



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KITUI

#### CIVIL APPEAL NO. 199 OF 2015

**KANAKE PETER ALIAS PETER WERU.....APPELLANT**

**VERSUS**

**DAVID LEMBA MBULI.....RESPONDENT**

**AND**

**1. MAKINDU MOTORS LTD.....1<sup>ST</sup> THIRD PARTY**

**2. ERASTUS WELU MUSYOKA.....2<sup>ND</sup> THIRD PARTY**

#### J U D G M E N T

1. **David Lemba Mbuli**, the Respondent, by way of Plaintiff sued **Kanake Peter alias Peter Weru**, the Appellant, seeking Special Damages in the sum of **Kshs. 5,700/=**, General Damages for pain and suffering and loss of amenities, costs and interest.

2. It was pleaded that on or about the **25<sup>th</sup> day of June, 2010** the Respondent was travelling as a pillion passenger on motorcycle registration number **KMCJ 483Y** when the Appellant by himself or his agent while in control of the motor-vehicle registration number **KBH 253X** negligently that he permitted it to lose control, veer of the road and hit the Respondent. As a result of the accident he sustained injuries. He blamed the Appellant for negligence.

3. In his defence the Respondent denied being the registered owner of the motor-vehicle registration **KBH 253X, Toyota Corolla**. He denied the allegation that the Respondent was lawfully travelling as a pillion passenger on motorcycle **KMCJ 483Y**. He denied having been negligent or driven the motor-vehicle in the manner described or having caused the accident.

4. In the alternative he pleaded that if the accident did occur it was caused or substantially contributed to by the driver of motorcycle registration number **KMCJ 483Y** and the Respondent.

5. The respondent denied the negligence attributed to him and the rider of the motor-cycle.

6. Pursuant to leave sought by the Appellant, a 3<sup>rd</sup> Party Notice was issued to **Makindu Motors LTD** (1<sup>st</sup> Third Party) and **Erastus Welu Musyoka** (2<sup>nd</sup> Third Party).

7. The 2<sup>nd</sup> Third Party filed a statement of defence denying occurrence of the accident and generally the claim by the Plaintiff. He attributed negligence to the driver of motor-vehicle registration number **KBH 253X** and denied having received notice of the suit.

8. In reply to the 2<sup>nd</sup> Third Party's defence, the Appellant specifically denied the particulars of negligence and being responsible for the accident that gave rise to the claim.

9. A Memorandum of Appearance was entered for the 1<sup>st</sup> Third Party and a Notice of Preliminary Objection filed concerning the Third Party Notice filed on the ground that the 3<sup>rd</sup> Party Notice was filed outside the mandatory 14 days after the close of pleadings without leave of the Court.

10. However, later on an interlocutory Judgment was entered against the 1<sup>st</sup> Third Party after he failed to file a defence.

11. The matter proceeded without any directions being taken as provided by the **Civil Procedure Rules**.

12. From evidence adduced the accident occurred at or about **8.30 p.m.** The Respondent testified that the rider of the motorcycle **KMCJ 483Y** was **Boniface Maluki** and there was a 2<sup>nd</sup> pillion passenger, **Kavutha**. That when he saw lights from behind he told the rider to move off the road. He moved to the left side white line only to be hit from behind. He (Respondent) fell in the middle part of the road.

13. **Peter Weru Kanake** who was in control of the motor-vehicle stated that on seeing the motorcycle ahead of him he indicated the intention to overtake and as he overtook he heard the sound of the motorcycle on the left rear side of the motor-vehicle. When he came out of the motor-vehicle he noticed it had been hit on the left side of the door. The motorcycle and four (4) people were on the middle part of the road.

14. The 2<sup>nd</sup> Third Party relied on the evidence adduced by the Respondent.

15. The learned trial Magistrate considered evidence adduced and found that the motorcycle and motor-vehicle collided on the road. No inspection reports of the two (2) motor-vehicles were adduced in evidence. That the Appellant admitted having been behind the motorcycle which had carried four (4) passengers therefore he should have been more careful. He apportioned liability at **60:40%** against the Defendant and the Third Parties who were to indemnify the Appellant to the extent of **40%**.

16. On quantum he awarded the Plaintiff General Damages in the sum of **Kshs. 480,000/=** and Special Damages of **Kshs. 500/=** making it a total sum of **Kshs. 480,000/=** plus costs and interest.

17. Aggrieved by the Judgment of the Court the Appellant appealed on grounds that: The learned trial Magistrate erred in holding the Appellant liable for causing the accident to the extent of **60%** contrary to the evidence adduced; He failed to determine the exact amount of money that was to be paid to the Respondent by the Appellant and the 2<sup>nd</sup> Third Party which finding led to an injustice; Ordering that the 2<sup>nd</sup> Third Party indemnifies the Respondent to an extent of **40%** was erroneous. The award of **Kshs. 480,000/=** was manifestly excessive in the circumstances of the case.

