



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 364 OF 2012

ANDREW NGARE KINGAU.....APPELLANT

VERSUS

JOSEPH SOSIO.....1ST RESPONDENT

PAUL MAKI.....2ND RESPONDENT

(Being an appeal from the judgment of the learned magistrate, Hon. Mr. C. A. Otieno (SRM),

delivered at Kikuyu on 22nd June, 2012 in Kikuyu PMCC NO. 128 OF 2010 –

Andrew Ngure Kingau vs. Joseph Sosio & Paul Maki)

JUDGMENT

The appellant was injured in a road traffic accident that took place on 26th August, 2010 along Nairobi/Naivasha road involving motor vehicle registration No. KBB 820 P. He brought this suit against both defendants who were said to be joint owners of the said motor vehicle and blamed the accident on the driver who was driving the said motor vehicle.

The defendants denied the plaintiff's claim in their defence. After a full trial the appellant's suit was dismissed with costs to the defendants. Aggrieved by the said judgment he lodged this appeal.

As the first appellate court it is my duty to evaluate the evidence adduced before the lower court and come to independent conclusions. I have taken into consideration the grounds set out in the Memorandum of Appeal.

In dismissing the appellant's suit, the trial court held that the appellant failed to establish that the defendants were the registered owners of the said vehicle. Further, the appellant was said to be wholly to blame for the accident because the evidence showed he was riding his bicycle on the wrong side of the road and collided with the said motor vehicle.

According to the appellant he was riding his bicycle heading in the same direction as the motor vehicle. He was hit from behind but did not see the vehicle before the impact because it was behind him. He was off the road at the time of the accident. After the accident he lost consciousness and by the time he came by, he was at PCEA Thogoto Hospital. He was later transferred to Kenyatta National Hospital where he was admitted for three months.

He produced a copy of records from the Registrar of motor vehicles showing ownership of the motor vehicle involved in the accident. He called Dr. George Mwaura Kungu who produced his medical report.

On the other hand the defence called Moses Moseka Maki who was the driver of the said motor vehicle at the time of the accident. He described how he was driving towards Kilgus from Nairobi when he saw a cyclist heading to Nairobi using his lane. He applied brakes and hooted. There was a collision resulting in the cyclist being injured. He was not expecting the cyclist to be heading in the opposite direction. He could not get off the road as there were pedestrians. He denied that the cyclist was heading in the same direction. According to this witness the bicycle had damage on its front wheel while the motor vehicle had damage on the left headlight. He blamed the cyclist for the accident and added that he was never charged with any offence.

The plaintiff had called PC. Zedekiah Mbori who visited the scene after the accident. This witness blamed the cyclist for the accident. In fact he confirmed that the cyclist was heading towards Nairobi and was not on the correct side of the road. This information was from the

driver of the motor vehicle and other eye witnesses. As the investigating officer, he blamed the cyclist for the accident.

The evidence on record proved that the cyclist, who is the appellant herein, was on the wrong side of the road. On a balance of probably the evidence of the motor vehicle driver and the police officer who visited the scene outweighed that of the appellant. The police officer however did not witness the accident. The other eye witnesses who supported the driver's version were not called to testify. We are then left with the evidence of the appellant and that of the motor vehicle driver. Whatever the case, the position of the point of impact, the damage to the bicycle and that of the motor vehicle would support the fact that the appellant was riding against the traffic heading towards Kilgoris.

Although the driver testified that he saw the appellant suddenly, at a speed of 50 to 60 kph, he could have stopped the vehicle in good time had he been driving with proper lookout. Time was 8 a.m and it was not raining. He said he could see ahead. If it is true that there were vehicles ahead of him according to his evidence, it is surprising that those vehicles did not collide with the appellant. The only explanation is that the driver was driving at the extreme end of the road but did not swerve on seeing the appellant.

The appellant had no reason to ride along that path. It is against the traffic regulations. Both the cyclist who is the appellant herein and the driver were to blame for the accident. However, the appellant was more to blame in the circumstances of the case. I find that he was 80 % to blame while the driver of the motor vehicle was 20% to blame.

On the ownership of the motor vehicle the lower court relied on the police accident abstract to conclude that the appellant did not establish ownership thereof. The appellant produced exhibit 4a which is an extract of the records held by the Registrar of motor vehicles. This document clearly showed that the motor vehicle as at the date of the accident was registered in the names of the defendants herein. No other evidence is more credible than that record. It was therefore a misdirection for the trial court to conclude that the plaintiff did not prove ownership of the motor vehicle.

I find that the appellant established, on a balance of probability that, the motor vehicle was owned and registered in the names of the defendants herein. The liability therefore attaches.

The lower court went ahead to assess damages at Kshs. 150,000/= general damages, future medical expenses at Kshs. 60,000/= and Kshs. 98,575/= special damages pleaded and proved. She also awarded Kshs. 5,000/= as witnesses expenses in respect of the doctor.

I have looked at the medical report prepared by Dr. Mwaura. I have also looked at the cited authorities before the lower court. With respect, the proposed awards by the lower court were on the lower side. The doctor was specific about the injuries sustained by the appellant, and the fact that a surgical intervention would be necessary to remove the metal implants to the arm which had suffered compound fractures – left radius/ ulna distal 1/3. In addition to the said fractures, the appellant had a fracture to the left 6th rib and blunt injuries to the left side of the chest wall. These injuries should attract an award of Kshs. 250,000/=. This award shall be reduced by 80% being the appellant's contributory negligence leaving a balance of Kshs. 50,000/=.

There is no reason to dispute the cost of future medical costs set by the doctor at Kshs. 120,000/=. This shall also be reduced by 80% leaving a balance of Kshs. 24,000/=. Special damages of Kshs. 98,675 shall also be reduced by 80% leaving a balance of Kshs. 19,735/=. The doctors' fees remain at Kshs. 5,000/=.

In the end this appeal succeeds by setting aside the judgment of the lower court both on liability and damages awarded. In place thereof, there shall be judgment for the appellant as set out hereunder;

Special damages	Ksh. 50,000/=
Future medical costs	Ksh. 24,000/=
Special damages	Kshs. 19,735/=
Doctor's fees	Kshs. 5,000/=

The appellant shall also have the costs of the case both in the lower court and this appeal, which however shall be reduced by 80% being his contributory negligence.

Dated, signed and delivered at Nairobi this 23rd day of October, 2018

A. MBOGHOLI MSAGHA

JUDGE