

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 13 OF 2019

(An appeal arising from the judgment and decree of the Hon. FM Nyakundi, Senior Resident Magistrate, in Mumias SPMCCC No. 101 of 2017 of 14th January 2019)

NESTER SHIKURI.....APPELLANT

VERSUS

IBRAHIM OKWIRI MATANJI.....RESPONDENT

JUDGMENT

1. The suit at the trial court was initiated by the respondent herein against the appellant, for general and special damages, arising from a motor traffic accident involving motorcycle, on which he was riding, and a motor vehicle owned and controlled by the appellant. The appellant entered appearance and filed a defence, in which he denied liability and attributed negligence on the respondent. The trial court heard three witnesses from the respondent's side and two from the appellant's side. After reviewing the evidence, the trial court found the appellant wholly liable for the accident, and awarded to the respondent a sum of Kshs. 200, 000.00 general damages and Kshs. 6, 000.00 special damages.

2. The appellant was aggrieved by the award and lodged this appeal. His case, according to the memorandum of appeal, is that the respondent had not proved his claim and injury, the driver of the appellant's vehicle had not been charged with any traffic offence, the police abstract had described the accident as a non-injury accident, the doctor did not produce an x-ray film to prove fracture of the leg, the court considered extraneous issues and the judgment was not based on sound law and procedure.

3. As a background to the assessment of the merits of this appeal, let me review the evidence that was recorded by the trial court. The respondent testified that he was riding his motorcycle along the Bungoma-Mumias road towards Mumias, when he was hit by a vehicle which was coming from the direction of Mumias. He said he was on his right side of the road, while the driver of the other vehicle was keeping to his right side of the road. He was injured and taken to hospital. He said that it was the other vehicle that crossed into his lane and hit him. He stated that the driver of that vehicle was not charged with any traffic offence. The respondent called a traffic police officer who stated that an accident occurred between a motor car belonging to the appellant, which was being driven towards Bungoma and a motorcycle that was being ridden in the direction of Mumias. He stated that the motor vehicle swerved from its lane, and collided with the oncoming motorcycle. He investigated the accident, went to scene and from his investigations blamed the driver of the motor vehicle. He said that the driver was never charged since he disappeared. The last witness was the doctor who attended to the respondent, Dr. Charles Andai. He described the respondent's injuries as an injury to lower limbs, with a broken tibia. The respondent was treated as an outpatient.

4. The appellant testified that he was the owner of the accident vehicle. He was a passenger in the vehicle on the material day, driven by someone else. He stated that the motorcycle hit his car. The motorcycle was not moving at the time, and the rider and the pillion passengers were not injured. He made a report at the police station and was issued with a police abstract which indicated that nobody was injured. He stated that his driver was not charged with any offence, and he did not disappear as alleged by the police witness. His witness was his driver. He stated that it was the motorcycle that hit his car. He stated that nobody was injured. He stated that he was making a turn into Mumias Sugar Company. He indicated and turned, and in the process he was hit by the motorcycle.

5. From the recorded evidence it is clear that there was a collision between the motorcycle and the motor vehicle. It is clear that the motorcycle was on its left side moving towards Mumias, while the motor vehicle was on its right side from the Mumias direction. At Shibale the motor-vehicle sought to turn into Mumias Sugar Company Complex, and it was during that manoeuvre that the collision happened. What is in dispute is who caused the collision between the driver of the vehicle and the rider of the motorcycle. The rider said he was on his lane, when the driver left his lane into his lane. The driver said that he did turn to enter the Mumias Sugar Company, then the motorcycle hit him. Quite obviously, it was the driver of the vehicle that turned into the lane of the motorcycle and got into its way hence the collision. The police officer who investigated the matter came to court and testified that the driver of the vehicle was to blame. He moved from his left to his right, and thereby into the way of the motorcycle, which had the right of way. From all indications, the appellant's driver was author of the accident, and I do not believe the trial court can be faulted for holding him 100% liable, for getting into the way of the respondent.

6. The other critical issue raised relates to whether the respondent was injured. The respondent's case was that he sustained a fracture and other injuries from that encounter. That evidence was supported by the police officer who testified in the matter, who was also the investigation officer into the accident. I said that he went to the scene and from his investigations he blamed the appellant's driver. He stated that after he was hit, the respondent fell and was injured. What is in contention is the police abstract that indicated that the accident was non-injury. It transpired that two police abstracts were issued, the investigating officer testified that he did not issue the one that indicated that the accident was non-injury, and held on to the position that the police abstract that he issued stated the correct position that the respondent was injured. It was the appellant who was relying on the police abstract that alleged that the accident was non-injury, it was incumbent upon him to call the police officer who issued him with that police abstract report to come and testify on that particular allegation, that the accident was non-injury, contrary to the other police abstract relied on by the respondent, who went on to call the officer who made to come and testify on it and to produce it. I, therefore, conclude that the respondent was indeed injured in that collision contrary to what the appellant alleges.

7. The appellant has made a lot play about his driver not being charged with a traffic offence arising from the said collision. The mere fact that a driver involved in an accident is not charged does not of itself absolve a driver of tortious liability. Traffic and civil proceedings are separate. If the police, or the Office of Director of Public Prosecutions, decide not to prosecute does not bar the injured person from initiating civil proceedings to recover damages in tort, and it does not bar the court either in determining the liability of the driver. Secondly, the investigating officer testified that the driver disappeared, he did not find him at the scene and he did not come to the station, and so he never got to charge him. Let me repeat that the mere fact that a driver involved in an accident is not charged with a traffic offence arising from that accident does not mean that he cannot be held liable for causation of the accident.

8. The other matter raised relates to production of x-ray films by Dr. Andai. Dr. Andai prepared a medico-legal report on the injuries sustained by the respondent. My understanding of his evidence was that he did not treat the respondent, but the latter was referred to him by his advocate for the purpose of the medico-legal report. He had been treated elsewhere. He came to the doctor with x-ray films or report, no doubt prepared at the point of treatment. He was not the maker of the x-ray films, and he was under no obligation to produce them. If the appellant really needed to rely on the x-ray films, nothing would have prevented him from causing the makers of the films subpoenaed for that purpose. The trial court did not fall into any error with respect to the matter of the x-ray films.

9. The appeal has not raised any issues on the quantum, and, therefore, I shall not train my mind on that.

10. Overall, I am not persuaded that there is any merit in the appeal before me. It is for dismissal and I hereby dismiss the same with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE