



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CIVIL APPEAL NO 30 OF 2015

HARRISON NDUNGI.....APPELLANT

AND

JOHN WAMBUA MUSAU.....RESPONDENT

(Being an appeal from the judgment of the Learned Senior Principal Magistrate HON E.G. Nderitu in P.M.C.C NO 142 OF 2014-VOI)

JUDGMENT

INTRODUCTION

1. In her judgment delivered on 23rd November 2015, Hon E.G. Nderitu, Senior Principal Magistrate at Voi Law Courts entered judgment in favour of the Respondent herein as follows:-

| | |
|--------------------------------|-----------------------|
| General damages | Kshs 750,000/= |
| Future Medical expenses | Kshs 250,000/= |
| Special damages | Kshs 11,110/= |

2. She apportioned liability at 10% as against the Appellant herein who was the 1st Defendant in the lower court proceedings with the Agility Logistics Limited (hereinafter referred to as “the 2nd Defendant”) therein bearing 90% contributory negligence. The 2nd Defendant was not enjoined as a party in the Appeal herein.

3. She indicated that the Appellant was to pay a sum of Kshs 101,111/= while the said 2nd Defendant was to pay a sum of Kshs 909,999/= and that the defendant (**sic**) was to pay the costs of the suit therein at the same ratio plus interest at court rates from the date of judgment till payment in full.

4. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant lodged its Memorandum of Appeal dated 23rd December on even date. The grounds of appeal were as follows:-

- 1. THAT the learned trial magistrate erred in holding that the Appellant was liable at 10% contributory negligence when there was no evidence to support the finding.**
- 2. THAT the learned magistrate erred in law and fact in making a finding that the plaintiff was a lawful passenger in the Appellant’s Motor Vehicle as an employee/agent of the 1st**

defendant when there was no evidence to support the finding.

3. THAT the learned Magistrate erred in law and fact in making an award of damages in the sum of Kshs 750,000/= and future medical expenses of Kshs 250,000/= and special damages of Kshs 11,110/= which awards were manifestly excessive and in any event not supported by evidence.

5. On 28th November 2016, counsel for the Appellant and counsel for the Respondent herein together with counsel for the aforesaid 2nd Defendant agreed that the Appeal herein be consolidated with **HCCA No 27 of 2015 Agility Logistics vs John Wambua Musau & Harrison Ndungi T/a Miangeni Meat Supplies** purely for purposes of disposing of the two (2) appeals as they had both emanated from the same matter in the Trial Court.

6. The Appellant's Record of Appeal was dated 1st July 2016 and filed on 11th July 2016. His Written Submissions were dated 7th February 2017 and filed on 9th February 2017. The Respondent's Written Submissions were dated 17th February 2017 and filed on 20th February 2017.

7. When the parties appeared before this court on 21st February 2017, they requested this court to render its judgment based on the said Written Submissions which they did not highlight but relied on the same in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. Being a first appeal, an appellate court is called upon to evaluate the evidence afresh and come at its own conclusion but keeping in mind that it did not have the advantage of seeing the demeanour of witnesses. This was a position that was held in the cases of **Sumaria & Another vs Allied Industries Ltd (2007) KLR 1** and **East African Portland Cement Company Ltd vs Tilikia Kelo [2016] eKLR**.

9. In the case of **East African Portland Cement Company Ltd vs Tilikia Kelo** (Supra), it was held as follows:-

“...The position of the law as regards a first appeal is that as the first appellate court, this court has a duty to re-consider the evidence, evaluate it and draw its own conclusions while appreciating that it did not have the advantage, like the trial court had, of seeing and hearing witnesses...”

10. Having looked at the Appellant's grounds of appeal and to the respective Written Submissions, it was clear that the issues that were really before this court for determination were:-

Whether or not the apportionment of liability was fair, reasonable and justifiable; and

Whether or not the quantum that was awarded was manifestly low as to warrant disturbance by this court.

11. The court therefore addressed its mind to the said issues under the following heads.

LIABILITY

12. Ground of Appeal Nos (1) and (2) were dealt with under this head.

13. The Appellant pointed out that no liability could be attributed to him because the Respondent was clear in his evidence that the 2nd Defendant's Motor Vehicle Registration Number KBM V ZC 5731 swerved into their lane to avoid hitting a pot hole and hit his Motor Vehicle Registration Number KBH 351V in which he was travelling in as a passenger from Voi towards Maungu (Nairobi-Mombasa Highway) on 3rd March 2014.

