



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.47 OF 2018**

**PATRICIA MUTHOKI NYAMAI ALIAS KIOKO.....APPELLANT**

**-VERSUS-**

**DELTA GUARD LTD.....1<sup>ST</sup> RESPONDENT**

**KUNGU NJOROGE.....2<sup>ND</sup> RESPONDENT**

**An Appeal from the Judgment and Decree of Hon. J. Omido, Principal Magistrate, Nakuru in CMCC No.1098 of 2011 dated 11<sup>th</sup> April, 2018.**

**JUDGMENT**

**BACKGROUND**

1. This appeal arises from a suit filed by the appellant in the lower court against the defendants seeking general and special damages for the injuries he sustained on 14<sup>th</sup> July 2010 when he was hit by the 1<sup>st</sup> defendant's motor vehicle registration number KAT 422S while riding motor cycle registration number KMCE 759T along Nakuru-Eldama Ravine road.

2. After hearing, the trial magistrate found that no liability was proved against the defendant and dismissed the suit with costs to the defendants. Being aggrieved by the said decision, the appellant filed this appeal on the following grounds: -

i. That the learned trial magistrate in dismissing the Appellant's case erred in law and in fact in relying exclusively on the evidence of PW2 and DW1 ignoring completely the evidence of the Appellant.

ii. That the learned trial magistrate erred in law and in fact in relying on the evidence of PW2 who was not an eye witness to find that the rider of motor cycle was to blame for the accident.

iii. That the learned trial magistrate erred in law and in fact in finding liability against a third party to the suit contrary to the provisions of **Order 1 Rule 15 and Order 2 Rule 4 (b) of the Civil Procedure Rules (2010)**

iv. That the learned trial magistrate erred in law and in fact and misdirected himself in relying on the evidence of PW2 despite there being evidence that: -

a. PW2 was not an eye witness.

b. PW2 testified that the motor cycle was to blame but admitted on cross examination that he did not know how that was arrived at.

c. PW2 did not produce a sketch map of the scene of the accident.

v. That the learned magistrate erred in law and in fact in not considering the pleadings, evidence and submissions filed on behalf of the appellant and if he did (which he denies) he reached wrong conclusions on the evidence and made wrong findings on the law cited.

vi. The decision was arrived at on consideration to the extent that this was done, of wrong Principles of Law and/or contrary to the principles of law.

vii. That the decision was against the weight of evidence.

3. The appellant prays that this Honorable Court be pleased to allow the Appeal by reversing and setting aside the judgment and decree in Nakuru CMCC 1098 of 2011 and finding for the Appellant wholly and assessing damages payable and the respondent be condemned to pay costs of the Appeal and the costs of the suit in the lower court.

4. Parties agreed to proceed by way of written submissions and highlighted submissions on 26<sup>th</sup> February 2020

#### **APPELLANT'S SUBMISSIONS.**

5. The appellant filed written submissions dated 16<sup>th</sup> December, 2019. The appellant submitted that the court has jurisdiction to evaluate evidence adduced and arrive at an independent conclusion. The appellant submitted that the trial magistrate erred by exclusively relying on the testimony of PW2 a police officer and DW1 the driver; that PW2 called by the appellant/plaintiff to adduce evidence was not an eye witness and he even admitted that he did not know why motor cyclist was being blamed in investigation of this case. The appellant argued that the trial magistrate ignored his evidence yet he was an eye witness and failed to state whether it believed the appellant's testimony or not. Appellant submitted that the trial magistrate blamed motor cyclist who was not party to the suit.

6. The appellants further submitted that the trial court misapprehended pleading on record as there were two defences filed by the defendant; one by the firm of **Omangi & Associates** which attributed the blame to the motor cyclist and the other which contained just mere denials by **Aming'a Opiyo & Masese Co. advocates** who conducted the defence both in the lower court and the high court.

