



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 32 OF 2015

ERNEST MUTEMBEI.....APPELLANT

VERSUS

THE B.O.G. ATHWANA SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Honorable A.G. Munene, Senior Resident Magistrate in Embu CMCC No.133 of 2015 as delivered on 16th July 2015.

2. The cause of action arose from a traffic accident that occurred on 15th June, 2013 along Embu-Meru Road involving motor vehicles registration numbers KAM 604M and KBR 384U; the appellant herein was lawfully travelling as a passenger in motor vehicle registration number KAM 604M.

3. The appellant filed the suit against the respondent seeking compensation for injuries he allegedly suffered as a result of the accident; after a full trial and the trial court rendered its decision where it found the respondent 20% liable for the occurrence of the accident and the driver of motor vehicle registration number KAM 604M was found to be 80% liable for the accident; the trial court then proceeded to award the appellant Kshs.1,290,000/= as general and special damages which were subjected to contribution;

4. Being dissatisfied with the decision of the trial court on the apportionment of liability, the appellant instituted this appeal seeking to have the judgment of the trial Court set aside; and listed the Grounds of Appeal as set out in the Memorandum of Appeal filed on 15th August 2015; which grounds of appeal are summarized as follows:-

- i. The trial court erred in finding a party not enjoined to the suit 80% liable for the accident.
- ii. The trial court erred by arriving at its decision on liability on assumptions not supported by evidence.

5. On the other hand, the respondent filed a Cross-Appeal and the grounds of appeal can be summarized into two grounds as follows;

- i. The trial court erred in apportioning liability at 20% liable against the respondent;
- ii. The appellant did not prove that the respondent contributed to the occurrence of the accident; the suit against it should be dismissed.

6. The parties were directed to dispose of the appeal and cross-appeal by filing and exchanging written submissions; the rival submissions are summarized hereunder;

APPELLANT'S SUBMISSIONS:

7. The appellant submitted that the trial court erred in making its findings on liability; and did not properly consider the evidence placed before it; no 3rd party proceedings were ever taken out against the deceased driver of motor vehicle registration number KAM 604M and therefore the trial court erred in apportioning liability against him; the appellant cited the case of **Pauline Wangare Mburu v Benedict Raymond Kutondi [2005]eKLR** in support of his contention.

8. The appellant pointed out that the evidence of **DW1** was not corroborated by any documentary evidence and therefore the trial court ought not to have relied on the same; the photographs produced by **DW2** in support of his evidence had no probative value; the evidence given by

DW2, was that he failed to signal the driver of the other vehicle and/or attempted to swerve to avoid the accident thereby proving the respondent's culpability for the occurrence of the accident.

9. It was the appellant's prayer that the respondent be found 100% liable for the accident or in the alternative, liability be apportioned equally between both drivers.

RESPONDENT'S SUBMISSIONS

10. The respondent submitted that the apportionment of liability to the driver of motor vehicle registration number KAM 604M was not erroneous; and the respondent associated itself with the trial court's finding that the appellant also had a duty to enjoin the said driver; the case cited in support of its contention was that of **Sammy Ngigi Mwaura v John Mbugua Kagai & Anor [2006]eKLR**;

11. The respondent supported the reasoning of the trial court but however disagreed with the conclusion that the respondent was 20% to blame for the accident; and its prayer was that the appeal be dismissed and the cross-appeal be allowed.

ISSUES FOR DETERMINATION

12. Upon reading the parties rival written submissions this court notes that there are no submissions challenging the award therefore this court has framed only one issue for determination; which is;

- i. Whether the appellant proved liability to the desired threshold;

ANALYSIS

13. The Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123** held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect; in addition, the Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal also held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also **LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403**).

Whether the appellant proved liability to the desired threshold;

14. Having perused the court record it is noted that there were four witnesses who gave evidence on liability; the appellant testified that he was a passenger in motor vehicle registration number KAM 604M and that the bus left its left lane and veered into their lane and caused the collision; he blamed the bus driver for the occurrence of the accident.

