



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 225 OF 2018

FELIX MBUVI.....APPELLANT

VERSUS

1. SAMUEL OCHIENG NDIEGE

2. RODANAO YIANI.....RESPONDENTS

(Being an Appeal from the Judgment and Decree of Kwale Chief Magistrate Hon. D. Nyambu delivered on 17th October, 2018 in Kwale Principal Magistrate Civil Suit No. 167 of 2014)

JUDGMENT

1. The Appellant was the 1st Defendant in **Kwale Civil Suit No. 167 of 2014** as he was sued by the 1st Respondent on a personal injury claim.
2. The facts of the case were that on or about 3/1/2014, the 1st Respondent was lawfully riding Motor Cycle Registration Number KMCZ 911 J, Boxer along Beach Road, Ukunda when he reached near Willow Club, Motor Vehicle Registration No. KBS 558 B, Toyota Corolla which was so negligently, carelessly and recklessly driven by the 1st Respondent and/or his authorised driver collided with Motor Vehicle Registration No. KBK 928 G, Toyota Vitz which was also so negligently, carelessly and recklessly driven by the 2nd Respondent that it caused the latter motor vehicle to veer off its lane and collide with Motor Cycle registration no. KMCZ 911 J, Boxer, are a result, of which the 1st Respondent sustained serious bodily injuries, loss and damage.
3. The 1st Respondent's case was that the aforesaid accident caused him the following injuries; *compound fractures of the right tibia and fibula leg bones at the ankle (bimalleolar fractures), fracture of the left clavicle shoulder blade bone and degloving tissue loss wound on the right ankle* which were wholly caused or substantially contributed to by the negligence of the Appellant and the 2nd Respondent and/or their authorized drivers and/or agents.
4. According to the 1st Respondent, the Appellant and 2nd Respondent were responsible for the accident and thus in his **Amended Plaintiff** dated **5/9/2014**, sought as against them jointly and severally an award of *general damages, special damages of Ksh. 8,230/= costs of the suit plus interest*.
5. The Appellant filed a **Statement of Defence** on the **17/10/2014** and denied that any accident occurred, and that if the same occurred, then it was substantially contributed to by the driver of Motor Vehicle Registration No. KBK 928 G and or the 1st Respondent, the rider of Motor Cycle Registration No. KMCZ 911 J. He sought that the 1st Respondent's suit be dismissed against him with costs.
6. The 2nd Respondent filed an **Amended Statement of Defence** on the **29/9/2014** and stated that the accident occurred solely because of the negligence on the part of the Appellant or his authorized driver of Motor Vehicle Registration No. KBS 558 B, Toyota Corolla and he sought that the 1st Respondent's suit against him be dismissed with costs.
7. The 1st Respondent called three (3) witnesses, Appellant called one (1) witness while 2nd Respondent filed a witness statement but did not call any witness to testify before the trial court.
8. The 1st Respondent testified as PW1 and he stated that on 3/1/2014 he was involved in an accident on his way to work as he rode his Motorbike make Boxer KMCZ 911 J. He state that the accident occurred on Beach Road as he was heading to Nakumatt.

