



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 19 OF 2013

EN &

MCB (Minor suing thro' his mother & next friend EN.....APPELLANTS

-VERSUS-

HUSSEIN DAIRY LIMITED.....1ST RESPONDENT

KHASSIM BEGA KAULI.....2ND RESPONDENT

TOP CARRIERS LIMITED.....3RD RESPONDENT

JOHN IGUKU.....4TH RESPONDENTS

(Being an appeal from the judgment and decree of the Hon. Aminga Resident Magistrate

in Kwale Civil Case no. 162 of 2011 delivered on the 30th January, 2013)

JUDGMENT

1) The suit subject to this appeal was instituted by the Appellants vide a plaint dated 23rd August, 2011 against the Respondents seeking for general damages for pain and suffering from injuries sustained in a road traffic accident that occur on 9th March, 2011. In the said plaint, the Appellant averred that while he was travelling as a passenger aboard motor vehicle registration number KBN 769F along Mombasa-Voi road when on reaching Taru area they encountered Motor Vehicle Registration No. KAX 315-ZB4994 owned by the 1st Respondent and driven by 2nd Respondent recklessly parked on the road. An on oncoming vehicle Registration NO.KBJ 384I-ZD 0376; owned by the 3rd Respondent and driven by the 4th Respondent, while in a bid to avoid a collision with the stationary vehicle (Registration No. KAX 315-ZB4994) swerved onto the lane of Motor Vehicle Registration number KBN 769F in consequence of which the motor vehicles collided causing the Appellants bodily injuries. Particulars of negligence for both drivers of motor vehicles registrations number KAX 315-ZB4994 and KBJ 384I-ZD 0376 were articulated therein. It is of note that neither the driver nor owner of the bus were sued nor joined in the proceeding throughout the trial.

2) The Respondents in their defenses denied any negligence, INCLUDING THE OCCURRENCE OF THE ACCIDENT or liability in respect of the accident and averred that the accident if any was solely or substantially contributed to by the Appellant or another party thereof. Particulars of negligence on were stated therein in respect of each defendant's line of defense.

3) This being a first appeal, this court is obligated to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir **Clement De le Stang** stated that:

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).

4) At the trial, the appellant gave evidence then called two witnesses, the doctor and a police officer while the respondents tendered evidence through their respective drivers and a turn-boy. After the close of the respective parties' cases their advocates filed written submissions both on liability and on quantum. In a reserved judgment, the trial court found that the accident was contributed to by the three drivers with the driver of M/v KAX playing the great role. He apportioned liability for motor vehicle Registration KAX 315-ZD4994 at 50%, M/v Registration KBJ 384L ZD 0376 at 25% and M/v KBN 769F at 25%. On quantum, the trial court awarded Kshs. 180,000/= general damages, Kshs. 10,000/= for future medication and Kshs. 2,000/= special damages. That decision not only provoked the current appeal but also two cross appeals by the respondent. The three challenges only attack the single question of apportionment of liability between the respondents and the non-party.

5) On his part, the Appellants fault the Judgment and decision on the grounds that it was erroneous to 'apportion 25% of the liability as against motor vehicle registration NO. KBN 796F whose driver and the owner are not parties to the suit and in failing to consider the submissions on liability by the parties to the suit'.

6) The cross-appeal by the 1st and 2nd respondents faulted the judgment for an erroneous apportionment in the manner he did by going against the grain of the evidence adduced, the judicial precedents cited and by taking into account irrelevant matters while ignoring relevant ones including submission by the appellant seeking only 10% contribution. On their part, the 3rd and the 4th Respondent's also filed a cross appeal faulting the judgment and decision on the grounds that *the learned magistrate erred in failing to consider the evidence adduced in court by the key eye witnesses and supporting documents and consequently arrived at the wrong decision by assigning 25% blame to them; in applying the wrong principal while assessing liability and consequently arrived at a wrong decision; by failing to apportion liability at 100% as against the 1st and 2nd respondents jointly and severally; and in failing to consider the cross appellants' written submissions and decided authorities in apportioning liability.*

