bus.

The fifth and sixth grounds of appeal

5.12 Finally, it is argued that the lower court failed to give proper weight to the evidence produced by the appellant and the judgment of the Learned Magistrate is unreasonable and cannot be supported.

5.13 I find that the Learned Magistrate has correctly evaluated all the evidence and reached a finding that the accident was not caused by the negligent driving of the respondent, but occurred as the respondent did "*what was necessary to save her family*", when the appellant's driver suddenly stopped in the middle of the road and drove into her safe distance.

5.14 On the appellant's demeanour, the lower court perceived as follows:

> *I have had the opportunity to observe PW2 while he was giving evidence in court.* ***He was very defensive when answering simple questions. He was not forthright with***

> ***his answers and gave me the impression that he was lying with his evidence.***
> *..I conclude that the Plaintiff has failed to prove his claim against the Defendant on the balance of probability.*
> .(emphasis added)

5.15 It is beyond controversy that an appellate court will rarely upset findings of fact in a case where there is a question of pure fact and the credibility of witnesses is crucial. In conclusion, I would resonate the passage cited by Mr Vakaloma in his written submissions from the case of ***QBE Insurance (Fiji) Ltd v Prasad***, [2011] FJSC 14 :

> *This is a case where the trial judge had the advantage of hearing and seeing the witnesses examined and cross-examined. It is not a case depending on inference to be drawn from admitted evidence. While there are many leading cases of high authority on the point, in my opinion, the words of Lord Reid in the House of Lords in Benmax v Austin Motor Company Ltd (1955) 1 ALL AER 326 at 328 and 329 are the most applicable to the present case and the judgment of Mr Justice Finnigan set out above.*
>
> > *Apart from the cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But* ***the trial judge has seen and heard from the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness.*** *But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court.*

> *Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in*
>
> *print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations.*(emphasis added)

6. Orders

a) The appeal is dismissed.

b) The appellant shall pay the respondent costs in a sum of $ 2000 summarily assessed.

14th October, 2014

ALB Brito- Mutunayagam

Judge