9. PW1 testified that Motor Vehicle Registration No. KBK 928 G, a small vitz was ahead of him when suddenly another Motor vehicle registration KBS 558 B, Toyota came out of a feeder road at a high speed. He stated that he stopped to pave way, when he noticed Motor vehicle registration KBS 558 B was being driven at a very high speed and that was when KBK 928 G and KBS 558 B collided. That it was from the impact of that collision that he was knocked by Motor Vehicle Registration No. KBK 928 G.
10. It was PW1's statement that he was hit so bad, that when he woke up, he found himself in a hospital. He stated that he lost consciousness and woke up at Msambweni Hospital where he learnt that he had suffered injuries of a broken right leg, broken left shoulder blade and a cut on the right leg with hanging flesh.
11. He stated that he was admitted at Msambweni Hospital for eleven (11) days where he was operated on and the cuts were stitched up. He testified that his right leg had four metal implants after the operation which he stayed with for over fifty-six (56) days.
12. PW1 also testified that he was later plastered and his arm put in a sling for the shoulder to heal as he was informed an operation could damage the hand completely. He stated that he felt pain during cold seasons and he could not carry heavy things or drag anything. He further stated that he could not work the way he used to and that his leg is not straight and his hand cannot stretch upwards completely.
13. He testified that he reported the accident at Diani Police Station, and was issued with an abstract and P3 form. He stated that the owner of the two motor vehicles were Felix and Rodano. He further blamed both Motor vehicle registration KBS 558 B and Motor vehicle registration KBK 928 G for the accident.
14. PW1 testified that his medical report was prepared by Dr. Ajoni Adede for Kshs. 2,000/= and his treatment notes were prepared by Msambweni Hospital for Kshs. 6,230/=.
15. PW2 was the Investigating Officer **No. 77446 Coporal Fridah Achieng** who was based at Diani Police Station. She stated that on 3/1/2014 while she performed her normal traffic duties, she investigated an accident case that involved motor vehicles KBS 558 B Toyota Corolla, KBK 928 G Toyota vitz and motor cycle KMCZ 911 J Boxer.
16. It was PW2's testimony that the accident occurred in Diani on Nakumatt-Ukunda Road. She stated that KBK 928G was from Nakumatt to Ukunda when another vehicle KBS 558 B which was joining the main road from a rough road failed to give way to KBK 928G thus caused an accident and in the process hit the motor cycle.
17. PW2 stated that the vehicle from Nakumatt lost direction and veered off the road and hit another motor cycle from the opposite direction from Ukunda heading to Nakumatt. She stated the Motor cycle was hit on the right side of the road as one faces Ukunda and the rider was injured.
18. It was PW2's testimony that it was KBS 558 B that was to blame for the accident, the driver was duly charged and taken to court. She stated that driver of KBS 558 B was charged with driving without undue care and attention.
19. PW3 was Dr. Ajoni Adede a medical doctor who examined PW1 on 2/7/2014. He stated that for the road accident that occurred on 3/1/2014, PW1 suffered compound fracture of right tibia and tibula at the ankle, left clavicle shoulder blade bone fracture and a degloving tissue loss injury on right ankle.
20. He also testified that PW1 had been at Diani Beach Hospital and admitted at Msambweni Hospital for eleven (11) days, where X-rays were done and metal implants put in. He stated that PW1 complained of pain at the injured areas and where the metal implants were removed.
21. It was PW3's testimony that when he examined PW1 after six (6) months, the right ankle had deformed and stiffened, he had two (2) scars, one of 10 cm and another of 2 cm. He further stated that PW1 had a deep tissue scar on his right heel and his shoulder blade had deformed at six (6) cm, X one (1) cm and had a scar.
22. He testified that to make the report he saw X-rays, treatment notes from Diani Beach and Msambweni Hospital and filled a P3 form. He stated that he estimated that PW1 had suffered a permanent disability at 9% due to the deformity of the left ankle, stiffness of right ankle and shoulder disfigurement from multiple scars. He stated that his findings were in a report dated the 2/7/2016 and he was paid Kshs. 2,000/= for his services.
23. The Appellant called one witness DW1 who was Kevin Mumo Kimweli and he stated that on 3/1/2014, an accident occurred at Darad along Beach Road in Ukunda. He stated that he was the driver of the said motor vehicle registration no. KBS 558 B.
24. DW1 also testified that as he drove towards Ukunda Shopping center from Darad, he joined the feeder road to the main road and as he was on the main road after one hundred (100) meters, an accident occurred.
25. He further testified that the feeder road was on the right towards Ukunda and a Toyota Vitz and motor bike were behind him. He stated that he maintained his lane at all times and when Toyota Vitz Registration No. KBK 928 G tried to overtake and realized the same was not possible, it got onto entered his lane and hit his vehicle on the right tyre.
26. It was DW1's testimony that he lost control, entered the left side and hit a wall as the vitz hit the motor bike which veered off the road then it stopped. He stated that the motor bike was hit by the vitz and he blamed the 2nd Defendant for the accident, since the driver never kept the required distance and for overtook when the road was not clear. He further stated that the accident would not have occurred had the 2nd Respondent been careful.

27. He testified that he joined the main road before the accident was driving at 40 Km/hr so that even if he slowed down, the accident could not have been avoided. Lastly, that he was not at fault as he was hit from behind by the 2nd Respondent.

28. In cross examination by Mr. Mungai DW1 stated that when he joined the main road from the right side going towards Ukunda, there was a Vitz which was about 100 meters behind him. He stated that according to him it was safe to join the main road when he did so.

29. He also testified that the driver of the Vitz was driving at a high speed and that if the car was less than 30 meters away, he would not have entered. He stated that the accident occurred when the 2nd Respondent tried to overtake him and that was when he was hit on the right side.

30. The 2nd Respondent did not call any witness to testify.

31. After hearing the parties, the Trial Court delivered its judgment on the **17/10/2018** and found the Appellant 100% liable. That it awarded the 1st Respondent *general damages of Kshs. 800,000/=, special damages of Kshs. 8,230/= and costs of the suit plus interests.*

32. Upon being dissatisfied with the findings of the trial court in the judgment dated 17/10/2018, the Appellant filed an appeal before this Court and raised the following grounds: -

1. That the learned trial magistrate erred in law and in fact in making a finding of negligence against the appellant without evidence and/or acting contrary to the evidence on record failing to hold that the Plaintiff had not proved their case on a balance of probability on negligence as against the appellant.

