



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 39 OF 2015

JOHN GITONGA KIARIE APPELLANT

VERSUS

SAFARI JIRA NDEGE RESPONDENT

(An appeal from part of the Judgment delivered by Hon. Kitagwa, Resident

Magistrate, on 19th February, 2015 in Mombasa SRMCC No. 915 of 2012)

JUDGMENT

1. The appellant John Gitonga Kiarie filed a memorandum of appeal on 20th March, 2015 raising the following grounds of appeal against part of the judgment delivered by Hon. Kitagwa on 19th February, 2015 in Mombasa SRMCC No. 95 of 2012:-

(i) The Learned Magistrate erred in law and in fact in holding that there was no sufficient evidence to attribute liability on the part of the Defendant despite the overwhelming and uncontroverted evidence to the contrary;

(ii) The Learned Magistrate erred in both law and in fact in assessing liability at 100% against the Defendant in total disregard of the evidence tendered by the Defendant;

(iii) The Learned Magistrate erred in both law and in fact in failing to appreciate that the Plaintiff was the author of his own misfortune and that the Defendant was not to blame for the occurrence of the accident in total disregard of the evidence tendered by the Defendant; and

(iv) The Learned Magistrate erred in fact and in law in wholly disregarding or failing to accord due and proper consideration of the Defendant's submissions on liability.

The defendant (*hereinafter referred to as the appellant*) prays for orders that:-

(a) This appeal be allowed with costs;

(b) The Judgment in civil suit No. 915 of 2012 by Hon. Kitagwa be reviewed as far as apportionment of liability is concerned and that this court apportions liability as against the plaintiff (*hereinafter referred to as the respondent*);

(c) The cost of this appeal and the suit in the subordinate be borne by the respondent; and

(d) Such other orders and relief that this court may deem fit to grant.

DUTY OF THE FIRST APPELLATE COURT

2. The duty of the first appellate court is to re-evaluate the evidence tendered before the lower court and arrive at its own decision, bearing in mind that it has neither had the opportunity to see or hear the witnesses who testified. The said duty was well captured in the case of **Selle vs Associated Motor Boat Company Limited** [1968] E.A. 123 as follows:-

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

This court will re-evaluate the evidence contained in the lower court record so as to determine if the Hon. Magistrate arrived at the right decision.

3. PW1, the respondent by the name Safari Jira Ndege testified that on 19th September, 2010 as he was riding a bicycle going to Bamburi, he was hit by a vehicle that was being driven from Bamburi to Utange. He stated that the Driver of the vehicle was avoiding pot holes. The respondent could not avoid the accident as there was a culvert and a hole on the road which left him with no space to swerve.

4. He was injured on the left side of his head and left leg which sustained 2 fractures. The Hon. Magistrate noted that injuries were visible on the respondent's face. He was treated at the Coast General Hospital where he was admitted for one and a half months. The registration No. of the motor vehicle that hit him was KBB 257D. The respondent produced a demand letter as plf. exh. 1, treatment notes as plf. exh. 2, certificate of insurance for the motor vehicle in issue as plf. exh. 3, he visited a Doctor for the insurance company as he was requested to do. He produced a letter dated 20th March, 2012 as plf. exh. 4. He also visited the Doctor for the appellant. The respondent produced two letters dated 14th June, 2012 and 20th June, 2012 as plf. exhibits 5 and 6, respectively. He was issued with a police abstract marked as MFI- 7 and a P3 dated 13th February, 2012 that was marked as MFI – 8.

5. He informed the court that he was still in pain (as at the time of testifying). He had an iron bar (sic) in his leg. The said leg was shorter than the other one, hence he could not walk well. He visited Dr. S.K. Ndegwa who examined him and prepared a medical report dated 22nd February, 2011.