7. Further that the trial court relied on defence filed by the firm of **Omangi & Associates** who ceased acting for the defendants and defence filed by defence counsel was not considered. Appellant submitted that the defence did not raise issue of negligence by motor cyclist; that it never attributed negligence to motor cyclist. That the defence was not adopted by current defence counsel and there was no change of advocate filed by the current advocate so that one can say he adopted defence of **Omangi & Associates**; and failure of the defendant to raise issue of negligence on motor cycle and by the court relying it relied on a matter not pleaded and under **Order 2 rule 4 (1) of the Civil Procedure Rules** a matter not pleaded cannot form issue for determination; that the Court attributed liability to motor cyclist and that motor cyclist was not a party in contrivance to **Order 1 Rule 15** that deals with 3<sup>rd</sup> Party.

8. Among the cases cited by the appellant include the case of **John Kibicho Thirima-v-Emmanuel Parsmei Mkoitiko [2017] eKLR**, where **Justice Aburili** stated as follows:-

“...I find that the defendant's counsel's assertion on that aspect of the plaintiff not being a fare paying passenger was misplaced, as it was neither pleaded nor evidence led capable of rebuttal by the Plaintiff.

108. Even if the assertion was to be availed through submissions, which, in this case, the court and the plaintiff had no occasion to consider before writing this judgment, trial by ambush through submissions is abhorred. Courts have over time held that submissions are not evidence however well-choreographed they may be. And that answers in cross examination do not form a party's case...

In my humble view, that submission which in itself is a form of defence was never pleaded and even if it was, the plaintiff's evidence is clear that the defendant voluntarily carried the plaintiff and that the car was a private personal vehicle.”

#### **RESPONDENTS' SUBMISSION.**

9. The respondent filed written submissions dated 16<sup>th</sup> December 2019. Respondent submitted that that it was clear from the police abstract produced in court by the Appellant that the person who was to blame for the accident was the motor cyclist. That, it is very strange for the Appellant to ask the court and the trial court to reject the evidence of PW2 for not being an eye witness yet he was called by the appellant to produce documents which the Appellant used in support of her case; and if the appellant is asking the court to totally disregard PW2'S evidence then the appellant's case will remain uncorroborated as there will be no documents to show the occurrence of the accident and it would just be the Appellant's testimony of being knocked down by the Respondents.

10. The respondent submitted that the appellant did not prove negligence against the Respondents as established in the case of **Thomas Vs Quartermaine (1887) 18 QBD** where **Bowen, LJ** stated as follows: -

**“The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody”**

11. Respondent submitted that it is the duty of the Appellant to sue the right party; that it is not the duty of the Respondent to bring about the person who was supposed to be sued; that the plaintiff should have sued the two party as per her evidence tendered in court since the motor cyclist owed her duty of care. It is not the duty of the Respondent to question the Appellant on who she blames for the accident but her responsibility of proving who actually was negligent.

12. The respondent further cited the case of **Sammy Ngigi Mwaura Vs John Mbugua Kagai & Another (2006) eKLR** where the Court of Appeal stated as follows:-

**“If, as was the position in this case, there was no Judgement entered in favour of the plaintiff against the defendant for the very good reason that there was no evidence of any negligence by the defendant or his employees, there could not be any**

**amount in respect of which the defendant could be indemnified by the Third Party or to which the Third Party could contribute however negligent the Third Party or its employee, driver of the lorry may have been”.**

13. Respondent submitted that the appellant never raised the issue of defence during pre-trial; that the law provides very clearly how documents should be expunged from record and raising the issue of two defences is an afterthought. The appellant did not raise any issue on the statements of defence filed by the respondents and the trial court did not misdirect itself when it considered the two defences filed in court.

14. In highlighting submissions, counsel for the Appellant urged the court to reevaluate evidence adduced in the lower court and arrive at an independent determination. He submitted that the trial magistrate relied heavily on the testimony of PW2 a police officer and DW1 the driver of the vehicle. He submitted that PW2 was not an eye witness and he even stated that he did not know why the rider of the motor cycle was being blamed.

15. He submitted that the trial magistrate completely ignored the testimony of the appellant; that the trial magistrate misapprehended the pleadings and record as there were 2 defence and the court considered defence filed earlier by an Advocate who withdrew from acting for the respondent yet the Advocate who took over from him did not adopted the defence as no notice of change was filed. That negligence on part of motor cyclist was not pleaded in the latter defence filed; that the matter was not pleaded and it goes against **Order 4 Rule 1 of the Civil Procedure Rules** which provide that a matter not raised cannot be an issue for determination.

16. Counsel submitted that the court attributed liability to 3<sup>rd</sup> party yet it was not a party to the suit as third party proceedings were not taken as required by **Order 1 Rule 15**. He cited the case of **James Gikongi** where the court held that court cannot find liability on a party which is not before it. Counsel submitted that the appellant proved the case on a balance of convenience. He further submitted that the submissions filed by the respondent has not addressed the issue that appellant's evidence was completely ignored.

17. He cited the case of **Sammy Ngigi Mwaura Vs John Mbugua Kagai & Another (2006) eKLR** referred to by response and argued that in that case, there was no evidence adduced by the plaintiff in the lower. He said DW1 confirms that he hit the motor cyclist; that there is evidence of collision with cyclist. He submitted that the appellant sued the correct party and on a balance of liability respondent is entitled to bring to court a party she feels was responsible for the accident.

18. Counsel for the respondent in highlighting written submissions argued that, this is a case of negligence and form of negligence has to be established, he stated that the case of **Thomas Vs Quartermaine (1887) 18 QBD** indicates the importance of proof of negligence. He submitted that PW2 whose evidence the court is asked not to consider was called by the appellant. Further police abstract and occurrence Book (OB) extract produced indicate clearly who was negligent. On the issue of third party, he submitted that from police abstract, it was clear who was to blame and the court of appeal ruled that, it was the responsibility of the plaintiff to sue the right party and it is not the responsibility of the defendant to bring the person who was to be sued.

19. Counsel for the respondent urged the court to look at the evidence tendered by plaintiff visa vis evidence of PW2 and DW1; that the plaintiff should have sued two parties; and the issue of 2 defences should have been raised in the lower court; that the issue was to determine who was at fault not who was first to file defence on behalf of the defendants. He urged this court to dismiss this appeal.

20. In a rejoinder, counsel for the appellant submitted that a court of law decides on evidence; he submitted that the plaintiff was not questioned by police and the issue about defences was raised in page 74 and it is not an afterthought; that they raised in court but the court did not consider it; he stated that they are not saying DW1 did not owe a duty; that DW1 was on the road and owed a duty.

#### **ANALYSIS AND DETERMINATION**

21. This being the first appellate court I am guided by determination in **Seller & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the court stated as follows: -

**“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”**

22. In view of the appeal I have perused and considered record of appeal alongside submissions filed together with authorities. I consider the following to be in issue

**i. Whether negligence against the motor cyclist was pleaded.**

**ii. Whether negligence was proved against the respondent.**

**iii. Whether the trial magistrate erred in making finding of liability against a third party.**

#### **i. Whether negligence against the motor cyclist was pleaded**

23. I have perused the record of appeal and note that two defences were filed; the firm of **Omangi and Associates** filed memorandum of appearance on 3<sup>rd</sup> February 2012 and defence on 6<sup>th</sup> February 2013 and the firm of **Aminga, Opiyo Masese & Co. Advocates** filed memorandum of appearance on 27<sup>th</sup> February 2012 and defence on 7<sup>th</sup> March 2012.

24. From proceedings of 6<sup>th</sup> September 2012, the court was informed that the firm of **Omangi & Co. Advocates** had withdrawn from acting for the defendants; I have not however seen the notice for withdrawal nor court's endorsement of withdrawal. It appears however that the court relied on defence filed by the firm of **Omangi & Co. Advocates** which stated particulars of negligence on part of motor cyclist.

