



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 127 OF 2018

BETWEEN

GECHUKI PETER NYAMBEGA.....APPELLANT

AND

MAUREEN OKOMO..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. Wamucii, RM dated 27th November 2018 at Kisii Magistrates Court in Civil Case No. 682 of 2016)

JUDGMENT

1.The appellant was the plaintiff before the subordinate court. He filed suit following injuries sustained in an accident that took place on 18th July 2015 along the Kisii – Keroka road. He alleged that on that day he was a passenger in motor vehicle registration KCC 980M which collided with the respondent’s motor vehicle registration number KCB 824T. The trial magistrate dismissed the suit thus precipitating this appeal.

2.Although the appellant raised several grounds of appeal in the memorandum of appeal dated 30th November 2018, the thrust of the appeal is that the trial magistrate erred in law and in fact in dismissing the suit against the weight of evidence which established that the appellant had proved his case on the balance of probabilities. At the hearing of the appeal, counsel for the appellant reiterated the grounds of appeal and urged the court to allow the appeal.

3.Counsel for the respondent opposed the appeal and supported the judgment of the trial magistrate. He argued that the trial magistrate was correct to dismiss the suit since the plaintiff and his witnesses gave two inconsistent accounts of the accident.

4.The determination of the issue of liability is a question of fact and since this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126*). At the hearing only the plaintiff called witnesses.

5.The appellant (PW 1) adopted his statement as his evidence. He stated that on the material day, he was driving motor vehicle registration number KCC 980M when the respondent’s motor vehicle KCB 824T lost control and occasioned the accident. He stated that accident was solely occasioned by the driver of motor vehicle KCB 824T. In his testimony he stated that, “*I blame the defendant as she was overtaking at a corner KCB 824 T was overtaking a lorry at a corner. It collided head on with our vehicle. I blame her for the accident ...*” When cross-examined, the plaintiff stated that the accident occurred at a corner as he was driving on the left side toward Nairobi. He told the court that he tried swerving to the left and KCB 824T knocked him on the right side and ripped off the side mirror.

6.PC Caleb Osodo (PW 2) produced a police abstract and confirmed that a collision took place between the appellant’s and respondent’s vehicle. He explained that the two vehicle were heading in the same direction. On reaching the scene, the driver of motor vehicle KCB 824T hit a matatu behind causing the tyres to burst. The driver on board got injured and lost control and landed in a ditch. When cross-examined, the officer denied that there was a head on collision as both vehicles were headed in the same direction. He also stated that the driver of KCB 824T was blamed for the accident for failing to keep a distance. When re-examined, PW 2 confirmed that the vehicles were headed in the same direction.

7.After considering the evidence, the trial magistrate concluded that the evidence of the two witnesses was inconsistent and it was therefore not possible to tell who was to blame on the balance of probabilities.

8.I have re-evaluated the evidence and I am satisfied that there was a collision involving both vehicles. The plaintiff was the only eye witness but he elected to support his case with the evidence of PW 2 who did not visit the scene and relied on the police records and investigation. Since the plaintiff brought the witness, his evidence was admissible and the court was entitled to rely on the evidence of both witnesses to come to a verdict. Both of them gave conflicting and different version of events. PW 1's case was that there was a head on collision between the vehicles and the respondent was to blame for dangerously overtaking while PW 2 denied that head on collision as both vehicles were going in the same direction. His version was that the respondent's vehicle hit the appellant's vehicle from behind causing a tyre burst.

9.Given the inconsistent evidence from the appellant and his witness, it was not possible for the court to apportion blame and the trial magistrate was right to conclude that the appellant had not proved his case on the balance of probabilities. I would also point out that the particulars of negligence in the plaint are so vague that they do not set out how the accident took place.

10.The appellant did not appeal against the award of general damages. He only complained that the trial magistrate failed to award special damages despite proof of the same. I have looked at the plaint and special damages are not pleaded. It is trite law that special damages must be pleaded and proved and since they were not pleaded, the trial magistrate was correct to dismiss the claim for special damages.

11.I affirm the decision of the trial magistrate and dismiss the appeal with costs to the respondent which I assess at Kshs. 30,000/-.

DATED and DELIVERED at KISII this 15th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr Mogire instructed by Ombuhi K. Mogire and Company Advocates for the appellant.

Mr Geno instructed by Murimi, Ndumia, Mbago and Muchela Advocates for the respondent.