6. The respondent called No. 62367 PC Bernard Hinga of Bamburi Traffic department as his witness. He testified as PW2. He had with him the occurrence book (OB) No. 26 of 19th September, 2010 wherein a report of severe injury was made at 10.55a.m. The victim was the respondent aged 30 years old. The motor vehicle involved was registration No. KBB 257D, a Nissan matatu driven by one Robert Karuch. The injuries that the respondent sustained as per the OB were a deep cut above the neck, a fracture on the left leg, a deep cut on the forehead and bruises on the right leg. He was admitted to Coast General Hospital.

7. According to the OB, the accident happened along the Mombasa-Malindi road as the respondent was going from Utange towards Bamburi mwisho and the Driver of the vehicle was heading to the opposite direction. There was a matatu that was heading towards Bamburi mwisho that was picking passengers. It was near off the road (sic). The respondent had to overtake, thus collided with the other matatu from the

opposite direction head on. PW2 informed the court that the report did not give the exact point of impact. It only states that it was near Wema Centre.

8. PW2 stated that the relevant police abstract filled by Corporal Kandie did not indicate who was to be charged. It gave the name of the owner of the vehicle as John G. Kiarie. The insurance company was Directline under certificate No. 4434081. He produced the police abstract as plf. exh. 7 and the P3 as plf. exh. 8. PW2 informed the court that he was not the Investigating Officer.

9. On being cross-examined, PW2 stated that Corporal Kandie was transferred to Njabini and PC Mugambi was at Makupa Police Station within Mombasa. He added that the police file could not be traced.

10. Doctor Ajoni Adede based at NSSF Building Mombasa testified as PW3. He examined the respondent on 6th June, 2013 following a road traffic accident that occurred on 19th September, 2010. His findings were that the respondent suffered fracture of the left femur thigh bone and compound fracture of the left tibia and left fibula bones as well as injury to the forehead. He had 2 deep cuts on the neck. He was admitted to Coast General Hospital for 36 days. A metal implant was inserted together with a left leg plaster cast. The cut wound was stitched. X-ray was done and the respondent was allowed to go home on crutches. He was to attend physiotherapy.

11. PW3 informed the court that he examined the respondent after 2 years and 9 months of the accident. He found him limping. He found a 20 cm surgical scar on the left thigh. His left leg bone was shorter by 4 cm. It had a curved deformity. The knee and left hip were stiff and a scar on his forehead was fading. The left side of the neck had a 4 cm scar.

12. PW3 was shown the x-rays which display the injury and a previous report by Dr. Ndegwa dated 22nd February, 2012, treatment notes from Coast General Hospital and a duly filled P3 form. He estimated partial disability at 19% due to the state of the left lower limb and stiffness of the left knee and hip and the curved deformity of the left leg. He noted that the metal implant will need to be removed after 2 years upon the discretion of the surgeon. He estimated the removal of the metal plate to cost Kshs. 40,000/= in a Government hospital and Kshs. 90,000/= in a private hospital.

13. PW3 emphasized that the respondent suffered 2 sets of fracture on the thigh bone and tibia/fibula, which was compound meaning that the bone had pierced through the flesh and the bone was exposed. It was a very serious injury. He explained that a segmented fracture is where the bone has broken in more than 2 places that is 3 times. He stated that it is a serious fracture and was the cause of the left leg shortening by 4 cm. He disagreed with the medical report of Dr. Ndegwa which he termed as shallow.

14. PW3 produced the medical report dated 6th June, 2013 as plf. exh. 9. He produced a receipt of Kshs. 2,000/= for the medical examination as plf. exh. 10 and receipt for Kshs. 3,000/= for court attendance as plf. exh. 12.

15. On cross-examination, PW3 explained that for a simple fracture, union takes place after 3 months but proper healing takes place after 2 years.

16. In his defence, the appellant called No. 92361, PC Naomi Maina Humbui attached at Bamburi South Base Traffic Department as his witness. She testified as DW1. She informed the court that she had the police file in court in respect to an inquiry of 19th October, 2010. PC Kandie was the Investigating Officer but he was transferred to another station. He interviewed witnesses at the scene. The investigation report was that the Driver of motor vehicle registration No. KBB 257D Nissan matatu was driving from Bamburi Wema Centre towards Utange direction while the respondent a pedal cyclist Safari Jira was from Utange direction towards Bamburi mwisho direction. The pedal cyclist while overtaking a stationary motor vehicle collided head on with the motor vehicle in issue which was being driven by Robert Kelah Sungu. According to information, it states that the pedal cyclist was to blame for the accident. She stated that the same is supported by the sketch plan. DW1 produced the police file as D. exh. 1.

