



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 66 OF 2018

JACKSON NDWIGA..... APPELLANT

VERSUS

SAMUEL MUGENDI NJERU.....RESPONDENT

JUDGMENT

1. The respondent herein was the plaintiff in Chief Magistrate's Civil Suit No. 231 of 2013 at Embu in which he sued the appellant, Atieno J. Ochola and Kennedy Mwangi as the 1st – 3rd defendants respectively following a road traffic accident that occurred on the 9th day of February, 2013 along Kawanjara – Karurumo road involving motor cycle registration No. KMCF 010M and motor vehicle registration No. KAH 258Z. They had been sued as the reputed owner, registered owner and the driver of motor vehicle KAH 258Z respectively.
2. In his plaint dated the 2nd day of September, 2013 he alleged that on the material day, he was riding his motor cycle aforesaid along the said road when motor vehicle registration No. KAH 258Z was so negligently driven by the 3rd defendant that it hit his motor cycle from behind causing him and the pillion passenger to fall off the same, as a consequence of which both were injured.
3. The particulars of injuries, negligence and those of special damages are set out in paragraphs 9, 10 and 16 of the plaint. He thus claimed general and special damages plus the costs of the suit.
4. The appellant filed his statement of defence on the 22nd October, 2013 in which he denied the claim and in particular that, he was the reputed owner of motor vehicle KAH 258Z as alleged and that the 3rd defendant was the driver of the aforesaid motor vehicle. Further, he denied that the respondent suffered any injuries as alleged. The particulars of negligence attributed to the 3rd defendant who was said to be the driver of the subject motor vehicle were denied.
5. The appellant denied that the 3rd defendant was his authorized driver at the time of the alleged accident and therefore not vicariously liable for the negligence.
6. All the defendants had initially failed to enter appearance and defence following which, interlocutory judgment was entered against them on the 7th day of October, 2013. However, the appellant successfully set aside the same against himself and the 3rd defendant.
7. The record further shows that, on the 25th June 2014, and on 1st July 2014, interlocutory judgments were entered against the 2nd and 3rd defendants for failing to enter appearance and defence.
8. The court has keenly perused the record of the proceedings and there is no indication whatsoever on whether the matter proceeded for formal proof and how this was done, but on the 8th October, 2018, the court gave directions on filing of submissions and gave a date for judgment. The said judgment was delivered on the 26th day of November, 2018.
9. It is not clear from the record whether the submissions the court ordered the parties to file, on the 8th October, 2018 were in respect to the hearing of the main suit, but even assuming that, that was the case, my considered view is that the procedure was fundamentally flawed. Order 18 of the Civil Procedure Rules is on hearing of the suit and examination of witnesses. It sets out in details how a hearing should proceed including; right to begin, statement and production of evidence, examination of witnesses, how evidence is to be recorded, remarks on demeanour of witnesses and taking of any particular question and answer.
10. It is not clear why this procedure as important as it is, was not followed by the trial court. No exhibits were produced and yet, the learned magistrate in his judgment referred to several exhibits. It is also not clear the evidence that was placed before the learned magistrate and how the same was done, to enable him write the judgment which is the subject of his appeal.
11. It is unfortunate that there is no evidence for this court to re-evaluate for the purposes of the appeal before it. In the circumstances, the

only order that commends itself to this court is to refer the matter back to the lower court for retrial. The matter is hereby referred back to the Lower Court for retrial.

12. Each party shall bear its own costs of the appeal.

13. It is so ordered.

Delivered, dated and signed at Embu this 27th day of September, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent