REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 8 OF 2016

DANIEL ZOMO KONDO.....APPELLANT

VERSUS

1. GLOBAL TRANSPORTERS EAST AFRICAN LTD

2. GODFREY INDIKU

3. ROBERT MUCHIRI KINYUA.....RESPONDENTS

(Appeal from the judgement and decree by Hon. T. A. Odera (PM) in Mavoko Principal Magistrates Court

Civil Suit No. 221 of 2012 delivered on 6th January, 2016)

JUDGEMENT

1. The appellant sued the respondents for recovery of damages in respect of injuries alleged to have arisen from an accident that occurred on 9th April, 2012 along Nairobi- Machakos Road at Mto Mawe area. The appellant averred that he was on the material day a passenger aboard the 3rd respondent's motor vehicle registration number KAY 729N when at Mto Mawe, the 1st and 2nd respondents/their agents and or drivers negligently controlled motor vehicle registration number KAR 345P that it hit motor vehicle registration number KAY 729N. That as a result of the said accident he sustained haematoma swelling over the left temporal region, injuries over the left frontal region, bruises over the left leg and cephalohematoma. The appellant attributed the accident and his damages to the respondents' negligence.

2. The 1st and 2nd respondents failed to enter appearance and interlocutory judgment was entered against them. The 3rd respondent on his part filed a defence in which he denied the appellant's claim particularly that the accident occurred as a result of his negligence. He further stated that the accident occurred as a result of the 1st respondent's driver that is; the driver of motor vehicle registration number KAR 345P.it was particularly averred that the 1st respondent's driver was driving at an excessive speed, failed to brake timeously, failed to heed the presence of other motor vehicles particularly motor vehicle registration number KAY 729N.

3. The appellant's evidence was as follows. Police Constable James Njuguna (PW1) testified that the report in regard to the accident was booked on 9th April, 2012 by PC Mochama who had since been transferred. That Choyo Kimeu was driving motor vehicle KAY 729N from Nairobi towards Mombasa direction. On reaching Mto Mawe, he overtook an unknown trailer on the left side of the road and tried to return to the tarmac and was hit by the unknown trailer and was thrown to the Mombasa lane. That a bus registration number KAR 345P from Mombasa then bumped into KAY 729 N's rear. He stated that the appellant was the driver of KAY 729N. That the appellant and his turn boy sustained serious injuries and were rushed to Shalom Hospital. He produced a police abstract in respect of the said accident as P. Exhibit 2. On cross examination, PW1 stated that the officer present at the time the report was made visited the scene and took sketches and witness statements. He however stated that he did not visit the scene and that he did not have the alleged sketches. He further stated that he had not seen the police file.

4. The appellant (PW2) testified that he was aboard KAY 729N when the driver of KAR 345P who was speeding hit KAY 729N. That the driver of KAR 345P entered the road suddenly from the left side from Nairobi. That there was a vehicle that hit KAY 729N and threw it to the right but that he did not see the said vehicle. PW2 was taken to Shalom Hospital, Athi River after the accident. He was referred to Mater Hospital where he received treatment. He produced treatment notes and receipts in respect thereof as P. Exhibit 1, 5a, 5b, 6, 7, 9a, 9b, 10, 11 and 12. He further produced search certificate for KAR 345P as P. Exhibit 3 and its receipt as P. Exhibit 4, search for KAY 729N as P. Exhibit 13 a and its receipt as P. Exhibit 13b.

5. The 3rd respondent's case was closed without calling of any witnesses. The appellant's case was then dismissed on the basis that liability was not proved against the respondents.

