IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA - A.D. 2005

CORAM - AKAMBA, JA [PRESIDING],
TWENEBOA-KODUA, JA
ANIN-YEBOAH, JA

CIVIL APPEAL
NO 132/99
24TH JUNE, 2005

(1) ISAAC BOAFO
(2) BETTY ACQUAH } **… PLAINTIFFS/RESPONDENTS**

V E R S U S

MARTEY PLANGE … DEFENDANT/APPELLANT

J U D G M E N T

ANIN YEBOAH, JA - On the 24th of September, 1995, the Plaintiffs/Respondents herein (who shall simply be referred to as the Respondents) were in a Mitsubishi Salon car registered as CR 110 A The said vehicle was driven by the fist Respondent herein who owned it at the time material to this action which culminated in this appeal. The Defendant/Appellant (simply referred to as the appellant)on the same day was in charge of a Toyota Corolla vehicle registered as TR 6915 as driver and owner thereof. It is not disputed at all by the parties that on the said date on the Nungua-Sakumono road, at about 11.00 p.m. the Appellant drove his vehicle to the opposite lane which resulted in collision with the fist Respondent's vehicle. Extensive damage was caused to both vehicles and the occupants of both vehicles suffered injuries as a result of the accident.

The first Respondent as owner and driver of his vehicle commenced action against the Appellant before the Circuit Court, Accra for damages and consequential loss. On or about 17/7/97 the learned trial judge upheld the claim of the first Respondent which culminated in the lodging of an appeal by the appellant to seek the reversal of the said judgment. Learned counsel for the appellant filed only two grounds of appeal and argued both together.

The said grounds are stated as follows:-

"(a) That the judgment is against the weight of evidence.

(b) That the learned trial judge erred in law and on the facts in finding that the Defendant/Appellant was negligent."

It is clear from the grounds of appeal that the Appellant has not complained about the quantum of damages assessed against him by the trial judge. This appeal is therefore limited to only the issue of negligence, which if resolved in favour of the Appellant will certainly erode the damages. Learned counsel for the Appellant in an effort to demonstrate that the trial judge did not come to the right conclusion subjected the undisputable evidence on record to critical analysis and submitted that the trial judge arrived at a wrong conclusion by declaring that the appellant was negligent.

As said earlier, the facts admit of no controversy. Indeed it was not disputed at the trial that the Appellant's vehicle veered into the lane of the first Respondent and caused the collision with the resultant damages to both vehicles and personal injuries to the occupants of both vehicles. From the undisputed facts, what the learned trial judge was enjoined by the facts and issues settled to decide was simply this: was the Appellant negligent or not? This was borne out by issue (d) set out in the summons for directions. To prove his case before the trial court, the evidence of the first Respondent was to the effect that the Appellant drove his vehicle into his lane and caused the collision.

This evidence was corroborated in detail by PW1, one Corporal Anda, who was a Police Officer then stationed at Kpeshie Division Motor Traffic Unit. PW1 was the Police Officer who upon the receipt of the information about the accident went to the scene and conducted investigations into the accident. The evidence shows that he took measurements and statements from the two drivers. In course of his evidence he tendered Exhibits "F" and "G" as the sketches of the scene of the accident involving the two vehicles. Both exhibits clearly point to the fact that the accident occurred within the lane of the first Respondent. Indeed, this was not denied by the appellant. The appellant's complaint against the judgment, as could be gleaned from the written submissions of his counsel, seek to attack the judgment on two main causes of the accident which the trial judge found against him. Counsel for the Appellant's first complaint is based on the trial judge's conclusion that failure of the Appellant to stop or brake at the junction before

joining the Nungua-Ashiaman road was the cause of the accident. The other cause of the accident which the learned trial judge attributed to the Appellant was the speed of the Appellant's vehicle at the time of the accident.

In my opinion these causes of the accident must be examined in detail. As the undisputed facts allowed the trial judge to draw her own inferences, this court as an appellate court is at liberty to also draw its own inferences from the primary facts. This duty of the appellate court was recognized in the case of **ASHITTEY & OR. VRS. DODOO [1969] CC 17 CA** Full Bench. It was held as follows:

"where the facts upon which a judgment is based are inferences drawn from primary facts an appellate court is in just as good a position as the trial court to draw these inferences, and where a court of Appeal is of the considered view that wrong inferences have been drawn by the trial court, it (Appellate Court) can properly substitute its own findings for those of the trial court."

