



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 219 OF 2008

GEORGE MUTUKU KIMEU1ST APPELLANT

NDALANI SECONDARY SCHOOL2ND APPELLANT

SUED THROUGH THE B.O.G CHAIRMAN

VERSUS

LABAN KYALO MUTISYA1ST RESPONDENT

RAPHAEL MUTUNGA MUNYOLI.....2ND RESPONDENT

(An Appeal arising out of the judgment of Hon A. W. Mwangi (S.R.M) delivered on the 26th day of November 2008 in the Senior Resident Magistrate's Court at Yatta, in Civil Case No. 343 of 2005.)

JUDGMENT

Introduction

The Appellants have appealed against the decision of the trial Court on the issues of liability and quantum awarded by the said Court in Yatta Senior Resident Magistrate's Court Civil Case No.343 of 2005. The main grounds raised in the Amended Memorandum of Appeal dated 27th January 2009 that the Appellants filed in this Court on 2nd February 2009 are that the trial magistrate did not appreciate the law on negligence, tort, evidence and the traffic laws; and did not appreciate sufficiently the evidence adduced in Court on the cause of the accident and the issue of liability.

The Appellants are the original Defendants in Yatta Senior Resident Magistrate's Court Civil Case No.343 of 2005 and the 1st Respondent was the original Plaintiff, while the 2nd Respondent was a Third Party in the said suit. The trial Court in its judgment delivered therein on 26th November 2008 apportioned blame equally between the Appellants and 2nd Respondent, who were each held 50% liable for an accident that occurred on 24th June 2005, and awarded the 1st Respondent damages of of Kshs 70,000/=, special damages of Kshs 2,000/= and costs of the suit.

The Appellants seek the following orders in their appeal:

- a. The judgment and decree in Yatta S.R.M.C.C. NO. 343 of 2005 be set aside .
- b. The appeal be allowed with costs.

c. This Court substitutes the Magistrate's judgment on liability and quantum with one that is based on all the evidential issues raised, put forward and submitted on.

d. This Court makes such further and other orders as it may deem just in the circumstance of the case .

The Facts and Arguments

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect in **Jabane vs. Olenja [1986] KLR 661** , **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**.

From the pleadings filed in the lower Court, the 1st Respondent claimed in a Plaint dated 21st October 2005 that he was injured in an accident that occurred on 24th June 2005 along Thika – Mwingi Road between motor vehicle registration number KAN 606U and motor vehicle registration number KAJ 957Y. He further claimed that he was a passenger in motor vehicle registration number KAN 606U that was negligently being driven by the 1st Appellant and owned by the 2nd Appellant. The 1st Respondent sought special damages of Kshs 2,200/=, general damages and costs .

The Appellants denied the particulars of negligence by the 1st Respondent in a Defence dated 16th December 2005, and issued a third Party Notice for contribution and/or indemnity against the 2nd Respondent, who was the owner of motor vehicle registration number KAJ 957Y. The said Third Party also filed a defence dated 9th September 2006 denying any negligence.

The hearing in the trial Court commenced on 16th April 2007, and the 1st Respondent called two witnesses to testify on his behalf, in addition to his own testimony. The Appellants called five witnesses to testify and the 2nd Respondent testified on his own behalf.

This Court directed that the appeal would be heard by way of written submissions, and the Appellants' Advocates, Muriu, Mungai & Company Advocates filed submissions dated on 30th March 2015. They pointed out inconsistencies in the evidence adduced by the 1st Respondent in the trial Court as to who was to blame for the accident, and submitted that the trial magistrate erred in holding that the Defendants and the Third Party were equally liable at 50:50, against the evidence adduced in the trial Court. In particular the evidence of PW1 was that the accident occurred on the side of the minibus meaning that the pick-up veered to the side of the minibus, and the contents of the police sketch map clearly indicated that the road was a width of 6.7 meters and the impact was 2 meters from the edge of the road on the side of the minibus.

Mutunga & Company Advocates filed submissions dated 6th October 2014 for the 1st Respondent, wherein it was urged that the trial magistrate wholly considered all the evidence on record and the submissions filed thereto in her judgment. Further, that the prayer on quantum of damages is ambiguous, as the Appellants do not state if the award given to the 1st Respondent was low or high considering awards given by courts for similar injuries.