6. The appellant aggrieved by the said judgment has filed this appeal on the following grounds:

a. That the learned magistrate erred and misdirected herself in law when she delivered the judgment when she did not have jurisdiction to deal with the matter.

b. That the learned magistrate erred and misdirected herself when she failed to appreciate that the evidence before her pointed to negligence of the drivers of the respondent's motor vehicles.

c. That the learned magistrate erred and misdirected herself in law when after framing the issues for determination she went outside the realm of those issues.

d. That the learned magistrate erred and misdirected herself in law and fact when she found that the appellant had not proved his case against the respondents.

e. That the learned magistrate erred and misdirected herself in law and facts when she considered extraneous matters whose evidence had not been adduced.

f. That the learned magistrate erred and misdirected herself when she dismissed the appellant's case with costs when the 1st defendant had not even entered appearance.

7. It was the appellant's submission that the trial magistrate misdirected herself in relying on an issue raised in the 3rd respondent's submission and not raised in his evidence. That the trial magistrate stated that it seemed to her that the appellant was either asleep at the material time or he simply did not see the accident happening. That the same was picked by the trial magistrate from the 3rd respondent's submission where it was submitted that the appellant could have been asleep during the accident as he admitted that he did not see the 1st vehicle which hit KAY. To emphasize his point that the trial magistrate misdirected herself, the appellant relied on **Mercy Njoki Kamau v. Tiny M. Royal Company and another [2016] eKLR** in which the judge therein cited the Court of Appeal judgment in **Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & Another [2014] eKLR.** It was submitted that it was not suggested anywhere in the appellant's evidence that he was asleep. That the fact that the appellant did not see the vehicle that hit them does not mean that he was asleep and that even if he was asleep, that does not exonerate the 3rd respondent's driver from blame. He further submitted that the police placed blame on the 3rd respondent. It was submitted that both PW1 and PW2 stated that motor vehicle KAR 345P hit KAY 719N and that the trial magistrate misdirected herself when she held that the evidence of PW1 and PW2 was contradictory and that she should have found the 3rd respondent 100% liable. On the issue of damages, the appellant was agreeable to the general damages save for special damages which he submitted that he had pleaded and proved at KShs. 24,650.00 with interest from 23rd August, 2012 until payment in full.

8. The respondent contended that the accident having occurred at Mto Mawe area, the trial court had the jurisdiction to deal with the matter. That the appellant failed to demonstrate negligence on the part of the 3rd respondent having not explained the manner in which the accident occurred. That the only way the appellant could have proved how the accident occurred was by the investigating officer PC Mochama producing the sketch maps and police abstract. It was submitted that since the 3rd respondent had denied the occurrence of the accident, the burden of proving negligence was on the part of the appellant. It was submitted that the appellant failed to prove that the driver of KAY 729N was negligent and admitted that the said vehicle was hit from behind. That it is the norm that the vehicle who hits another from behind is blamed for the accident. That due the uncertainty the trial court could not determine who was to blame for the accident since there was no sufficient proof. It was submitted that he who alleges is under duty to prove all allegations as contained in his claim on a balance of probability. That it was incumbent upon the appellant to prove the negligence as alleged. In this regard, the 3rd respondent cited **Kirugi & another v. Kabiya & 3 others [1987] KLR 347**. It was submitted that there was no evidence that the 3rd respondent or his driver were driving at an excessive speed in the circumstances and therefore there was no basis for apportionment of liability. In this regard, the 3rd respondent cited **Stapley v. Gypsum Mines Ltd (2) (1953) AC 663**.

9. This being a first appeal, this court is called upon to re-evaluate the facts afresh, re-assess this case and arrive at independent conclusions. See: ***Peters v. Sunday Post (1958) E.A. 424 at 429*** *where Sir Kenneth O'Conner held:*

> **"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."**

10. I have given due consideration to the appeal herein and find that the following issue fall for determination:

a. Whether or not the appellant proved liability to the required standard.

