REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 318 OF 2000

GERALD MUKUHA WAGANA .....1ST APPELLANT

EZEKIEL M. WAFULA .....2ND APPELLANT

VERSUS

ARVIND VIBHAKAR .....1ST APPELLANT

DUNCAN KARANJA MUSAU .....2ND RESPONDENT

(Being and appeal from the Judgment of M.W. Wachira (Mrs) Senior Resident magistrate in Civil Case No. 8813 of 1997, Delivered on 20th June, 2000)

JUDGEMENT

The proceedings of the lower court ended up in the Court of Appeal and on 29th January, 2015 the parties by consent recorded that, the appeal be remitted for hearing to finality and the costs abide by the outcome of the appeal at the High Court.

The genesis of this case was a road traffic accident that took place on 25th June, 1995 along Nairobi - Mombasa. There was a collision between motor vehicle registration No. KJY 536 and motor vehicle registration No. KAD 501 D. There was another vehicle registration No. KRE 650 which however was not involved in the collision. Its involvement in the pleadings is to be found in the evidence of the 1st respondent and the judgment of the trial court.

For purposes of clarity, motor vehicle registration No. KRE 650 was owned by the 2nd appellant in this appeal and driven by the 1st appellant at the time of the accident. Motor vehicle registration No. KJY 536 was owned and driven by the 1st respondent while motor vehicle registration No. KAD 501 D was owned and driven by the 2nd respondent herein.

In the lower court the 1st respondent sued the appellants herein and the 2nd respondent as defendants No. 1 to 3. After the full trial, the trial court found the defendants liable to the 1st respondent, but it later transpired that the 2nd respondent had been removed from the proceedings and therefore his apparent inclusion in the final judgment was in error.

An application to review that judgment did not succeed, and the trial court rightly decided that only the appellate court could remove the name of the 2nd respondent. The 1st respondent and a doctor R.P. Shah testified in support of the plaintiff's case while the defence did not call any witnesses.

From the record, the 1st respondent testified that he was driving motor vehicle registration No. KJY 536 from Mombasa to Nairobi. The following is what he told the court,

> **"After passing 1st entry to Machakos, we were moving further up. There were 2 cars ahead of me. There were motor vehicle registration no. KRE 450 and kept a distance of 120 feet. This Subaru overtook the motor vehicle ahead of him and the driver noticed another motor vehicle driving towards him so the driver went further right to avoid a head on collision. The motor vehicle from Mombasa direction was KAD 501D.**
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> **The motor vehicle KAD 501D started moving in a zigzag manner and came straight onto our motor vehicle. The road was clear and I was on my left side at a distance of 30 feet. I realised the car would collide with ours. The motor vehicle went far left side our motor vehicle and hit the side where my wife sat. My car turned 90 degrees and stopped."**

From the evidence in chief and cross-examination, the 1st respondent confirmed that there was no collision between motor vehicle

registration No. KAD 501 D and KRE 650. He however said that he was moving slowly and that he was not in a hurry. The collision was on his side of the road.

There was no police officer called to testify and therefore the lower court did not have the benefit of observing the sketch maps relating to the scene. The trial court in its short judgment stated as follows,

> **"I find there is no evidence to rebut the plaintiff's evidence that defendant's motor vehicle collided with his motor vehicle while he was lawfully driving on his lawful side of the road. I enter judgment on full liability for the plaintiff against the defendants. "**

I have already observed that the 2nd respondent was removed from the proceedings at the beginning of the trial, and therefore the blanket reference to the defendants in the judgment was in error. It should have been confined to the two appellants herein.

Whereas it was true that there was no collision between the appellants' motor vehicle and that of the 1st respondent, the facts as detailed by the 1st respondent clearly show the 1st appellant who was the driver of the motor vehicle registration no. KRE 650 was responsible for the events that led to the collision of motor vehicle registration no. KJY 536 and KAD 501D.

The 1st respondent saw the driver of motor vehicle registration no. KRE 650 overtaking the motor vehicles ahead of him. It was unsafe for him to do so and indeed motor vehicle registration No. KAD 501 D emerged from the opposite direction. He did not exercise proper look out and was reckless in the circumstances. He in fact had to drive off the road to avoid colliding with the oncoming motor vehicle. Had he not taken the risk to start overtaking, the motor vehicle registration No KAD 501 D could not have collided with the 1st respondent's vehicle.

Whereas it is true that just before the accident motor vehicle registration no. KAD 501 D was moving in a zig zag manner, it is more probable than not that this was as a result of avoiding motor vehicle registration No. KRE 650 which had crossed its path by swerving to the right to avoid collision.

The circumstances presenting in this case clearly point to the fact that, liability cannot be based on collision per se. Where a driver of a motor vehicle is responsible for the chain of events leading to an accident, it matters not that his vehicle did not collide with any of the motor vehicles involved in the accident.

It is clear that the 2nd appellant who was the driver of motor vehicle registration KRE 650 was responsible for this accident. He must have been driving with the authority of the 2nd defendant and therefore vicarious liability attaches in the circumstances.

There are only two grounds of appeal. The first was that the 1st respondent having testified that his car collided with that of the 2nd respondent, the learned magistrate erred in finding that the collision involved the appellants' car. I have already determined that ground in my observation above. The 2nd ground was that the learned trial magistrate erred in expecting a rebuttal of evidence that did not exist. I have already observed that the chain of events leading to the collision is attributable to the driver of motor vehicle registration No. KRE 650. That was evidence that required a rejoinder. Instead, the appellants offered no evidence in the lower court.

Other than the inclusion of the 2nd respondent in the judgment on liability, his name having been removed, I find no fault in the judgment of the learned the learned trial magistrate. There is no appeal against the award of damages. The end result is that this appeal is dismissed with costs to the 1st respondent.

Dated, signed and delivered at Nairobi this 19th Day of June, 2018.

A. MBOGHOLI MSAGHA

JUDGE