The conclusion by the trial judge that the Appellant had failed to stop or brake at the junction and thereby entering into the lane of the first Respondent in my view had a basis from the answers the Appellant himself gave in cross-examination. The Appellant said his car could not stop when he pressed the brakes. Indeed this line of defence which was very crucial and material to resist a claim of this nature, was not pleaded at all in the amended statement of defence filed on 25/5/96. However, as this evidence of the Appellant was not objected to at the trial court, the judge was duty bound to consider it on the authority of **MARFO VRS. ADUSEI** [1963] 1 GLR 225 SC. She rightly considered the evidence in her judgment and it has not been the subject of any criticism by counsel for the Appellant. She was further enjoined by law to find as a fact whether the Respondent had proved negligence against the Appellant from the evidence placed before her. For negligence is a question of fact. This court in the case of **NYAME VRS. TARZAN TRANSPORT & ANOTHER [1973] 1 GLR 8 CA** held as follows:

"Negligence is a question of fact and the burden is always on the Plaintiff to prove his case on a balance of probabilities or to adduce evidence from which the inference can be drawn that the negligence of the defendant led to the accident. In the instant case the drivers of the two defendants were in control of vehicles that collided in circumstances which must have been due to the negligence of either of them."

The judgment shows that the learned trial judge found as a fact that the Appellant's vehicle had veered into the lane of the first Respondent to collide with his (Respondents) vehicle. She also found that the first Respondent's vehicle was within his authorized lane when the Appellant's vehicle made a sharp turn from the junction to join the major road which is the Nungua-Ashiaman road and thereby colliding with the first Respondent's vehicle. Indeed a careful perusal of the written submissions of counsel for the Appellant does not dispute the findings which led to the accident. As said earlier, he contends that the trial judge's concluding that the speed of the Appellants vehicle caused the accident was wrong and that the accident was caused by the brake failure. It was therefore submitted that if the trial judge had given due consideration to Exhibit "E" she would have arrived at a different conclusion. Exhibit "E" from the record is the Vehicle Examiner's Report on the appellant's vehicle's, that is, Toyota Corolla vehicle registered as TRC 6915. To appreciate the force of the submissions of counsel for the appellant a relevant portion of the said report is reproduced as follows:

> **R E P O R T**
>
> The above-mentioned vehicle was examined and tested on the 8th instant as requested. The vehicle was found to be in good working order to the accident. A burst pipe rendered the braking system ineffective hence the accident (Brake Failure). (Emphasis mine)

This evidence was also supported by PW2 when he admitted that the accident was caused by the brake failure.

However, the position of the law on this line of defence is that a mere plea of brake failure does not necessarily absolve the defendant from negligence. Having put forward the plea, the law requires the defendant to have satisfied the trial court that he the appellant had exercise reasonable care in maintaining the vehicle by subjecting same to regular maintenance so as to rebut the prima facie evidence of negligence led against him by the Plaintiff (Respondent). Indeed the few local cases on this subject like: **KESIWAH VRS. JAJA [1976] 2 GLR 280 CA, BOATENG VRS. OPPONG & ANOTHER [1980] GLR 946 CA and DECKER VRS. ATTA [1970] CC 109 CA** establish the principle that when a plea of such nature is urged on behalf of a defendant, to exonerate him from negligence, he is duty bound to offer evidence to displace the

findings of negligence against him. In this case under consideration, the Appellant in his evidence said that he had no knowledge of faulty brakes. He said a resident mechanic serviced the car but he was not named or called as a witness.

Assuming there was even the case of latent defect in the brake system, the onus was still on him on the authority of **KESIWA VRS. JAJA** (supra) where this court held as follows:

> "Where a plea of latent mechanical defect was urged as exculpatory of negligence, a burden was cast on the defendant to show that the defect was not discoverable by the exercise of reasonable care and consequently, the accident occurred without any contributory fault."

The appellant closed his case without calling any further evidence to show that he had exercised reasonable care in putting on the road a roadworthy vehicle with good brakes. He also offered not enough evidence to establish that he had prior to the accident maintained the vehicle on regular basis as expected of any reasonable driver. In my opinion, the Appellant failed to support his plea with such evidence of servicing of the brakes to displace the finding of negligence inferred from the facts of the accident. I think the facts on record establish that the Appellant was negligent as could be inferred from the facts and therefore the judgment should not be disturbed on this score.