18. The Appeal was canvassed by way of written submissions. The Appellant through the firm of **Mulwa & Mulwa Advocates** submitted that the 2<sup>nd</sup> Third Party was arraigned in Court for the offence of **Careless Driving**. He was convicted and fined **Kshs. 20,000/=**. They urged that the 2<sup>nd</sup> Third Party was totally to blame for the accident. That the 2<sup>nd</sup> Third Party's failure to tender evidence should be interpreted as an admission of all allegations made against him in the Third Party Notice and the Appellant's evidence that was not significantly challenged.

19. The Appellant faulted the manner in which the learned trial Magistrate apportioned the liability between him and the 2<sup>nd</sup> Third Party at the ratio of **60:40%**. It was his contention that he should have only been ordered to pay **60%** of the sum awarded to the Plaintiff as that was the extent of liability the Court found against him. That being ordered to pay the **40%** share of the 2<sup>nd</sup> Third Party would be a miscarriage of justice since he would not be able to recover the sum from a person whose means were unknown. That would mean being required to carry a burden that was not his. That should the liability be apportioned each party should pay its respective share.

20. On quantum, he stated that considering the nature of injuries sustained, the sum of **Kshs. 250,000/=** would have been adequate in General Damages. He relied on the case of **Peter Okello Omedi vs. Clement Ochieng Kisumu CA No. 196 of 2003** where **Kshs. 300,000/=** was awarded for a fracture of distal fibula and dislocation of the ankle joint.

21. The Respondent through the firm of **Mulu & Co. Advocates** submitted that it was the motorcycle that suddenly collided with the car as it was overtaking it. That evidence called by the 1<sup>st</sup> Respondent blamed the Appellant for occurrence of the accident. The 3<sup>rd</sup> Respondent (2<sup>nd</sup> Third Party) chose to rely on his evidence as it was in congruence with his version of events. That liability was apportioned at **60:40** to the Defendant and the Third Party respectively. That the person who was charged with the Traffic Offence was **Boniface Maluki** and at the time of obtaining the Police Abstract the matter was pending in Court.

22. Regarding indemnity, it was stated that the contention of the Appellant is not supported by law.

23. That **Order 1 Rule 22** of the **Civil Procedure Rules** obligates the Defendant to apply for directions on how the issue of liability between the Defendant and 3<sup>rd</sup> Party will be determined during trial. But this was not done hence the Court had to make such Judgment as the nature of the case required. He relied on the case of **Pan Africa Insurance Co. LTD and 2 Others vs. Clarkson and Southern Limited (2008) eKLR**.

24. On quantum it was submitted that injuries sustained were serious and it was not alleged that wrong principles were relied upon to arrive at the award.

25. This being the first Appeal, it is my duty to re-examine a fresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility (**See Selle vs. Associated Motor Boat Company Limited (1968) EA 123**).

26. On the question of liability the Respondent (Plaintiff) contended that he was a pillion passenger on a motorcycle that was hit from behind. He narrated how he noted the presence of the motor-vehicle that was behind him and he alerted the rider of the motorcycle who moved off the road to the extreme left where the white line is marked. He fell in the middle part of the road as a result of the impact. This was the position of the 2<sup>nd</sup> Third Party who chose to rely on the evidence adduced by the Respondent (Plaintiff). The Appellant on his part argued that the motorcycle that he was overtaking after duly notifying the rider of his presence by indicating suddenly knocked his car.

27. The Investigator of the Traffic Case opined that the rider of the motorcycle was negligent and charged him with the Traffic Case. The evidence adduced on record was of an abstract from the police on the accident that showed that the rider of the motorcycle one **Boniface Maluki Philip** was charged with the offence of **Careless Driving** that was pending before Court.

28. The elementary principle of law is that he who alleges must prove. **Section 107** of the **Evidence Act** provides thus:

*“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*“(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”*

**Section 112** of the **Evidence Act** stipulates:

*“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”*

29. In his testimony the Appellant (Defendant) alleged without proof that the rider of the motorcycle was charged with a Traffic Offence and convicted. In submissions on his behalf it was alleged that the 2<sup>nd</sup> Third Party was convicted and fined **Kshs. 20,000/=**. It turns out that it could have been his agent that was charged. As such the learned trial Magistrate was correct in stating that no proceedings or Judgment were produced in Court therefore the outcome of the case was not known.

30. PW3 **Caroline Kavutha** who was a pillion passenger with the Respondent (Plaintiff) confirmed what was stated by the Respondent that they were hit from behind and she fell on the left hand side of the road.

31. On cross examination the Appellant stated that he saw the motorcycle ahead of him while he was 30 meters away. And after overtaking it there was the collision. He just heard a bang but he did not see the motorcycle go to the overtaking lane. This suggested that he was not diligent in his manner of driving. Therefore the learned trial Magistrate was correct in observing that he should have been more careful. Having been behind the motorcycle which was in his full view, lights of the motor-vehicle having been serviceable and on he had a greater duty of care that he owed to the other road users.