17. On cross-examination, DW1 stated that there was no statement of the plaintiff. A sketch plan was drawn the same day. According to the OB, it states that the pedal cyclist was overtaking a matatu which was dropping and picking passengers near off the road (sic).

18. The medical report of Dr. Isaac Theuri was produced by consent as D. exh. 2.

19. The Hon. Magistrate considered the evidence tendered before her and came to the conclusion that the respondent was knocked down by the appellant's Driver who was trying to avoid hitting a pothole thereby swerving into the respondent's lane thereby occasioning the accident. She also believed that there was a stationary vehicle parked slightly off the road, thus the respondent was most likely on his lane. The Hon. Magistrate also accepted the explanation that there was a culvert on the other side and a hole which prevented the respondent from swerving. The Hon. Magistrate also noted that the police abstract produced in evidence did not make any reference to such blame being attributed to the respondent. She found that the respondent's evidence that he was overtaking and there being a stationary vehicle was corroborated by the Police Officer, PW2. The Hon. Magistrate disregarded the evidence of another Police Officer, DW1 who testified that the respondent was to blame for the accident as no statement was recorded from the respondent and it was not explained how the respondent was to blame for the accident without him having been given an opportunity to explain how the accident happened.

20. The Hon. Magistrate found that the appellant's Driver swerved to avoid a pothole and went to the respondent's lane. She therefore held that the appellant was 100% liable for the accident.

21. In making an award of Kshs. 600,000/= in this case, the Hon. Magistrate noted that the respondent sustained multiple injuries and relied on the case of **Soren Peterson & Another vs Charles Muhari Isinga**, Eldoret Civil Appeal No. 149 of 2003. She also awarded Kshs. 90,000/= for the removal of the metal implant and special damages of Kshs. 2,000/= as pleaded and proved.

ANALYSIS AND DETERMINATION

The issue for determination is if liability should be apportioned as between the appellant and the respondent.

22. The crux of the appeal herein as submitted by Ms. Lewa for the appellant is that of liability. She submitted that the lower court record indicates that the respondent was overtaking a stationary motor vehicle. The appellant's witness, DW1, produced a police file to confirm that the respondent was overtaking a stationary vehicle, which resulted in an accident and he was to blame for the accident. She further submitted that the Hon. Magistrate misdirected herself by stating that the respondent was overtaking on his lane. In the Counsel's view, the evidence of PW1 and PW2 was not analyzed as the cause of the accident was overtaking. She urged the court to apportion liability as against the respondent.

23. On his part, Mr. Kalimbo, Counsel for the respondent submitted that the appellant did not call any eyewitness in the lower court and in particular, the Driver who caused the accident of the motor vehicle in issue was not called to controvert the evidence of the respondent. He further stated that DW1 did not inform the court the point of impact and the police file that was produced had no probative value as witnesses who had recorded the statements contained in the police file were not called for cross-examination. The respondent's statement was also not recorded.

24. He wound up his submissions by stating that the appellant gave no evidence to challenge the respondent's evidence. He prayed for the appeal to be dismissed with costs.

25. In response to the foregoing, Ms. Lewa submitted that witness statements including that of the Driver of the matatu were contained in the police file that was produced as D. exh. 1. She stated that the sketch plan was in the said file and there is no doubt that the respondent was overtaking and that is the reason why the accident happened.

26. An analysis of the evidence of PW2, a Police Officer who read out the entry of OB No. 26 of 19th

September, 2010 clearly indicates that the respondent was overtaking when he collided with motor vehicle registration No. KBB 257D head on, near Wema Centre in Bamburi. The said report indicates that the respondent was overtaking a matatu which was almost off the road, as it picked passengers. The said report did not indicate the exact point of impact. The police abstract he produced as plf. exh. 7 did not indicate who was to blame for the accident. It is not in issue that an accident happened and that the respondent suffered serious injuries.