Another limb of the submissions of counsel on the issue of negligence was based on the findings of the trial judge as regards the speed of the appellant's vehicle at the time of the accident. The trial judge in her judgment delivered as follows:

> "Although the defendant in his evidence denied being drunk, I am inclined to believe the evidence of the Plaintiff that defendant was drunk because it is the speed resulting in not being able to slow down or stop at the junction and resulting in making a sharp turn thus, going off course and into the Plaintiff's lane."

The finding by the trial judge that the Appellant was drunk was not seriously attacked in the submissions of counsel for the Appellant. In my opinion this did not establish conclusively as the cause of the accident. Learned counsel contended that on the authority of **EWUDZIWA VRS. ATTORNEY-GENERAL** [1982-3] GLR 625, excessive speed alone should not be a mark of negligence. Even though the learned trial

judge in her judgment found as a fact that the speed caused the accident at the junction, I am of the opinion that the whole circumstances must be looked at.

The appellant was approaching a major road. He himself in his evidence as the driver could not narrate with clarity how the accident occurred. The undisputed facts show that the appellant was joining the major road from a minor road and his vehicle veered into the lane of the other vehicle and caused the accident. I think the judge was of the opinion that it was the speed which led to the appellant unable to slow down at the junction as expected of motorists. She proceeded to conclude as follows:

> "In the circumstances I am of the view that the defendant failed to exercise reasonable care on the road taking into consideration the condition on the road that is, that, there was a junction and also another junction further up the road where the Plaintiff came from."

It is therefore clear that the trial judge did not adjudge the Appellant as negligent only on the speed alone but took into consideration the circumstances of the case. There was clear evidence of breach of duty on the part of the appellant to have veered into the lane of the 1st Respondent's vehicle which had a right of way at the time material to the accident. Exhibits "F" and "G" established conclusively that the Appellant drove into the lane of the first Respondent's vehicle in a manner in which any trial court after taking all the circumstances of the case into consideration will adjudge the appellant to be negligent. The facts of the case and the inferences drawn from the facts support the learned trial judge's finding of negligence against the Appellant.

Learned Counsel for the appellant as said earlier, did not file any ground of appeal against the quantum of damages assessed against the appellant. It should be taken that he has no quarrel with the damages awarded by the trial judge and same ought not to be disturbed. For the above reasons the appeal ought to be dismissed.

I think there is one procedural point which emerged before this appeal was adjourned for judgment. On the 15/6/2004 the Respondents were granted permission to file their written submissions out of time in reply to the written submissions of counsel for the appellant which on record had been filed as far back as 7/10/99. The Respondents were ordered by this court differently constituted to pay cost of ¢2,000,000 before their written submission would be accepted. This order was blatantly ignored and they proceeded to

file their written submissions without complying with the court's order. This court was of the view that such contemptuous act ought not to be accepted in a court of law and therefore on 26/4/05 proceeded to strike out the written submissions filed by the Respondents in total disregard for the orders of this court. I think this court was right, mindful of the delay in prosecuting this appeal from 1999 to date.

Indeed the supreme Court in **OPPONG VRS. ATTORNEY-GENERAL & OTHERS [2000] SCGLR 275,** Bamford-Addo JSC, strictly applied the rules of court and time limits for filing process and proceeded to observe as follows:

> "Many a time litigants and their Counsel have taken the rules of procedure lightly and ignored them altogether as if those rules were made in vain and without any purpose. Rules of procedure setting time limits are important for the administration of justice, they are meant to prevent delays by keeping the wheels of justice rolling smoothly. If this were not so, parties would initiate actions in court and thereafter go to sleep only to wake up at their own appointed time to continue with such litigation at their pleasure. If this were allowed, litigation would grind to a halt, a sure recipe for confusion and inordinate delay in the due and proper administration of justice."

This appeal therefore had to be determined solely on the written submissions of learned counsel for the appellant upon the striking out of the written submissions of the Respondents by this court. We were therefore left unassisted by the Respondents in this appeal. Such practice ought not to be encouraged and should be condemned.

ANIN YEBOAH
JUSTICE OF APPEAL

AKAMBA, JA - This decision is unanimous. In the circumstances of this case, we make no order as to costs.

J.B. AKAMBA
JUSTICE OF APPEAL

I agree. **K. TWENEBOA-KODUA**
JUSTICE OF APPEAL

COUNSEL - ANDREW TETTEY FOR RONNEY HEWARD-MILLS FOR APPELLANT.

A.O. DARKU FOR K. ADJEI LARTEY FOR RESPONDENT

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