25. I have not seen notice of change of advocates in the file. I have not also seen order for withdrawal from acting by the Advocate who first came on record for the defendant. I note from proceedings of 6<sup>th</sup> September 2012 that the plaintiff's counsel informed the court that **Mr. Omangi** had withdrawn from acting. There was counsel for the defendant on that day and hearing date was given by the court. Record do not show any application or order to expunge the first defence on record. The matter proceeded without the issue of the two defences being raised by any party. However, the trial magistrate in his judgment found that the appellant failed to prove negligence against the 2<sup>nd</sup> defendant/driver of the vehicle. He stated that PW2 demonstrated that the rider was to blame.

26. The rider was not however a party to the suit. Particulars of the motor rider were not given in defence filed by advocates who took over the matter. Evidence is adduced to prove issues raised in the pleadings. Even if the issues were raised in submissions if not in pleadings court should not have considered as parties are bound by their pleadings. The advocates who took over and prosecuted the matter to its conclusion filed a defence without particulars of negligence on part of motorist. There is no doubt that there was procedural technicality by failure by advocates who took over the matter to file notice of change of advocates and also filing a second defence. It created a situation where there are two different pleadings in the same matter; the court cannot consider both. In my view by the incoming advocates filing a second memorandum of appearance and defence, it is presumed that they prosecuted their case on the basis of the defence filed by them; and evidence adduced was intended to prove pleadings filed by them. What was therefore before court for consideration was the second defence filed which did not have particulars of negligence on part of the motorist.

27. But even if the defendants intended to prove contributory negligence on part of the motorist, there is a procedure provided under **Order 1 Rule 15 of the Civil Procedure Rules**. They should have taken up third party proceedings to make the motor rider a party to this suit. That way, the motor rider would have had an opportunity to defend himself. Appellant's show that the appellant in her evidence believed the motorist was to blame for the accident. She cannot therefore be blamed for failing to sue the motor rider.

28. It was upon the defendant to amend its pleadings to include negligence on part of motor cyclist and file third party proceedings to enjoin the motorcyclist; the court can only make determination concerning liability between the parties before court.

#### **ii. Whether the appellant proved negligence on part of the defendant and to what extend?**

29. From the appellant's evidence the vehicle was moving from the opposite direction and as they were branching from Kiamunyi, the vehicle collided with the motor cycle. He said the vehicle did not wait for the motorcycle to turn. He said they were hit on the rear. He said the motorcycle did not go back to the road. He said he sued the motor vehicle for knocking the motorcycle. In reexamination he said police did not question him either at the site or after.

30. PW2 a police officer testified that the motorcyclist was to blame and added that he did not know whether the police file was opened. In cross examination he said he did not know who filled P3 and he also did not know how the decision to blame the motor cyclist was arrived.

31. On the other hand, DW1 who was the driver of the vehicle said the accident occurred at the junction and there were many vehicles as there was jam. He said he saw the motor cyclist emerge from vehicles and cut across to the junction. In cross examination he said the area was clear and one could see vehicles from far. He said he never sued the motor cyclist; he said he was driving at speed of 50 km per hour. He confirmed that the pillion passenger was not at fault.

32. From the evidence adduced it is clear that PW2 was not of much help to the court as he could not tell how the decision to blame the appellant was reached. From evidence of vehicle driver, the area was clear and he was able to see far. If he was driving at speed of 50 km per hour as he alleged, he should have been able to see that the motor cyclist was trying to branch at the junction and slowed down to avoid collision.

33. The appellant herein was a passenger. The respondent never enjoined the motor cyclist in this suit. He confirmed in cross examination that the appellant was not to blame for the accident. From the foregoing I find the respondent 100% liable for the accident.

34. The trial magistrate assessed damages at kshs 350,000 after dismissing the suit. The assessment has not been challenged. The damages therefore remain as assessed.

#### **35. FINAL ORDERS**

1. Appeal on liability is allowed.
2. The respondent to shoulder 100% liability.
3. Judgment is entered for appellant against the respondents for kshs.350,000.
4. Costs in the lower court to the appellant.
5. Each party to bear own costs of appeal.

**Judgment dated, signed and delivered via zoom at Nakuru This 28<sup>th</sup> day of May, 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola - Court Assistant

No appearance for Counsel for Appellant

Kamau Chomba Counsel for Respondents