



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 55 OF 2012

**Arising from the Judgment of Hon S.MGITHINGICM (as he then was) in NKUBUSPMCC NO.
126 of 2010 delivered on 6th June 2012**

(CORAM: F. GIKONYO J)

JULIUS MURIUKI MUTIRIAAPPELLANT

VERSUS

JOSEPH MOGERE.....1STRESPONDENT

GEOFREY KIRIMI.....2ND RESPONDENT

KOOME M'IKIARA.....3RD RESPONDENT

JUDGMENT

[1] This Appeal arises from the Judgment of Hon S.M GITHINJI CM (as he then was) in NKUBU SPMCC NO. 126 of 2010 delivered on 6th June 2012 in which the Learned Trial Magistrate dismissed the case by the Appellant. The Appellant was aggrieved by the said decision and filed this appeal citing the following grounds of appeal:

1. THAT the learned Magistrate erred in law and fact in disregarding and dismissing the evidence adduced by the appellant and his witnesses.
2. THAT the Learned Magistrate erred in Law and fact in failing to address his mind to the documents produced by the Appellant as evidence in support of his case.
3. THAT the Learned Magistrate erred in Law and fact in failing to appreciate the standard of proof in civil proceedings as on a balance of probabilities.
4. THAT the Learned Magistrate erred in Law and fact in basing his decision on the evidence adduced by the Respondents only.
5. THAT the Learned Magistrate erred in Law and fact in failing to find the Respondents jointly and severally wholly liable.
6. THAT the Learned Magistrate erred in Law and fact in failing to comply with the provision of Order 21 R.1 of the Civil Procedure Rules Cap 21 L.O.K.

8. THAT the Learned Magistrate's decision/judgment is bad in law.

[2] On 27th November 2014, the court directed that that the appeal shall be determined by way of written submissions. The Appellant filed submissions but, on 20th April 2017, Mr. Kariuki, legal counsel for the Respondents informed the court that they will not file submissions and that the court should go ahead and decide the appeal.

[3] As is the duty of this court, I will evaluate the evidence as was recorded by the trial court and come to my own conclusions and findings, except, however, I should give allowance to the fact that I neither saw nor heard the witnesses. See the case of Selle. PW2 testified that on 30th day of March 2010, he was cycling at the extreme left side of and along the Mitunguu-Tunyai rough road. He saw an on-coming vehicle registration number KAZ 257G at about 80 metres away. The vehicle was being driven in a zigzag manner. The vehicle left its lane and came to his side. The Appellant went off the road but the vehicle hit. He suffered injuries for which he was treated. He blame the lorry for the accident for not hooting and driving on the wrong side of the road. In cross examination, PW2 admitted that he had carried 8kgs of maize and a crate of soda and was descending. Except, however, he denied that he was cycling at high speed or that he fell on his bicycle before he was hit. PW3 was a police officer but he was not the investigation officer. He produced the investigations file. But stated that investigations were not complete and that the matter is pending further investigations. He also stated that there were no recommendations in the file. The witness told the trial court that the Appellant recorded a statement in which he did not blame the driver of the lorry for the accident. He stated further that one more witness recorded a statement but he did not blame the driver of the lorry for the accident. He further told the trial court that the point of impact was not indicated although the Appellant stated that he was beside the road. Reading from the file, the driver of the lorry stated that the Appellant run over loose soil, thus, lost control and came on the way of the lorry and was hit by the mudguard of the lorry. DW1 the driver of the lorry herein told the court that he was driving on a murram road when he saw a cyclist and he slowed to 30 to 40 kph. He notice the cyclist was carrying a load but the cyclist slid and came to his side and fell on the right front tyre of the lorry. He said that the cyclist was in the middle of the road and blamed him for the accident.

[5] The Appellant blames the driver of the lorry for the accident in question. The driver of the lorry blames the Appellant for the accident. The question the court is to decide first is: whether the Appellant prove on a balance of probabilities that the driver of the lorry was negligent. The Appellant submitted that he showed that the driver of the lorry lost control and hit him. He also submitted that the evidence by PW3 corroborated these facts. He laid emphasis on the statements recorded with the police which he sated showed with absolute certainty that the driver of the lorry was to blame. The Appellant blamed the trial magistrate of not reading these pieces of evidence. On my part, the evidence by PW3 showed that the investigations into the accident in issue were not complete. For this reason, he also stated that there are no recommendations made about the accident. PW3 stated that neither the Appellant nor the other witness who recorded statements with the police blame the driver of the lorry for the accident. He stated that even the point of impact was not indicted in the investigation file. Therefore, nothing in the investigation file that blame the accident on the driver of the lorry in question. The incomplete investigations do not at all corroborate the evidence by the Appellant that the driver of the lorry caused the accident herein. The trial magistrate also considered these facts and all the documents produced. Therefore, he did not disregard the evidence adduced by or on behalf of and produced by documents by the Appellant as alleged. Is the sole testimony of the Appellant proof that the driver was negligent? The Appellant did not allege that the lorry was at high speed. No witness alleged that. On that point I believe the evidence by the driver of the lorry that he was driving at a speed of 30 to 40 kph. The speed is not high in the circumstances. I note that the Appellant was carrying a load and was descending the road. DW1 told the trial court that the cyclist slid into his path and hit the front right tyre of the lorry. According to DW1, the Appellant was riding in the middle of the road. The Appellant's version of the accident is that he was riding on the extreme left side of the road when he was hit by the lorry. PW3 said that the point of impact was not indicated. From the evidence, one detail given by DW1 is relevant; that the Appellant hit the front right tyre of the lorry. The evidence by PW2 is not clear on exactly how the accident happened. That of DW1 is clearer and has fine details which are believable. Accordingly, the trial magistrate was right in believing the testimony of DW1 and held PW2 to be the cause of the accident in issue. I also hold that the Appellant was the sole

cause of his misfortune. He did not prove on a balance of probabilities that the driver of the lorry in question was negligent and caused the accident. At this juncture I must state that, contrary to the arguments by the Appellant, the trial magistrate was acutely aware that the Appellant bore the burden of proving his case on standard of balance of probabilities and he specifically made this statement:-

“The burden rests on the plaintiff to prove his claim on balance of probabilities, and not upon the defendant to disprove it”.

Thus, I agree entirely with this finding by the trial magistrate that:-

“The Plaintiff has failed to prove negligence on part of the 3rd defendant manner of driving the said lorry, and he was the cause of the accident. The defence case is more reliable and believable than his. His claim is therefore dismissed with costs to the defendants”.

In the upshot, the trial magistrate considered the entire evidence and made an overall impression of it that the Appellant did not prove his claim on balance of probabilities. All the grounds of appeal fail. Consequently, I dismiss the appeal with costs to the Respondent. Costs of the lower court also go to the Respondent. It is so ordered.

Dated, signed and delivered in open court at Meru this 24th of July 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Ojiambo advocate for M/s. Muthida for appellant

Mr. Kariuki advocate for respondent –absent

F. GIKONYO

JUDGE