7) By consent of the parties, both the appeal and the cross appeals were canvassed by way of written submissions which were later highlighted on 24/02/2020. I will consider the same as follows:

The Appellant's submissions

8) The first issue submitted on is on whether the learned trial magistrate erred in law and facts in apportioning 25% liability as against motor vehicle registration No. KBN 769F when that owner was not a party to the suit. The appellant took the position that the trial magistrate failed to consider the evidence on record by which PW1 testified that the bus registration no. KBN 769F she was travelling in was hit while on its lane by an oncoming lorry registration number KBJ 384L which was overtaking a stationary lorry registration no. KAX 315Z. It was emphasised that PW1 blamed both Lorries and not the bus, that PW3, PC Isaac Mwinzi testified that the 2nd Respondent was charged with traffic offence of causing death by dangerous driving and that the driver of the oncoming M/v registration no. KBJ 384L was contributorily negligent for not slowing down.

9) It was then contended that since the driver and/or the owner of M/v Registration number KBN 769F were not party in the lower court suit, liability could not be attributed on their end as it is trite that a party cannot be blamed unheard. To buttress this line of argument, the counsel for the appellant relied on a number of judicial decisions including; ***Pauline Wangare Mburu-vs-Benedict Raymond Kutondo & another [2005] eKLR*** and ***Mwanahamisi Omar Mzee also known as Fatuma Mohamed Ali Omar-vs-Chengo Kahindi Biryia & another [2018] Eklr*** for the position of the law that a court of law cannot purport to determine the rights of a party not before it.

10) The decision in the case of ***Wilfred Ndumba-vs-James Kiogora & ANOTHER. 147/1993*** where the court in a case of similar circumstances held the driver who tried to overtake the stationary motor vehicle 90% liable and the owner of the stationary motor vehicle 10% liable. It was then added that even the respondents never attributed liability to the driver of the bus and as such the trial magistrate arrived at the wrong decision for not considering the submissions put before him. The appellants therefore seek this court to set aside the 25% liability apportioned against the driver of the bus and apportion liability afresh between the Respondents.

11) The 1st & 2nd Respondents faulted the trial court for finding them 25% liable when their motor vehicle was never involved in any collision and entirely agreed with the appellant that the trial court erred in apportioning liability to a party not part of the suit. It is further submitted that the 1st Respondent's motor vehicle driven by the 2nd Respondent was not involved in the accident at all and circumstances dictate that the 3rd and 4th Respondents are 100% liable for the accident.

12) For the 3rd & 4th Respondent/Cross Appellants' it was submitted that the court should consider the cross appeal and set aside the apportionment on liability and reassess the Judgment by the trial court to dismiss the suit against the cross appellants with costs. It was reiterated that the trial magistrate erred in apportioning liability against the cross appellants bearing as it did by disregarding the evidence that the 1st & 2nd Respondent failed to comply with requirements set under Section 53 of the Traffic Act in cases of a break down by mounting warning signs at a safe distance which could have otherwise prevented the accident. It was submitted that the accident was wholly contributed to by the driver of motor vehicle registration no. KAX 315-ZB4994 and therefore the 1st & 2nd Defendants should be held 100% liable. In support of the submissions reliance is placed on the case of ***Peter Ochieng & 2 others-vs-Serfina Atieno Okwaro & another*** in which a driver of a stationary vehicle rammed into by another was found 80% liable.

