



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 379 OF 2006

ELIUD KIMANI MWANGI.....APPELLANT

VERSUS

BRITISH AMERICAN INSURANCE COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. *Eliud Kimani Mwangi*, the appellant herein had sued the respondent, *British American Insurance Company Limited* seeking special damages in the sum of KShs.58,000 being repair costs following material damage to his motor vehicle registration number KWV 046 Mitsubishi canter in an accident involving motor vehicle registration number KYJ 003 Peugeot saloon on or about 31st March 1999. It was the appellant's case in the lower court that the accident was solely caused by the negligence of the respondent's driver, agent or servant.

2. In its defence and counterclaim dated 25th July 2002, the respondent admitted the occurrence of the accident but denied that it was caused by its servants or agent's negligence. The respondent claimed that the accident was caused or materially contributed to by the negligence of the appellant and/or his driver and made a counterclaim for KShs.172,182 being the costs incurred in repairing the damage caused to motor vehicle registration number KYJ 003 in the aforesaid accident.

3. The record of the lower court reveals that the trial proceeded before two different magistrates namely *Hon. Shem Kebongo* (RM) and *Hon. M. Mburu* (SRM). Judgment was however written and delivered by another magistrate *Hon. A. Lorot* (RM) on 16th May 2006. In the concluding paragraph of his judgment, the learned magistrate appreciated that he had not heard any of the witnesses who testified in the case; that he had written the impugned judgment on the basis of the evidence on record after *Hon. Mburu* resigned from the Judicial Service.

4. In his judgment, *Hon. Lorot* apportioned liability between the parties in the ratio of 70:30 in favour of the respondent against the appellant. With regard to the claim for special damages in both the plaint and the counterclaim, the learned trial magistrate found that both parties had proved their respective claims against each other and based on his earlier finding on liability, he entered judgment for the appellant against the respondent in the sum of KShs.17,400 and allowed the respondent's counterclaim in the sum of KShs.103,054.40 after setting off the sum of KShs.17,400 awarded to the appellant.

5. The appellant was dissatisfied with the learned magistrate's decision. He proffered this appeal citing four grounds of appeal which are reproduced verbatim as follows;

1. *The Honourable magistrate erred in law and in fact in proceeding to deliver judgment in the case whereas he had not taken evidence or heard the parties and no directions to that effect had been taken.*

2. *The learned magistrate erred in law and in fact in apportioning the liability at 70:30 against the appellant contrary to clear evidence on record to the contrary.*

3. *The learned magistrate erred in law and in fact in finding that the respondent had proved the special damages whereas no receipts or evidence of the same was provided to specially prove the counterclaim.*

4. *The learned magistrate erred in law and in fact in failing to weigh all the facts and evidence on record which would have led him to find for the appellant.*

6. When the appeal came up for hearing on 20th June 2018, both parties agreed to have the appeal prosecuted by way of written submissions. Following the said consent, I directed counsel on record to exchange and file their written submissions on or before 18th September 2018 when the appeal was to be mentioned to ascertain compliance and further orders.

On 18th September 2018, there was no appearance for the respondent and the respondent had not filed its written submissions. As the mention date had been taken by consent and no explanation was offered for the respondent's lack of compliance with the court's order, I

proceeded to reserve judgment date for the appeal.

7. The court record reveals that subsequently, the respondent somehow managed to file its written submissions on 21st September 2018. I must say that this was done irregularly and unprocedurally as the submissions were filed outside the time limited by the court and without leave of the court. Consequently, the respondent's written submissions are hereby expunged from the court record.

8. That said, I wish to note that this being a first appeal to the High Court, it is an appeal on both facts and the law. As the first appellate court, I am duty bound to revisit and to re-evaluate the evidence tendered before the lower court to draw my own independent conclusions giving due allowance to the fact that I did not see or hear any of the witnesses who testified in the lower court - See: **Selle V Associated Motor Boat Company Limited [1968] EA 123; Peters V Sunday Post Limited, [1958] EA 424.**

9. I have considered the grounds of appeal, the trial court's record, the appellant's written submissions and the authorities cited.

In the first ground of appeal, the appellant faults the learned magistrate for having written and delivered judgment in the suit without having recorded any evidence from the witnesses or issued directions on the way hearing would be concluded.

In addressing this complaint, I will do no more than to reproduce the provisions of *Order 18 Rule 8 (1)* of the *Civil Procedure Rules* which states as follows:

“Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.”

10. It is important to note that *Section 2* of the *Civil Procedure Act* defines a judge to mean the presiding officer of a court. The term therefore refers to any judge or magistrate seized of proceedings in any suit.