15. The 2nd plaintiff Samuel Muiga Kirutu had testified at trial that he was a passenger in motor vehicle registration number KAM 604M when it was hit by motor vehicle registration number KBR 384U; that the vehicle he was travelling in was hit on their left lane; he blamed the driver of motor vehicle registration number KBR 384U for over-speeding and veering into their lane; under cross-examination, the appellant testified that they were going downhill while KBR 384U was going uphill and that his driver was driving at about 70-80kph and was speeding but then so was KBR 384U

16. DW1 – PC Wachira testified that on the date of the accident he was called to the scene and according to his investigations, the driver of motor vehicle registration number KAM 604M lost control, left its lane and collided with motor vehicle registration number KBR 384U; that when he arrived at the scene of the accident, he found KAM 604M on the lane of KBR 384U; he confirmed that KAM 604M was going downhill when the accident occurred and blamed the driver of the said motor vehicle for the accident;

17. Under cross-examination, he stated that he did not have the police file with him; with regard to the police abstract, he explained that at the time of its issuance, investigations were still ongoing hence the fact that no one was blamed; during re-examination, he stated that once he had concluded his investigations, he found that the deceased driver of motor vehicle registration number KAM 604M was to blame for the accident since it left its lane;

18. The respondent's driver adopted his witness statement at trial; the statement provides that on the fateful day he was driving uphill when he saw motor vehicle registration number KAM 604M coming down the hill in a zigzag manner; this forced him to bring his motor vehicle to a complete stop and he turned on his hazard lights; he was unable to swerve away from the oncoming vehicle as he was on a cliff and the oncoming vehicle left its lane and collided into his vehicle;

19. From the evidence on record, the undisputed facts are that the accident occurred at night; that the accident occurred on a slope and at a bend and that motor vehicle registration number KAM 604U was going downhill whilst KBR 384U was going uphill;

20. The question posed is which vehicle left its lane? both parties blame each other for the accident; however, this court is inclined to look to the evidence of **DW1** – the Investigating Officer who for all intents and purposes is a neutral and independent party; he testified that when he came onto the scene of the accident, he found motor vehicle KAM 604M on the lane of KBR 384U; upon conclusion of his investigations he

found that the driver of KAM 604M left his proper lane and thereby caused the accident; this evidence corroborates the respondent's driver's testimony;

21. Whereas the 2nd plaintiff had testified that his driver was speeding while going downhill which could have caused the said driver to lose control of the motor vehicle as was evidenced by the respondent's driver when he said he saw the motor vehicle coming towards him in a zig zag manner;

22. From the facts and evidence adduced it is apparent that the accident was caused by the driver of KAM 604M who was not a party enjoined to the suit; despite this it is noted from the judgment the trial court apportioned liability at 80% on the driver of motor vehicle registration number KAM 604U and this court reiterates that this driver was not a party to the suit; the trial court found that the respondent was 20% liable for the accident due to the fact that the driver had not attempted to swerve to avoid the accident;

23. Upon re-evaluating the evidence this court finds that the trial court misapprehended the evidence before it and ought not to have apportioned liability to a party who was not enjoined to the suit and by doing so it arrived at an erroneous decision;

24. The question posed at this stage is whether the appellant proved that the respondent's driver caused the accident; it was incumbent upon the appellant to discharge the burden of proof as encapsulated by the provisions of Section 107 of the Evidence Act, Chapter 80 Laws of Kenya which provides:-

'107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'

25. This court it is inclined to look to the evidence of **DW1** – the Investigating Officer who for all intents and purposes is a neutral and independent party; he testified that when he came onto the scene of the accident, he found motor vehicle KAM 604M on the lane of KBR 384U; upon conclusion of his investigations he found that the driver of KAM 604M left his proper lane and thereby caused the accident; this evidence corroborates the respondent's driver's testimony that driver of KAM 604M had lost control of his vehicle;

26. For the forgoing reasons this court finds that the appellant failed to discharge his burden of proof on the particulars of negligence and that the respondent was at fault; and finds that there is good reason to interfere with the trial court's finding on liability;

27. On quantum, this court is required to give findings on the amount it would have awarded had the appellant been successful; based on the authorities cited by the appellant which presented similar injuries this court finds no good reason that warrants interference with the amount awarded by the trial court for general damages.

FINDINGS AND DETERMINATION

28. For the forgoing reasons this court makes the following findings and determinations;

- i. The appellant is found to have failed to prove his case to the desired threshold;
- ii. The appeal is found lacking in merit and is hereby dismissed in its entirety; the cross-appeal is found to have merit and it is hereby allowed;
- iii. The judgment of the trial court delivered on 16/07/2015 is hereby set aside and substituted with the dismissal of the suit;
- iv. The respondent shall have costs of the appeal as well as costs in the lower court.

It is so Ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 24TH DAY OF JUNE, 2021

HON.A.MSHILA

JUDGE