IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Civil Jurisdiction

Action No. 142 of 1977

BETWEEN:

MUTHU KRISHNA alias DAUD KHAN — Plaintiff

- and -

1. WALI MOHAMMED f/n Not known
2. MOHAMMED BASIR KHAN s/o Wali Mohammed — Defendants

Mr. A. Patel & Mr. Punja, Counsel for the Plaintiff

Mr. G.P. Shankar, Counsel for the Defendants

JUDGMENT

This is an action for damages arising out of a collision between two motor lorries at Tuvu on the main road between Lautoka and Ba. It occured in the morning during daylight on a tarsealed surface. Although there had been some rain the surface of the road was dry.

The plaintiff's claim is for $3,643.17 of which $2,243.17 is alleged to be the cost of repairs and $1,400 the cost of hiring other transport.

The accident occured on 12th January 1977 and the plaintiff's claim was filed on 7th July, 1977.

On 5/8/77 a defence was filed which denies negligence and includes a counterclaim for $1,476.47, loss of earnings amounting to $1,680.00 and a claim for $1,000 being the alleged depreciation in value giving a total of $4,156.47.

Both motor lorries are used for conveying and selling petroleum products which are obtained from the shell Depot at Vuda. The plaintiff's lorry was proceeding towards Ba and the other was going in the opposite direction.

The defence account as to how the accident occured is presented by two persons who were in a "Pine Commission" Land Rover travelling in the same direction as the defendant's motor lorry, i.e. from Ba towards Lautoka. They are D.W. 1, Semesi, who was a passenger in the rear of the Land Rover and D.W.2, Timoci, the driver. D.W.2 says that he saw the defendant's

lorry ahead just before the accident. He denied that he endeavoured to overtake it but claimed that he saw the plaintiff's lorry approaching from the opposite direction that he actually saw the driver's hands as the latter turned his steering towards the defendant's truck. How D.W.2 could see this in such detail, from behind the defendant's truck which was carrying large petrol tanks I find difficult to comprehend. D.W.2 also denied that he had pulled out to overtake the defendant's motor lorry and denied that anyone called out to him not to try and overtake it. His evidence contrasts strongly with that of his passenger D.W.1 who said that D.W.2 pulled out to overtake the defendant's lorry and he noticed the plaintiff's approaching motor-lorry. He says that the plaintiff's driver deliberately swerved towards the defendant's motor lorry, and he called out to D.W. 2 to fall behind and not try to overtake.

The wide discrepency between their evidence is such that I cannot place reliance on D.W. s 1. & 2.

D.W.3, a member of the defendant firm, was driving the defendant's lorry from Ba towards Lautoka. He says that his own speed was 30-35 m.p.h. and when the plaintiff's lorry was very close it swerved towards him. D.W.3 says he swerved to his left to try and avoid an accident and his nearside wheels mounted the grass verge on the nearside of the road. He failed to avoid the plaintiff's motor lorry which hit him.

The evidence of D.W.'s 2 & 3 is that the near side of the road facing Lautoka was blocked by the defendant's lorry and the landrover had to pass the scene by moving over to its offside of the road. D.W.1's evidence is similar.

In their counterclaim the defence alleged that their lorry was off the road for 14 days undergoing repairs. That would be from 12th or 13th to 26th or 27th of January, 1977. However, P.W.7 Harry Rounds, who is employed by Shell Co. at Vuda gave evidence showing that the defendant's lorry was back in use on 19.1.77, and Mr. Shankar (defendant) reduced the counterclaim for loss of use to a period of 6 days. D.W.3, in cross-examination stated that the exaggerated claim was due to a mistake made by a clerk. It was a mistake which more than doubled the defendant's counterclaim for loss of use. If the lorry was in regular use after the repairs, and the evidence indicates that it would be, it seems to me that the error would have to

be repeated daily for about eight days.

Repairs to the defendant's lorry was done by D.W.4 who allegedly presented an invoice to the defendants for the repairs. D.W.4 is a son of the defendant Wali Mohammed and works for him as a driver but says he is not a member of the firm. He was not an impressive witness nor was I persuaded by the account he allegedly presented to his father for the repairs, especially in relation to the labour costs and the towing charges.