11. As noted earlier, two magistrates who had recorded all the evidence in this case were for different reasons unable to conclude the trial. *Hon. A. Lorot* who delivered the judgement challenged in this appeal took over the case from *Hon. Mburu* who had resigned from the Judicial Service. Given the provisions of *Order 18 rule 8(1)* of the *Civil Procedure Rules* which I have reproduced above, I find that although it would have been desirable for *Hon. Lorot* to consult the parties and take their proposals into consideration when deciding on the best way to conclude the case, the learned magistrate in deciding to write and deliver judgment on the basis of the evidence recorded by his predecessors acted in accordance with the law and did not err in any way. Nothing therefore turns on that ground of appeal.

12. I will now proceed to deal with the other grounds of appeal collectively since they are to a large extent interrelated.

The gist of the appellant's complaints in those grounds is that the learned trial magistrate erred in law and fact in apportioning liability in the ratio of 30:70 against the appellant which was against the weight of the evidence on record and in allowing the counterclaim when no receipts or other evidence had been adduced to prove the special damages pleaded in the counterclaim.

13. I have perused the evidence on record. I find that PW2's claim that he was not to blame for the accident as the appellant's motor vehicle was hit at the rear by motor vehicle registration number KYJ 003 when he had already joined the Thika-Garissa road and had already driven for about 100 yards from the junction was not supported by any other evidence including the evidence of the appellant's own witness, PW4, the police officer who investigated the accident.

14. PW4's testimony contradicted PW2's evidence and corroborated the evidence of DW1, the co-owner of motor vehicle registration number KYJ 003 who is the person who had been driving the vehicle at the material time. PW4 and DW1 both testified that the accident occurred at the Gatitu junction because PW2, who was the driver of KVV 046 joined the main road from a feeder road when DW1's vehicle was already too close to the junction making a collision between the two vehicles inevitable. These evidence taken as a whole means that PW2 joined the main road without first ascertaining that it was safe to do so. As he was joining a main road from a feeder road, PW2 was under a legal duty to stop at the junction and ensure that the main road was clear of any vehicle before joining the road. The evidence adduced by PW4 and DW1 which was accepted by the trial court and which I have no reason to doubt shows that PW2 carelessly joined the main road when DW1's vehicle was fast approaching near the junction and was therefore largely to blame for the accident.

15. I have noted from the evidence on record the respective sizes of the motor vehicles involved in the accident and the impact of the accident. It is apparent that DW1 must have been driving at a very high speed not the 60 km per hour he had quoted in his evidence. I agree with the trial court's finding that a prudent driver would have driven at a much lower speed considering that he was approaching a junction.

In view of the foregoing, I am satisfied that the learned trial magistrate's did not err in his finding on liability. The apportionment of liability at 70:30 in favour of the respondent is consequently upheld.

16. Regarding the claim that the trial court erred in allowing the respondent's counterclaim when the same had not been proved, I find that though the respondent did not produce receipts to prove payments of the sums claimed as costs for repair of motor vehicle KYJ 003, the court record reveals that the respondent produced through DW2 evidence confirming that the vehicle sustained material damage as a result of the accident which was repaired at a cost of KSh.154,152. The charges for the assessment report amounted to KShs.9,230 and KShs.8,700 was paid as towing charges. DW2 produced documentary evidence through vouchers and letters produced as Exhibits 4-7 to prove that the respondent incurred the above expenditure as repair costs and other incidental charges. The repair costs and related expenses were specifically pleaded in the counterclaim. It is however noted that the amount claimed as towing charges was KShs. 9,700 and not KShs. 8,700 which was the amount proved. It is worth noting that the amount of KShs.100 pleaded as cost of obtaining the police abstract was not

proved.

17. In his judgment, the learned trial magistrate entered judgment in favour of the respondent on the counterclaim in the sum of KShs. 120,457 being 70% of the counterclaim considering the earlier finding on liability.

Some basic calculation shows that in awarding the said amount, the learned trial magistrate only allowed the amounts that had been specifically pleaded and proved which is what the law required him to do. I am thus satisfied that in allowing the respondent's counter claim in the sum of KShs. 120,457, the learned trial magistrate arrived at the correct decision.

18. For the foregoing reasons, I am persuaded to find that this appeal is not merited. It is consequently dismissed with costs to the respondent.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 18th day of October, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kamau for the appellant

Mr. Mwaura Kamau holding brief for Ms Wachira for the respondent

Mr Fidel: Court Assistant