32. On the issue of indemnity, the Third Party Notice was drawn thus:

*“..... The defendant’s claim against you is for indemnity and/or contribution against the plaintiff’s claim and the costs of the defendant in defending this action and the costs of the Third Parties proceedings.....”*

It was therefore the Defendant’s case that he was seeking indemnity and/or contribution from the Third Parties in the case against any orders that could be made against him. By claiming indemnity the Appellant was alleging that he was entitled to reimbursement by the 3<sup>rd</sup> Party. In the case of contribution he was urging that he was supposed to pay but the Third Party who was also responsible should be obligated to pay the portion of liability.

33. The Third Party Notice was issued to two (2) persons. The 1<sup>st</sup> Third Party entered appearance but did not file a defence. In the case of **Solomon Mwarimbo vs. Kenya Bus Service Ltd (1993) eKLR RSC Omollo J** (as he then was) stated that:

*“I have stated that there is no provision in the Rules requiring a third party who has appeared to also file a defence. A defendant who has issued a third-party notice is not, for example, entitled to apply to the court for an ex parte judgment on the basis that a third party who has entered appearance has failed to file a defence. It appears to me that once a third party has entered an appearance and a defendant wishes to pursue the claim against the third party, then the burden shifts to such a defendant to apply to the court, by way of a summons in chambers to give directions and when giving such directions, the court, if satisfied that there is a proper question to be tried as to the liability of the third party, order such question of liability to be tried at or after the trial of the suit. If there is no proper question to be tried regarding the liability of the third party to the defendant, then the court is entitled to enter such judgment as it thinks proper against the third party. All these matters are to be determined at the stage where the court is giving directions and directions can only be given on the application of the defendant.”*

34. A request for judgment dated 3<sup>rd</sup> August, 2012 was made against both 3<sup>rd</sup> parties namely **Makindu Motors & Erastus Welu Musyoka**. When the matter came up on the 7<sup>th</sup> August, 2012, Counsel for the Defendant applied for Judgment to be entered against the 1<sup>st</sup> Third Party and the Court ordered thus:

*“..... Interlocutory against (sic) 1<sup>st</sup> Third Party entered as prayed.”*

35. Where a third party makes an appearance under **Order 1 Rule 22** of the **Civil Procedure Rules** as was the case of the 1<sup>st</sup> Third Party, the Defendant was supposed to apply for directions by way of summons. As it is at this point that the directions in the manner the matter may be determined is given. Prior to giving directions the Court must be satisfied that there is a proper question to be tried as to the liability of the Third Party before giving the method to be adopted by the Defendant and the Third Party whether it should be determined in the course of trial of the suit or otherwise.

36. In the instant case no directions were taken. It was therefore a misdirection on the part of the Court to enter the interlocutory Judgment.

Failure by the trial Magistrate to follow the laid down procedure made the 1<sup>st</sup> Third Party appear as if it expressed its intention to admit the validity of the decree obtained against the Defendant and its own liability to indemnify or contribute to the extent denied by the Defendant.

37. In the impugned Judgment the learned Magistrate directed the Third Parties to indemnify the Defendant to the extent of their apportioned liability of **40%**. There was no basis upon which such a decision was reached as no directions had been made. In the case of **Jessie Mwangi Gachago vs. A.G. (1987) eKLR** it was stated that Third Party issues are usually tried at or after the trial of the suit between the Plaintiff and Defendant and this must be made clear. This was not the case herein.

38. From evidence adduced in the matter it is proved that the rider of the motorcycle who had overloaded it by carrying four (4) pillion passengers instead of one and was riding on the road oblivious of other road users an act that materially contributed to the accident. The individual was charged with a Traffic Case as a result. The question of indemnity and/or contribution should have been inquired into.

39. On quantum, in the case of **Butt vs. Khan (1977) KAR 1 Law JA** stated that:

***“An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that it misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”***

40. The Respondent (Plaintiff) sustained a fracture of the right fibula, he had a chest injury that was blunt in nature, he had a cut wound on the right knee and blunt injury on the right leg. The trial Court was required to take into consideration injuries sustained and the case law cited.

41. This is a matter where the 1<sup>st</sup> Third Party was erroneously denied the right to participate in the case. The learned trial Magistrate misdirected himself as there were no directions given as to how Third Party issues were to be tried. The decision the Magistrate came up with lacked clarity. In the circumstances the matter must be remitted to the Lower Court for re-hearing.

42. In the premises, I allow the Appeal by setting aside the Judgment entered against the Appellant in the Lower Court and substitute it with orders as follows:

- The matter is remitted to the Lower Court for re-hearing on priority basis.
- Mention before the Chief Magistrate’s Court for directions within 7 days.
- The Appellant who omitted to move the Court to give directions is condemned to pay the costs of the Appeal.

43. It is so ordered.

**Dated, Signed and Delivered at Kitui this 25<sup>th</sup> day of September, 2018.**

**L. N. MUTENDE**

**JUDGE**