14. He submitted that what would have happened if his driver had stopped was a matter of speculation. He was categorical that the Respondent's evidence in his Witness Statement that the 2nd Defendant's Motor Vehicle was trying to overtake another vehicle was at variance with his oral evidence in court that the 2nd Defendant's Motor Vehicle swerved on their lane to avoid pot holes. It urged this court not to believe his evidence as he was not a credible witness.

15. He further denied that he was vicariously liable for the actions of his driver who was on a frolic of his own as the Respondent was an unauthorised passenger and that the side of his vehicle was clearly written "No unauthorised passenger." He contended that the Respondent's assertion that he was his Broker was an afterthought and an ambush as the same ought to have been clearly stated in his Witness Statement. He said that his evidence was unshaken during his Cross-examination.

16. On his part, the Respondent submitted that he was not the Appellant's employee but acted as his agent. It was his submission that the Appellant's denial of his role at the material time was a mere denial. He added that if the Appellant was contending that he was not in his vehicle with his authority, then he was in his vehicle with the authority of his driver who was an admitted agent.

17. According to the proceedings in the Trial Court, the Respondent testified that the Appellant would pay him commission for sourcing livestock for sale. He denied that he was his employee and in his Cross-examination, reiterated that he was his Broker.

18. It was his testimony that on the material date, the Appellant sent them to purchase charcoal at Maungu and it was while they were coming back that they were involved in an accident at about 7.30pm- 8.00pm. It was his testimony that they were hit by the 2nd Defendant's Motor Vehicle.

19. Notably, he did not allude to the fact that he had a business relationship with the Appellant herein in his Witness Statement, a fact that was correctly pointed out by the Appellant. He had merely stated that he was travelling in his Motor Vehicle.

20. It was clear that the 2nd Defendant did not rebut the Respondent's evidence on what transpired on the material date as it did not adduce evidence having failed to attend court on 28th September 2015 when the Learned Trial Magistrate closed its case. The Appellant herein did not also adduce documentary evidence to demonstrate that the Respondent was an unauthorised passenger. Indeed in his List of Documents, the 2nd Respondent had indicated that the documents were **"To be Stated."**

21. Consequently, in the absence of such proof which could have included photographic evidence of his Motor Vehicle or insurance policy showing that the Appellant's Motor Vehicle had been insured as a commercial vehicle and not as a passenger vehicle, this court came to the firm conclusion that the Respondent was lawfully in the said Motor Vehicle and the Appellant was vicariously liable for the actions of his driver at the material time. Indeed, this court was persuaded by the Respondent's submissions that if the Appellant was contending that he had not authorised him to be in his said Motor Vehicle, then he was in the said Motor Vehicle with the authority of his driver.

22. Notably, the legitimate expectation of any passenger being carried and/or ferried in a motor vehicle is that the driver of such motor vehicle will manage, control and/or drive the said motor vehicle in a manner that will not cause such passenger. It is therefore well established in common law that a driver of such motor vehicle ought to be held wholly liable for any loss, damage or injury that such passenger suffers in case of an accident.

23. For such a passenger to be found liable, it must be demonstrated that he acted and/or omitted to act in a particular manner as a result of which the accident in which he suffered loss, damage or injury, occurred so as to bring him within the ambit of the doctrine of *volenti non fit injuria* and thus bear some degree of contributory negligence.

24. As no evidence was adduced to show that the Respondent contributed to the causation of the accident

herein in any manner, liability could only therefore be apportioned between the Appellant herein and the said 2nd Defendant.

25. Notably, both the Appellant and the 2nd Defendant did not call their respective drivers as witnesses in this case or any witnesses at all. Although the Appellant testified in the Trial Court, he was not at the scene of the accident. He could therefore only have controverted the Respondent's evidence by furnishing the Trial Court with documentary evidence.

26. The court perused the Record of Appeal and proceedings but did not find any photographs or sketch plan of the scene of the accident. It therefore resorted to the Police Abstract Report that was adduced by the Respondent herein with a view to establishing liability and extent of liability of the parties herein in the causation of the accident herein.

27. The said Police Abstract report clearly showed that although the matter was referred to insurance, the 2nd Defendant's driver was to blame for the accident herein and a charge of careless driving against him was contemplated. In the absence of any other documentary evidence, the only document the Trial Court could fall back on with a view to apportioning liability was the said Police Abstract Report.

