



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.E002 OF 2020

LEONARD MAKOKHA OTUNGO.....APPELLANT

VERSUS

DENNIS JUMA MWONGELA.....RESPONDENT

J U D G M E N T

1. This appeal arises from the ruling delivered on the 10th September 2020 by the Chief Magistrate at Busia in **CMCC No.145 OF 2018** in which the appellant, **LEONARD MAKOKHA OTUNGO** sued the respondent, **DENNIS JUMA MWONGELA** and another for damages arising from a road traffic accident which occurred on or about the 26th October 2017, along the Busia – Mumias Road within Nambale area near St. Mary’s Primary School involving the respondent’s motor vehicle **REG No.KBM 151L** and the appellant who was lawfully walking as a pedestrian along the said road.

2. It was the appellant’s contention that the said motor vehicle was on the material date driven by the respondent in a manner which was so negligent and reckless such that it veered off the road and hit the appellant thereby occasioning him serious bodily injuries.

The appellant therefore prayed for special and general damages as well as future radical expenses against the respondent whose apparent statement of defence dated 28th June 2018, was filed herein by **MULWA NDUYA & CO. ADVOCATES**, but more in relation to the previous first defendant, **DODHIA MOTORS LTD**, even though the memorandum of appearance was filed on behalf of both defendants by **OCHARO KEBIRA & CO. ADVOCATES**.

3. Be that as it may, in a ruling made by the trial court on 28th February 2019, the then first defendant was struck off and removed as such defendant. The matter was therefore to proceed to hearing against the then second defendant (respondent) only, and when it was mentioned on 23rd May 2019, **MR JUMBA**, advocate, requested for two weeks to come on record presumably for the remaining second defendant (**RESPONDENT**). However, by the time the matter came up for hearing on 5th November 2019, the said advocate had not formally come into the record. Neither the respondent nor his advocate (**IF ANY**) were present in court on that date. The matter therefore proceeded to hearing in their absence.

4. Thereafter, on the 17th December 2019, the court delivered its judgment in favour of the appellant. After eight (8) months or thereabout the respondent filed an application vide the notice of motion dated 24TH AUGUST 2020 seeking orders for stay of execution of the decree and setting aside of the judgment. The application was heard and a ruling in respect thereof was made on **10TH SPETMEBER 2020**, in favour of the respondent/defendant.

The judgment delivered by the trial court on 17th December 2019 was thus set aside together with all consequential orders.

5. Being aggrieved by the said ruling, the appellant preferred this appeal on the basis of the grounds set out in the memorandum of appeal dated 25th September 2020, filed herein by **CALISTUS & CO. ADVOCATES**. The appeal was canvassed by way of written submissions which were filed by the appellant on 16th April 2021. The respondent’s submissions opposing the appeal were filed on 12th April, 2021 by **BALONGO & CO. ADVOCATES**.

6. Basically, the duty of this court at this juncture was to reconsider the evidential material availed to the trial court at the hearing of the application and arrive at its own conclusions. (see, **SELLE V ASSOCIATED MOTOR BOAT CO. [1968] E.A 123**).

Having done so, against the grounds of appeal and the rival submissions, this court forms the opinion that the appeal turns on the legal representation of the respondent at the hearing of the main suit on the 5th November 2019. This is actually the substratum of the appeal.

7. It was the appellant’s contention that as at the hearing of the suit before the trial court on 5th November 2019, the respondent was represented by the firm of Ocharo Kebria & Co. Advocates but not Balongo & Co. Advocates whose Mr. Jumba, appeared and asked for two

weeks to come on record on behalf of the respondent but never did so at any one time thereby causing the appellant to serve the necessary hearing notice upon the proper advocates on record i.e. Ocharo Kebira & Co. Advocates.

8. The appellant further contended and implied that Balongo & Co. Advocates could not have filed a statement of defence on 12th July 2019, as they requested for time to come on record on 5th November 2019. It was on the basis of the foregoing factors that the appellant faulted the trial court for finding that Balongo & Co. Advocates were proper on record for the respondent prior to the delivery of the judgment and that they were not properly or at all served with a hearing notice for 5th November 2019.

9. In its rejoinder, the respondent dealt mainly on the competence or otherwise of the appeal on the basis that the order appealed from has not been attached to the record of appeal. However, this fact is disproved by the record filed herein by the appellant on 20th January 2021. In any event, the issue would border more on technicality rather than substance of the appeal. It is not the duty of the court to give undue regard to matters of procedural technicalities rather than substance of the dispute.

10. On the issue of representation, the respondent contended that the trial court did not err when it found that the firm of Balongo & Co. Advocates were proper on record and were not served with the necessary hearing notice even if the firm of Ocharo Kebira & Co. Advocate was also on record for the respondent.

This court, having carefully perused the material lower court proceedings is satisfied that the record does not vindicate the appellant but the respondent. It clearly shows that the firm of Balongo & Co. Advocates were proper on record for the respondent prior and after the delivery of the impugned judgment but were not served with the pre requisite hearing notice. The appellant therefore proceeded with the hearing of the suit in the absence of the respondent who had no prior notice of the hearing. As it were, the respondent was denied an opportunity to be heard and was thus condemned unheard.

11. It is ironic that the appellant forged ahead with the hearing of the appeal when the lower court record was very clear on the respondent's legal representation prior and after the delivery of the impugned judgement. In doing so, the appellant attempted without success to violate the respondent's right to a fair hearing of the claim against him.

In sum this appeal is lacking in merit and is hereby dismissed with costs to the respondent.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[Delivered and signed this 25TH day of MAY 2021].