



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.89 OF 2013

JOSEPH KIMELI A. SITONIK.....1ST APPELLANT
JOSEPH K. TUIYA.....2ND APPELLANT
KIBET SANG.....3RD APPELLANT
RICHARD KOECH.....4TH APPELLANT
KIPKURUI A. NYANAGALA.....5TH APPELLANT
JOYCE CHEPTOO SOMONI.....6TH APPELLANT
KIPLANGAT ROTICH.....7TH APPELLANT
ESTHER KIPKORIR.....8TH APPELLANT
KIPKORIR KUCHA.....9TH APPELLANT
GRACE CHEPLANGAT.....10TH APPELLANT
JANE CHELAGAT.....11TH APPELLANT
PAUL CHERUIYOT.....12TH APPELLANT

-VERSUS-

MICHAEL MUCHIRI KIBE.....1ST RESPONDENT
FRIGOKEN LIMITED.....2ND RESPONDENT
PATRICK KARANJA.....3RD RESPONDENT

(Being an appeal from Judgment/Decree of Hon. H. M. Nyaga Senior Principal Magistrate dated 14th of May, 2013 Molo SPMCC No.166 of 2009 being the test suit in a series of 13 cases consolidated for the purposes of liability.)

JUDGMENT

BACKGROUND

1. This appeal arise from suit filed at lower court in Molo by Plaintiff seeking general and special damages for injuries he sustained while travelling in GK A 585Q which collided with motor vehicle registration number KBC 119M owned by the 1st Defendant driven by the 2nd Defendant on 1st October 2008.

2. After evaluating evidence adduced, the trial court found that the accident could not be attributed to one party. He apportioned the blame at 50:50 as between Plaintiff and 3rd Defendant. He proceeded to assess damages in respect to claimants in all files consolidated for

purposes of liability.

3. The appellant being aggrieved by the said determination, filed this appeal on the following grounds:-

- i. That the learned magistrate erred in law and fact in finding that the appellants had not proven their case on a balance of probabilities to the extent of the respondents herein being 100% liable.
- ii. That the learned magistrate erred in law and in fact in finding that the Appellants had not proven their case on a balance of probabilities to the extent of the respondent herein being 100% liable
- iii. That the learned magistrate erred in law and in fact in disregarding and or ignoring the evidence adduced by the appellants in their testimony, the testimony of all their witnesses, the exhibits produced and their submissions against the Respondents.
- iv. That the learned magistrate erred in law and fact in finding that the Respondent only 50% liable for the occurrence of the accident.
- v. That the learned magistrate erred in finding that misdirected himself in appropriating liability to a party that was not enjoined and or did not form part of the proceedings and or participate in the trial suit.
- vi. That the learned magistrate erred in law in shifting the burden of suing the A.G. to the appellants yet the appellant's sole case was against respondents.

4. Parties agreed to proceed by way of written submissions

APPELLANT'S SUBMISSIONS

5. Appellants restated the grounds of appeal and background of the case. Appellants submitted that they were passengers in the GK vehicle and that the vehicle had an open canvas at the back, which enabled them to see the happenings during the journey. Appellants submitted they all blamed the 3rd Defendant for veering off his lane and causing the accident, Appellant submitted that the court noted that the collision was head on.

6. The Appellant submitted that the trial magistrate misdirected himself by appropriating liability to a party that was not enjoined and or did not form part of the proceedings and or participate in the trial

RESPONDENT'S SUBMISSIONS

7. The respondent started by stating brief facts of the case and submitted that this appeal being the first, the court is allowed to reconsider evidence, evaluate it and draw own conclusion. Respondent submitted that the court noted that if the Respondent's driver was the cause of the accident, he could have been charged; which never happened; that it was in the basis of the evidence adduced that the court found that the accident could not be attributed to one party alone and proceeded to hold Respondent's driver 50% liable. Respondent submitted that if the Appellant wanted the Respondent to be held 100% liable, it would have been incumbent upon them to lead sufficient evidence to show that. Respondent cited the case of **Hussein Omar Farah Vs Lento Agencies [2006] eKLR** where the court held that the court had two conflicting versions of how the accident occurred and both side could not establish the fault of the opposite side and the court decided to apportion liability equally. And in **Wilfred Wanjala Vs Samul Gudu[2018]** where the Plaintiff who was a passenger led evidence to the contrary and the motorcyclist was not party to the suit. The court held as follows:-

“It emerged from the respondent's evidence that he saw the motor cycle coming from the opposite direction. That it lost control and hit his vehicle. From the said evidence an inference is made that the respondent too was driving in a careless manner no wonder despite seeing the motor cycle he could not control the vehicle to avoid the accident. Based on that disposition, this was an accident between two motor machines. As correctly submitted by the appellant, in case a where such an accident occurs and the court finds it difficult to ascertain liability it is safe to apportion the same at 50:50.

ANALYSIS AND DETERMINATION

8. The trial magistrate noted that the fact that the collision was head-on show that the driver of the GK vehicle was able to see the vehicle coming, there is no evidence on his attempts to swerve or reduce speed to avoid the accident.

9. PW1 testified that they were 15 people in the GK vehicle and since it was covered with canvas he was able to see oncoming vehicle. He said the oncoming vehicle was moving in high speed and that their driver did not veer off the road. He said their driver was seriously injured resulting in his death. PW2 also said the other vehicle moved to the lane of GK vehicle. All the witnesses who were in the GK vehicle said the other vehicle moved to their lane.

10. DW1 who was the driver of KBC 119M testified that he saw an oncoming GK vehicle, which was trying to overtake 2 vehicles as he approached. He said the driver of the GK vehicle tried to go back to his lane but he lost control and swerved from side to side. He said he moved to the edge of his lane but the GK vehicle was already rolling and it hit his vehicle. He denied having caused the accident. He said that he testified in traffic case No. 1259/09 and that his employer sued AG for damage of the vehicle and the suit was determined in favour of his employer. In cross examination, he said he saw GK vehicle 100 meters away trying to overtake other vehicles.

11. The Appellant argued that if the 3rd respondent is blaming the GK vehicle for contribution, it ought to have taken out 3rd party proceedings.

12. I agree with trial magistrate that there there is contribution on liability on part of the GK vehicle. In Paragraph 6 of their defence, the Defendants attributed blame to the driver of motor vehicle registration number GK 585 Q but failed to take out 3rd party proceedings to enjoin the driver of the GK Vehicle as a party to the suit. Liability cannot be apportioned to a party who has not been enjoined in the suit. My view is that, the Respondents having failed to enjoin driver of GK 585 Q in the suit they should have been made to shoulder liability 100% as the plaintiffs were passengers in the GK vehicle and never contributed to the occurrence of the accident.

13. I see merit in the appeal and set aside finding on liability by the trial magistrate.

14. **FINAL ORDERS**

1. **Appeal on liability is allowed.**
2. **The respondent to shoulder 100% liability.**
3. **Finding on quantum to remain.**

Judgment dated, signed and delivered at Nakuru this 27th day of February, 2020

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

Jeniffer/Schola – Court Assistant

Momanyi holding brief for Gekonga Counsel for the Appellants

Ms. Obura holding brief for Mukite Musangi Counsel for the Respondents