28. In Paragraph 5 of the Plaint dated 1 and filed on 1st September 2014, the Respondent itemised the particulars of negligence as follows:-

Particulars of negligence of the driver of M/S Registration No KBH 351V

- a. Driving at a speed that was excessive in the circumstances.**
- b. Driving without due care and attention.**
- c. Failing to have any/or due regard for other road users.**
- d. Failing to stop, slow down, brake or in any other manner so manage and/or control Motor Vehicle registration No. KBH 351V Toyota Pick up so as to avoid the said accident.**

Particulars of negligence of the driver of M/S Registration No KBM 152V ZC 5731

- a. Driving at a speed that was excessive in the circumstances.**
- b. Driving without due care and attention.**
- c. Failing to have any or any proper control of Motor vehicle registration No. KBM 152V ZC 5731.**
- d. Failing to have regard for other road users especially the presence of Motor vehicle registration No KBH 351V Toyota Pick up.**
- e. Colliding into Motor vehicle registration No KBH 351V Toyota Pick up.**
- f. Failing to have regard for Traffic regulations and the Highway Code.**
- g. Driving onto the path of Motor vehicle registration No KBH 351V Toyota Pick up.**
- h. Failing to stop, slow down, brake or in any other manner so manage and/or control Motor vehicle registration No. KBM 152V ZC 5731 so as to avoid the said accident.**

29. Having had due regard to the said particulars of negligence, this court found and held that the Respondent's evidence as to what transpired therefore remained unrebutted. It was persuaded to find and

hold that the Appellant's driver ought to have slowed down, stopped or in any other manner manage the subject Motor Vehicle so as to avoid coming into collision with the 2nd Defendant's Motor Vehicle which had veered off its lane.

30. The fact that the 2nd Defendant's Motor Vehicle veered into the lane of the Appellant's Motor Vehicle was indicative of excessive speed which caused the driver to lose control of the said Motor Vehicle as was contended by the Respondent hereinof which it must therefore shoulder a greater part of the liability. This was irrespective of the fact that his driver had been trying to avoid pot holes on the said road.

31. If the Appellant's driver exercised due diligence to avoid colliding with the 2nd Defendant's Motor Vehicle, this court will never know as he did not testify in the Trial Court. He must therefore shoulder some contributory negligence.

32. This court thus found itself in agreement with the Learned Trial Magistrate's apportionment of liability at ninety (90%) per cent against the 2nd Defendant and ten (10%) per cent against the Appellant herein was fair and reasonable in the circumstances of the case herein.

33. In the circumstances foregoing, Ground of Appeal Nos (1) and (2) of the Appellant's Appeal were not merited and the same are hereby dismissed.

QUANTUM

34. Grounds of Appeal Nos (3) and (4) were related and they were dealt with under this head.

35. Notably, the Appellant did not submit on the question of liability but wholly concurred with the submissions the 2nd Defendant had made in **HCCA No 27 of 2015 Agility Logistics vs John Wambua Musau & Harrison Ndungi T/a Miangeni Meat Supplies**. The Respondent also relied on the submissions it had made in the said Appeal and urged this court to uphold the Judgment by the said Learned Trial Magistrate.

36. As none of the parties expressly submitted on this issue in the Appeal herein but merely relied on the submissions in the related Appeal, this court found that there was no value in re-analysing the question of quantum as the same was adequately tackled and determined in the said Appeal.

37. Suffice it to state here that in the said Appeal to wit, **HCCA No 27 of 2015 Agility Logistics vs John Wambua Musau & Harrison Ndungi T/a Miangeni Meat Supplies**, this court set aside the judgment that was entered into in favour of the Respondent against the Appellant herein and the 2nd Defendant by the Learned Trial Magistrate on 23rd November 2015.

38. In its place, this court entered judgment in favour of the Respondent against the Appellant herein and the 2nd Defendant for sum of Kshs 511,110/= made up as follows:-

| | |
|------------------------|-----------------------------|
| General Damages | Kshs 500,000/= |
| Special damages | <u>Kshs 11,110/=</u> |
| | Kshs 511,110/= |

together with costs and interests therein until payment in full.

39. Apportionment of liability was to remain at 90% against the 2nd Defendant and 10% as against the Appellant herein. For the avoidance of doubt, the Appellant's and 2nd Defendant's share of the decretal sum was to be Kshs 459,990/= and Kshs 51,110/= respectively together with costs and interest in the same ratio.

DISPOSITION

40. For the reason that this court found the award of general damages to have been manifestly high and the award for future medical expenses was set aside as the same was not pleaded, this court found the Appellant's Appeal to have been partly successful and as a result, each party shall bear its own costs.

41. It is so ordered.

DATED and DELIVERED at VOI this 20th day of April 2017

J. KAMAU

JUDGE