The 2nd Respondent did not file any submissions on the appeal.

The Issues and Determination

I note that the Appellants have not argued their grounds of appeal as relates to the evidence on injuries suffered by the 1st Respondent or the award of damages in their submissions, and only contest the apportionment of liability. After perusal of the evidence in the trial Court the evidence by the 1st Respondent who was PW1 on liability was that both motor vehicle registration number KAN 606U and KAJ 957Y were being driven at high speed, and that at the police station he blamed the pick-up (motor

vehicle registration number KAJ 957Y).

Further, that the accident occurred at 9.00pm in the night and the motor vehicle registration number KAJ 957Y was being driven with full lights on, and that the collision occurred in the middle of the road. His evidence was reiterated by that of PW3, Anthony Mutungi Mburu, who was a fellow passenger in motor vehicle registration number KAN 606U.

PW2 who was PC Bernard Otieno referred to the police file and sketch map on the accident and testified that the point of impact was not in the middle of the road but on the side of the bus.

The evidence by the Appellants was that the motor vehicle registration number KAN 606U was not being driven at high speed, and that motor vehicle registration number KAJ 957Y was the one that caused the accident by hitting motor vehicle registration number KAN 606U on its lane.

DW1, who was the 1st Appellant and driver of motor vehicle registration number KAN 606U, testified that his motor vehicle had a speed governor limiting the speed to 80 kilometers per hour, and that on the material night he was driving at 40 to 50 kilometers per hour. He also testified that the oncoming motor vehicle was driving at high speed with full lights on, and hit his vehicle on the side where he was seated. Josephine Mwikali (DW4), who was a passenger in motor vehicle registration number KAN 606U, corroborated the evidence of DW1.

The evidence by the 2nd Respondent who was DW6 was that it was motor vehicle registration number KAN 606U that hit his car, motor vehicle registration number KAJ 957Y, and three people in his car died. Further, that his motor vehicle was not driving fast and was driving at a speed of 50-60 km per hour, and that motor vehicle registration number KAN 606U swerved from its lane to their lane, and then went back to its lane. Lastly, that after the collision, motor vehicle registration number KAJ 957Y overturned and landed in the middle of the road.

DW2 was IP Nelson Omwenga, and he produced the sketch map of the accident as an exhibit and testified that the same showed that motor vehicle registration number KAJ 957Y kept right instead of left, and that is how the accident occurred. This evidence was corroborated by that of DW3, Robert Kanyana, and investigator for Gateway Insurance Company.

From the evidence adduced in the trial Court I concur with the Appellants' submissions that the preponderance of the evidence by the 1st Respondent and Appellants pointed to greater negligence and liability on the part of the driver of the 2nd Respondent's motor vehicle registration number KAJ 957Y, and in particular there was evidence that showed that the said driver was driving at high speed, with full lights on, and did leave his lane and thereby caused the accident.

However, the evidence also shows that the driver of motor vehicle registration number KAN 606U was driving at high speed and he could not thereby not avoid the accident. By his own evidence he did state that he if he had swerved his vehicle would have overturned, which is an indicator that he was driving at high speed.

The apportionment by the trial magistrate of equal liability as between the Appellants and 2nd Respondent was therefore in error, and I find that the apportionment of liability for the accident as between the Appellants and 2nd Respondent to be at the ratio of 30:70. I accordingly allow the appeal only to the extent of this finding, and apportion the general damages of 70,000/= and special damages of Kshs 2,000/= awarded by the trial Court as follows:-

1. For the Appellants

a. General damages for pain suffering and loss of amenities.....Kshs.21,000, /=

b. Special damages as pleaded and provedKshs. 600/=

Sub total.....Kshs. 21,600/=

2. For the 2nd Respondent

a. General damages for pain suffering and loss of amenities..... Kshs. 49,000/=

b. Special damages as pleaded and proved Kshs. 1,400/=

Sub total.....Kshs. 50,400/=

The Appellants and 2nd Respondent shall meet the costs of the trial and appeal jointly and severally.

It is so ordered.

DATED AT MACHAKOS THIS 2nd DAY OF AUGUST 2017.

P. NYAMWEYA

JUDGE