2. The learned trial magistrate exercised his discretion in making his findings on liability and or negligence wrongly by, acting contrary to the weight of evidence that was before the court.

3. That the learned trial magistrate erred in fact and in law in failing to consider judicial precedent, and in failing to appreciate the doctrine of causation and blameworthiness hence arrive at wrong decision, on negligence and liability.

4. The learned trial magistrate took into account issues he ought to have considered and failed to consider facts that he ought to have considered hence arrived at a decision on liability and or negligence.

5. That the learned trial magistrate erred in law and in fact in failing to find the 2nd Respondent 100% liable for the accident for failure to controvert evidence tendered against him and failing to hold that negligence had been proved against the 2nd Respondent on a balance of probability.

33. The Appellant prayed that the appeal be allowed and that the trial court's finding on liability for negligence against the appellant be set aside and the suit against the appellant be dismissed. He further asked this court to find the 2nd Respondent wholly liable for the accident and that costs of this appeal and proceedings in the subordinate court be awarded to the Appellant.

34. Directions were then given on the **11/4/2019** that the appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Appellant filed his submissions on the **11/6/2019** while the 1st Respondent filed theirs on the **7/11/2019**.

35. The 2nd Respondent did not participate in the Appeal herein despite being served with several notices to appear before court. He did not file any written submissions before this court.

36. Parties relied on their written submissions.

Analysis and determination

37. This being the first appeal, this Court has a duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions while bearing in mind that it neither saw the witness nor heard the evidence when parties were testifying so as to see their demeanour. (See the case of ***Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR.***)

38. I have carefully considered the pleadings and submissions filed herein and in my view I find that issue for determination being *whether the trial Court was right to find the Appellant 100% negligent and liable for the accident.*

39. It is not disputed that an accident occurred on the **3/1/2014** and the 1st Respondent was injured. What is in contention is who is liable for the accident. It is evident from the 1st Respondent's case that he blames both the Appellant and the 2nd Respondent for the accident, while the Appellant blames the 2nd Respondent.

40. The trial court in its analysis found that the Appellant was 100% liable and responsible for the accident for not waiting for the 2nd Respondent to pass before he joined the main road at low speed whilst the 2nd Respondent was already on the main road driving at a high speed.

41. In his Appeal, the Appellant contends that the 1st Respondent did not discharge the burden of proof on the issue of negligence and thus

the trial Court was wrong to find him negligent and liable for the accident. Further, that there was uncontroverted evidence that the 2nd Respondent was driving at a high speed and that had he driven the motor vehicle at a reasonable speed, the accident would not have occurred. The Appellant also added that his evidence as against the 2nd Respondent was uncontroverted and that the accident occurred because the 2nd Respondent tried to overtake a motor vehicle ahead and that was when he knocked the Appellant's car.

42. Since it is not in dispute that an accident occurred on the **3/1/2014**, this court is called upon to determine who was responsible for the accident between the Appellant and the 2nd Respondent.

43. In the case of **Machindranath Kermath Kersar v D. S Mylarappa & others, Civil Appeal NO 3041 of 2008, S.B Sinha, J.** writing for the Supreme court of India, stated the following on negligence: -

“A suit for damages arises out of a tortious action. For the purpose of such action, although there is no statutory definition of negligence, ordinarily, it would mean omission of duty caused either by omission to do something which a reasonable man guided upon those considerations, ordinarily by reason of conduct of human affairs would do or be obligated to, or by doing something which a reasonable or prudent man would not.”

44. In applying the above authority to the case herein, it is evident from the evidence of PW1, PW2 and the Appellant who testified as DW1 that he was the cause of the accident that occurred on the **3/1/2014**. It is very clear that despite the fact that 1st Respondent was hit by the 2nd Respondent, the Appellant was the one responsible for the accident when he joined the main road from a feeder road without warning and at a short distance.

45. If a reasonable man's test is to be applied to the case herein, the Appellant, having noticed that the 2nd Respondent was driving at a high speed ought not to have joined the main road and maintain a speed of 40km/hr.

46. The allegation that the 2nd Respondent was driving at a high speed does not amount to negligence as there should be circumstances that accompany the said occurrence of the negligence complained of. The Appellant's defence that the 2nd Respondent was trying to overtake does not hold water as it is evident from his evidence that he joined the road at low speed without giving way to the 2nd Respondent.

47. In view of the above, record and evidence, I find no reason to tamper with the decision of the trial court dated **17/10/2018** that found the Appellant was 100% liable for the accident that occurred on **3/1/2014**.

48. The upshot is that the Appeal dated **6/11/2018** be and is hereby dismissed.

49. Costs to the 1st Respondent.

It is so ordered.

SIGNED AND DATED AT MOMBASA THIS 26TH DAY OF JULY, 2021.

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JULY, 2021.

A. ONG'INJO

JUDGE