



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 122 OF 2017

BETWEEN

ANTHONY NJUGUNA GATHURIA.....APPELLANT

AND

DAVID PETER OWUOR.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Gatundu PMCC No. 151 of 2011 by Hon. M.W.Kinyanjui (SRM) on 11th September, 2014)

JUDGMENT

Background

1. ANTHONY NJUGUNA GATHURIA (*hereinafter referred to as Appellant*) sued DAVID PETER OWUOR (*hereinafter referred to as Respondent*) in the lower court claiming damages for personal injuries he suffered on 20.09.11 when motor vehicle KBF 417S that he was travelling in was rammed on the rear by Respondent's motor vehicle KBL 714J allegedly due to the negligence of the Respondent, his servant, employee, agent or authorized driver.
2. By an order issued on 03.10.13, the Respondent's application dated 18.09.12 to enjoin **ZIQRA AUTO DELEARS** as a 3rd party was allowed with an order that the 3rd Party be served within 30 days.
3. By a judgment dated 11th September, 2014, the trial court apportioned liability at 40% against the Respondent and 60% against **ZIQRA AUTO DELEARS** and awarded the Appellant general damages in the sum of Kshs. 150,000/- and special damages in the sum of Kshs. 3,100/.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal on 20.06.17 by a Memorandum of Appeal dated 09.10.14 which sets out 7 grounds which mainly fault the Learned Magistrate for apportioning liability against a party that was not enjoined in the suit.
5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Appellants' submissions

6. It was submitted for the Appellant that the motor vehicle he was travelling in was rammed on the rear by Respondent's motor vehicle and that Respondent was therefore liable at 100%. Appellant faulted the trial court or apportioning liability as against **ZIQRA AUTO DELEARS** which was not enjoined to the suit and argued that the trial court ought to have apportioned liability against the Respondent at 100%. Whereas it was conceded that **Gatundu SPMCC 152 Of 2011 Stephen Ngugi Kinuthia v David Peter Owuor & Another** and the Appellant's case arose from the same accident, Appellant denied existence of a test suit.

Respondent's submissions

7. Respondent argued that **ZIQRA AUTO DELEARS** was served with a third party notice and was therefore a party to the suit. Respondent holds the view that liability in **Gatundu SPMCC 152 of 2011** should apply to this case the same having arisen from the same accident.

Analysis and Determination

8. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Abok James Odera T/A A.J. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**).

9. I have considered the appeal in the light of the evidence on record, the submissions and authorities filed on behalf of both parties.

10. The trial court found as a fact that the Appellant was not liable for the accident. The issue in question is whether or not Respondent is liable but whether liability as against **ZIQRA AUTO DELEARS** was correctly apportioned.

11. The trial court record reveals that the court apportioned liability at 40% against the Respondent and 60% against **ZIQRA AUTO DELEARS** which it erroneously referred to as 2nd Respondent.

12. In the case of; **Kenya Commercial Bank vs Suntra Investment Bank Ltd (2015) eKLR**, was the Court held that;

“in law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 Rule 15 to Rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the Defendant and cannot be a bona fide issue triable between the Defendant and the Plaintiff”.

13. In its pleadings and evidence, the Respondent blamed the driver motor vehicle KBF 417S owned by **ZIQRA AUTO DELEARS** for swerving onto the lawful lane of its vehicle thereby causing the accident.

14. It follows therefore that to enable the court apportion liability, the Respondent ought to have taken out third party proceedings. The record shows that the Respondent commenced third party proceedings and was by an order issued on 03.10.13, allowed to enjoin **ZIQRA AUTO DELEARS** as a 3rd party. The court made a further order that the proposed 3rd Party be served within 30 days.

15. Contrary to the Respondent’s submission, the court record does not disclose evidence of service of the 3rd party notice to **ZIQRA AUTO DELEARS**.

16. In the result, I find that the trial court erred in apportioning liability as against **ZIQRA AUTO DELEARS** which was not enjoined to the suit. By failing to serve the third party notice, the court was left with no option but to hold the Respondent fully liable and I so find. I would adopt the observation by Kimaru J., in **Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003 [2005] eKLR** that:

The 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]

17. From the foregoing, the Respondent’s assertion that the issue of liability in **Gatundu SPMCC 152 of 2011** applies to this case is rejected.

Disposition

18. In the end and for the reasons given on the assessment above, the appeal is allowed on the following terms:

1) The judgment of the trial court on liability at 40% against the Respondent and 60% against ZIQRA AUTO DELEARS is set aside and substituted with an order on liability at 100% as against the Respondent.

2) Respondent shall bear the costs of this appeal and of costs in the lower court

DELIVERED AND SIGNED AT KIAMBU THIS 25TH DAY OF OCTOBER 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Nancy

For the Appellant - N/A

For the Respondent - Ms. Etole hb for Mr. Ngulli