The defendants did not, in my view, present an honest counterclaim in regard to the quantum of damage and in my opinion D.W.'s 3 & 4 dishonestly exaggerated it. It does nothing to help me to rely upon D.W.3's account as to how the accident occurred.

P.W.2, ANASA RABULA, was driving the plaintiff's motor lorry from Lautoka towards Ba. He says that the defendant's lorry was overtaking a landrover as it approached him, that it was on its offside of the road and that he (P.W.2) slowed down to almost 5 m.p.h. just before the impact. In cross-examination he said that the defendant's truck had overtaken the landrover just before the accident.

P.W.3 who was driven for 20 years confirmed P.W.2's evidence. He was a passenger in the plaintiff's lorry. P.W.3 says that after the accident the plaintiff's truck was on its left hand side portion of the road and the defendant's truck which had gone beyond the plaintiff's truck was on its right hand side facing Lautoka - the direction in which it had been going. P.W. 3 got a lift into Lautoka to notify the police and he collected a camera with which he took photographs of the scene, but this must have been an hour or two after the accident. I did not place any reliance on the photographs which were produced in the course of the hearing. There was no positive proof that the motor vehicles had not been moved.

Apart from P.W.'s 2 & 3 there are two independent eye-witnesses in the form of P.W.'s 5 & 7. P.W.5's evidence regarding the accident commenced with the statement,

> "I saw the defendant's lorry, I knew it I have seen it regularly. It is blue. One vehicle was trying to overtake the other. It could not get back of its own side. I did not see the collision. I heard the impact."

There were no details in that statement indicating in which direction the vehicles were going and which motor vehicle was trying to overtake. It seemed to be the statement of a youth recounting what had appeared most vividly to his eye at a moment or two before the impact. It was dissembled during examination-in-chief and he explained that it was the defendant's lorry which was overtaking a van. He stated in cross-examination that the van was a landrover. P.W.7 brother of P.W.5 gave similar evidence of the defendant's truck overtaking and being on its wrong side at the time of the accident. These witnesses appeared to become confused when asked such questions as, "On which side of the road was the defendant's lorry when one is facing in the direction of Ba", relating to the final positions of the motor vehicles. There were minor discrepencies in their evidence as to whether or not they knew P.W.3. But I am satisfied they were not trying to conceal anything.

As to the relative positions and behaviour of the motor vehicles prior to the accident I accept the evidence of P.W.'s 5 & 7. They were not passengers in other vehicle and therefore had none of that bias which can affect the judgment and recollection of a person who was driving or who was a passenger in one of the motor vehicles. Preferring, as I do, the evidence of P.W's 5 & 7 as to the behaviour of the lorries immediately prior to the accident I find that the defendant was overtaking the landrover when travelling in the direction of Lautoka and before he had time to fully regain his correct side of the road he collided with the plaintiff's approaching motor lorry which was on its correct side. I find that the plaintiff's motor lorry was reducing his speed at the time of the impact and that the driver was in no way to blame for the accident.

Having found that the defendant was negligent it remains to quantify the damage suffered by the plaintiff. The plaintiff has put in full accounts for spares and labour charges from Millers Motors Ltd. and called witnesses from the office and workshop of that firm to substantiate the accounts. His lorry was out of action from 12th January to 18th February and

for that period claims $1400 for the hire of another. The reason why it was off the road for such a long period was that Millers Ltd. had to wait for spares to be delivered. It is very noteworthy that the plaintiff who is in the same kind of business as the defendant claimed $60.00 per day to replace his damaged lorry whereas the defendant claimed $120.00 per day for alleged loss of use. On that basis it would seem that the plaintiff's claim for hiring a replacement lorry could not be regarded as in any way extravagant.

I am satisfied that the amount claimed by the plaintiff is quite reasonable, unexaggerated and an honest account of his actual damage.

There will be judgment in full for the plaintiff on his claim for $3,643.17 and the defendant will pay the plaintiff's costs.

The counterclaim is dismissed and the defendant will pay the plaintiff's costs thereof.

LAUTOKA,
21ST JULY, 1978.

(Sgd.) J.T. Williams
JUDGE

Messrs G.P. Lala & Co., for the Plaintiff
Messrs G.P. Shankar & Co., for the Defendant.

Date of Hearing: 19.6.78
22.6.78
10.7.78