11. PW1 testified that motor vehicle KAY 729N overtook an unknown trailer at Mto Mawe area and on trying to get back to the tarmac, it was hit by the said trailer and thrown to the lane facing Mombasa. That it is then that motor vehicle KAR 345P bumped onto the rear of KAY 729N occasioning the appellant injuries. The appellant's account of the accident was that KAR 345P was speeding and hit KAY 729N. He also stated that there was a vehicle that hit KAY 729N and threw it to the right. The respondents on the other hand did not call any evidence to rebut the appellant's evidence. The 3rd respondent did not contend the fact that the accident occurred and that his vehicle was involved in the subject accident. despite his driver having information on the accident he was not called to testify. In circumstances where a party has in his possession information but keeps it from the court, an adverse inference is normally made against the said party. See **Kenya Akiba Micro Financing Limited v. Ezekiel Chebii & 4 others [2012] e KLR** where it was held:

"Section 112 of the Evidence Act Chapter 80 of the Laws of Kenya provides:

> **In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing or disproving that fact is upon him…where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party."**

12. Additionally, the respondents failed to tender any evidence in rebuttal of the appellant's allegations. In the said circumstances, his allegations are taken to be true. In view of the said failure, I associate myself with Hon. Judge Mabeya's finding in **Safarilink Avaition Limited v. Trident Aviation Kenya Limited & Another [2015] eKLR** where he held that:

> **"Failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true…"**

13. From the prosecution evidence, it was clear that motor vehicle KAY 729N was overtaking and was hit in the process of trying to get back to the tarmac and thrown to the lane where Motor vehicle registration number KAR 345P was. It is then that KAR bumped onto KAY's rear. Had the drivers of the said vehicles been driving diligently and with proper look out for other vehicles, they would have managed to control the vehicles to avoid the occurrence of the accident. In the circumstances I find both drivers to have been negligent. It is however hard to tell bearing in mind the evidence on record to what extent the two are liable. In circumstances where it is hard to apportion liability and two vehicles have been involved in an accident, it is the norm for courts to apportion liability equally. In the end, I find that the appellant proved liability. On the issue of contradiction raised by the 3rd respondent, I find that there was contradiction in PW1 and PW2's evidence where PW1 stated that it was the appellant who was driving motor vehicle KAY 729N while the appellant stated that he was a passenger in the said vehicle. I however find that the said contradiction did not affect the material evidence in any manner to warrant dismissal. In the end, I find that the appellant proved liability against the respondents on a balance of probability and I find it safe to apportion liability against the 1st and 2nd respondent and the 3rd respondent at the ratio of 50:50.

14. On quantum, I am guided by the pronouncement in **Loice Wanjiku Kagunda v. Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where the Court held:-

> **"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)**

15. I have given due consideration to the trial magistrate's finding on general damages and find that she considered the submissions tendered and the injures sustained by the appellant and was thereby not at fault in awarding general damages. The general damages awarded therein were reasonable in the circumstances. As to special damages, the appellant produced receipts dated 21st May, 2012 for KShs. 1,500.00, 16th May, 2012 for KShs. 1,500.00, 9th April, 2012 for KShs. 2,400.00, KShs. 15,000.00 and KShs. 950.00, 5th July, 2012 for KShs. 500.00 and 10th August, 2012 for KShs. 2,000.00 all totaling to KShs. 23,850.00. In his plaint, the appellant pleaded KShs. 200.00 for police abstract, KShs. 500.00 for copy of records, KShs. 2,000.00 for medical report and KShs. 21,950.00 for medical expenses. In regard to special damages, I find that the appellant proved special damages of KShs. 23,850.00 and the same is awarded.

16. In the end this appeal succeeds. The trial court's judgement and decree is hereby set aside and substituted with an order that judgment be and is hereby entered for the Appellant against the Respondents as follows:-

a. Liability .....50:50 between the 1st & 2nd Respondents and the 3rd Respondent.

b. General damages **KShs. 150,000.00**

c. Special damages **KShs. 23,850.00**

d. The Appellant is awarded the costs of the appeal and in the lower court.

Orders accordingly.

Dated and delivered at Machakos this 24th day of April, 2019.

D. K. KEMEI

JUDGE