27. The respondent's account of the accident was that on 19th September, 2010, he was going to Bamburi while cycling. He was hit by a vehicle that was being driven from Bamburi to Utange; The Driver of the vehicle had swerved to avoid pot holes. According to the respondent, the accident happened as there was no space for him to swerve as there was a culvert and a hole on the road. He sustained multiple injuries and was admitted to hospital for 1½ months.

28. PW3, the Doctor, explained the nature of injuries sustained by the respondent and the treatment undertaken as well as that which was outstanding. DW1, a Police Officer attached at Bamburi South Base Traffic Department produced as the police file as D.exh. 1. She was not the Investigating Officer. PC Kandie who investigated the case had since the accident been transferred to another station. DW1 referred to a sketch plan drawn by the said Investigating Officer and stated that the finding of PC Kandie was that the respondent was to blame for the accident as he overtook a stationary vehicle and collided with the appellant's motor vehicle.

29. The court notes that production of the police file as a whole by DW1 was an erroneous approach to adducing evidence on behalf of the appellant, in an attempt to prove that the respondent was to blame for the accident. The police file contains witness statements, the P3 form, a copy of the police abstract, the sketch plan, the covering report and other documents. The proceedings reveal that it was Counsel for the respondent who suggested to the Counsel for the appellant that DW1 should produce the police file. Counsel for the appellant without giving the said suggestion much thought as to the implication of so doing, went ahead and did so. The production of the police file jeopardized the appellant's case as it is trite that evidence adduced in court must go through the rigours of cross-examination unless there is a consent of the parties for documents to be produced without the need of calling the makers for cross examination. If the production of the police file was meant to have a cure all effect, then it backfired as against the appellant, as none of the witnesses who had recorded statements therein were called to testify. Thus the veracity of the contents of their statements was not tested on cross-examination.

30. The sketch plan was not produced as a stand-alone document and if indeed it shows that the respondent was to blame for the accident, the same would have been captured in the police abstract, which was however silent on who was to blame for the accident. At most, a police file which is produced in the style that was used in this case can only go to the extent of showing if a police file has been closed with recommendations of no further action being taken against either of the parties or if one of the parties was charged with a traffic offence and was either convicted or acquitted. I therefore agree with the submission of Counsel for the respondent that the production of the police file was of no probative value to the case in the issue.

31. Section 107 (2) of the Evidence Act provides as follows:-

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

32. In the case of **Nandwa vs Kenya Kazi Ltd** [1988] KLR 488, the Court of Appeal held thus:

“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant's evidence provides some answer adequate to displace that inference.”

33. The appellant failed to call any evidence to rebut that of the respondent to the effect that the accident occurred when the appellant's Driver moved onto his path whilst avoiding potholes on the road. The respondent's case therefore stands unchallenged. It is therefore my finding that the Hon. Magistrate was correct in holding the appellant 100% liable for causing the accident. She could not on her own go on a fishing expedition in the police file to trawl for evidence that would have assisted the appellant's case. I hasten to add that omnibus production of a police file to prove a civil case is a very dangerous trend that can whittle down a case to nothing. Parties should produce exhibits that will advance their cases.

34. In the circumstances of this case, it is my finding that the Hon. Magistrate did not misdirect herself when she entered Judgment against the appellant. The respondent proved his case on a balance of probabilities. I note that PW3 produced a receipt for the sum of Kshs. 3,000/= as plf. exh. 11, for the fees he was paid by the respondent for court attendance. I therefore make an additional award of Kshs.3,000/- for the said expense.

35. The appeal is hereby dismissed for lack of merit. I award costs of the case in the lower court and this appeal to the respondent. Interest is also awarded to the respondent at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 30th day of March, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kiti holding brief for Kairu Mc Court Advcoates for the appellant

Mr. Njoroge Simon for the respondent

Oliver Musundi - Court Assistant