Analysis and Determination

13) I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellants as well as the respondents / cross appellants and taken into account all the decisions relied on. This appeal is only on liability. In my view, there are only two issues for determination in this appeal:

- i. **Whether the trial court erred in law and fact in apportioning liability at 25% to driver of motor vehicle KBJ 769F which was not a party to the lower court proceedings.**

ii. Who was liable and to what extent for the accident

14) A finding and apportionment of liability by a trial court calls for exercise of judicial discretion based evaluation of the evidence adduced and an appellate court can only interfere if the finding is not supported by the evidence on record. In **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142** and **Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981**, it was held that apportionment of blame an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

15) In this case the learned trial magistrate found and concluded that the accident was a result of acts of negligence omissions and/or commissions of no single individual of the three drivers concerned. However, in describing the fault for the bus driver, the trial magistrate observed as follows:

“...the accident occurred at the on the right of the road after the driver of the bus registration KBN in apparent panic and/or confusion also veered off the road to avoid a head on collision with the oncoming motor vehicle registration KBJ...”

16) This excerpt is the residence of the answer to my first issue for determination. It cannot be denied that in deed that was the accurate capture of what Dw1 had said in his examination in chief. However, that is the furthest a court could go. It was not open to the court to consider how negligent a party not before it could be. The law confines a court to determining only the rights of the parties before it and upon the evidence availed by and against such parties. In fact, I doubt whether it was admissible to receive evidence against anon-party and consider same without affording him a right to be heard. I take the view that the legal thing for the 2nd respondent to have done was to seek the joinder of the owner and driver of the bus, either as a third party of co-defendant before seeking to push a burden in the case against them.

17) I agree with the Appellant's submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This position was similarly adopted in the case of **Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003 [2005] eKLR** where the court observed as follows,

[T]he defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability. [Emphasis mine].

18) Having found that the trial magistrate erred on apportioning liability at 25% against the bus driver I now turn to the next issue on who was to blame for the accident. The evidence adduced by the Appellant was uncontested that it was the driver of truck registration number KBJ 384L ZD0376 who crossed into the lane of the bus while attempting to overtake another vehicle thereby causing the accident. The facts as relating to how the accident occurred are not contested. The 1st and 2nd Respondent averred that their stalled motor vehicle was not at all involved in the accident and had been stationary at the same point for more than an hour before the accident occurred they submitted that the 3rd & 4th Respondent were to blame entirely for overtaking when the road was not clear. In response the 3rd & 4th Respondent blamed the 1st & 2nd Respondent's for not complying with traffic regulations when a motor vehicle stalls. It is averred that no warning signs were erected for safety of other road users.

19) The police officer, PW3 in his testimony stated that the 3rd and 4th Respondent were to blame for overtaking when it was not clear to do so. The cross Appellants on that regard submitted that the stalled motor vehicle was not visible enough since no warning or even hazard lights to inform the other road users of the danger of a stalled motor vehicle on the way.

20) In my view and opinion two related acts contributed to the occurrence of the accident. It was the act of the 2nd defendant, as the 1st respondent's driver, in parking his truck on a descending section of the road thus obstructing other road users thereby compelled the 4th defendant to swerve in the negligent manner he did without fast ascertaining that it was safe to do so. I therefore find that the 2nd respondent ignited the chain of events and therefore even if his vehicle was stationary he cannot be exonerated from the blame. I do find therefore that both the drivers for motor vehicles KAX 315-ZD4994 and KBJ 384LZD0376 contributed equally to the happening of the accident and their employers are vicariously liable.

21) On the foregoing and for the reasons stated above I would apportion liability in the ration of 50%:50% against drivers for motor vehicles KAX 315Z/D4994 and KBJ 384L/ZD0376 respectively.

22) The upshot is that I allow the appeal and set aside the judgment of the subordinate court. I substitute it with a judgment apportioning liability equally between the owners of motor vehicles registration KAX 315-ZD4994 and KBJ 384LZD0376 in the ratio of 50%:50% respectively. I consider the two cross-appeals to abide the same finding on apportionment of liability. Accordingly, I consider all the parties to have succeeded and the order on costs which recommend itself to me is that each party shall bear own costs of the appeal will the plaintiff shall be entitled to the costs at trial.

23) It is so ordered.

Dated, Delivered and Signed at Mombasa this 29th day of May 2020.

P.J.O. OTIENO

JUDGE