



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 40 OF 2015

NYANZA PETROLEUM LIMITED APPELLANT/DEFENDANT

VERSUS

ROBERT NYABAYO OSIEKO..... RESPONDENT/PLAINTIFF

(An appeal from the judgment delivered by Hon. B.M. Ekhubi, Senior Resident Magistrate on 5th March, 2015 in Mombasa RMCC No. 3165 of 2007).

JUDGMENT

1.The appellant filed a memorandum of appeal on 25th March, 2015 in which he raised the following grounds of appeal:-

(i) That the Senior Resident Magistrate erred in law and in fact in holding that the defendant's driver was to blame for the accident contrary to the evidence before him and that the defendant was vicariously liable;

(ii) That the Learned Senior Resident Magistrate erred in failing to consider or adequately consider the Judgment of the Chief Magistrate R. Muthoka (sic) in Mombasa Traffic Case No. 10849 of 2007, Republic vs Samson Muthama Stanley (hereinafter called the Traffic case) which was adduced in evidence by consent of the parties and marked as defence exhibit 2 wherein the defendant's driver, after a full hearing was acquitted of the offence of careless driving contrary to section 49(1) of the Traffic Act;

(iii) That the Learned Senior Resident Magistrate erred in failing to hold that the defendant's motor vehicle Registration No. KAK 466E was not involved in an accident with the plaintiff on 6th September, 2007 when there was clear evidence before him in the form of the judgment in the traffic case;

(iv) That the Learned Senior Magistrate erred in relying on the testimony of PW3 PC Pius Njiru when it was clear from the judgment in the traffic case that PC Njiru was not the Investigating Officer and therefore was of no help to the court in determining the question of liability;

(v) That the Learned Senior Resident Magistrate erred in his finding that PC Njiru was the Investigating Officer when it was clear from the traffic case that PC Rashid was the Investigating Officer and not PC Pius Njiru;

(vi) That the Learned Senior Resident Magistrate erred in failing to dismiss the plaintiff's claim wholly and to hold that the defendant's motor vehicle Reg. KAK 466E was not involved in an accident on 6th September, 2007;

(vii) The Learned Senior Resident Magistrate erred in failing:-

- (a) to appreciate the significance of the various facts that emerged in the evidence of the plaintiff;
- (b) to consider or properly consider all the evidence before him especially the traffic case and/or;
- (c) to make any or any proper findings on the evidence before him; and
- (d) that the Learned Senior Resident Magistrate erred in failing to consider or properly consider the written submissions filed by Counsel for the defendant.

As a result of the foregoing, the appellant prays that the appeal be allowed with costs and for the Learned Senior Resident Magistrate's Judgment dated 5th March, 2015 to be set aside or varied as this court deems proper and appropriate.

2. Mr. Mwabonje, Learned Counsel for the appellant submitted that the appeal arises from a road traffic accident that happened on 6th September, 2007 along the Mombasa - Nairobi Highway. He stated that he would argue grounds No. 1, 2 and 3 of the appeal together and grounds No. 4, 5, 6, 7 and 8 together.

3. It was submitted that the plaintiff (respondent) is alleged to have been standing off the road when a motor vehicle veered off the road and hit him. He was with Aron Musembi (Musembi) who testified in the civil case and the traffic case. Counsel stated that the said witness was important because the respondent did not see the registration number of the vehicle that knocked him down and that Musembi had testified that when the vehicle knocked down the respondent, he recorded the registration No. of the vehicle as **KAK 460E**. He argued that when the matter was reported to the police station, the registration number of the motor vehicle was erroneously captured as **KAK 466E**, which is owned by the appellant.

4. The Counsel further submitted that the appellant's Driver, Samson Mugama Stanley was acquitted in the traffic case and therefore argued that the lower court erred in finding the appellant's Driver liable in the civil case. He however elucidated that the effect of an acquittal in a traffic case does not preclude institution of a civil case and for one to be held liable. In Mr. Mwabonje's view, the finding of the traffic case was conclusive so as to shift the burden of proof from a balance of probability to nil. He submitted that the acquittal in the traffic was not due to lack of witnesses but was based on merit hence such an acquittal should have tilted the burden of proof. He referred to page 43 of the Record of Appeal where the Hon. Magistrate in the traffic case held that the respondent's case was a schemed plot and advised the appellant to take action against the respondent.

5. Ms Okata, Learned Counsel for the respondent opposed the appeal. She stated that the appellant's Counsel relied on the traffic case but she was unable to know what the witnesses said in the said case and that Musembi did not testify in the civil case. She submitted that it was confirmed that motor vehicle registration No. **KAK 466E** caused the accident. The Hon. Magistrate however did not have the advantage of hearing the Investigating Officer and indicated that the latter did not testify to state why he charged the appellant.

6. Counsel submitted that the civil case in the lower court had sufficient corroboration of the respondent's witnesses but the appellant called no witnesses. It was further submitted that the judgment of the traffic case was produced by consent, but acquittal in the traffic case does not preclude liability in a civil case.

7. In making reference to page 43 of the Record of Appeal, Counsel informed the court that there was a conductor with the Driver of the appellant's vehicle and that he was under obligation to show that they

did not cause the accident.

8. Ms. Okata submitted that she did not know where the particulars of motor vehicle registration No. **KAK 460E** came from as their pleadings referred to motor vehicle registration No. **KAK 466E**. She stated that the statement of defence was a mere denial yet it was incumbent upon the appellant to show that the motor vehicle that caused the accident was No. **KAK 460E**. She wound up her submissions by stating that having called no evidence, the appellant's grounds of appeal are mere speculation.

9. In response to the foregoing, Mr. Mwabonje submitted that the Judgment of the traffic case was conclusive enough as the Magistrate in his Judgment captured what the witness (Musembi) said. He added that the contention of the wrong motor vehicle registration number having been captured should have been brought up at the hearing of the lower court civil case. He stated that the Hon. Magistrate captured the fact that three witnesses testified in the traffic case and the judgment thereof was produced by the consent of the parties. In his view, there was no need to call witnesses in the civil case because the findings of the traffic case was conclusive enough to make the Magistrate arrive at a finding. He submitted that the appeal has merits as there is doubt as to which motor vehicle caused the accident, in addition to the fact that the Hon. Magistrate in the traffic case made a finding that the appellant's Driver did not cause the accident. He prayed for the appeal to be allowed.

ANALYSIS AND DETERMINATION

The issues for determination are:-

(i) If the Driver of motor vehicle registration No. **KAK 466E** is culpable for the injuries sustained by the respondent; and

(ii) If the judgment of the traffic case is binding on the civil case in the lower court.

10. This being a first appeal, this court is under duty to analyze and re-evaluate the evidence adduced before the lower court and arrive at its own decision. This is bearing in mind that it neither saw nor heard the witnesses who testified in the lower court. See **Selle vs Associated Motor Boat Co. Limited, [1968] E.A.123**.

11. The respondent, Robert Nyanyo Osieko testified as PW1 in the lower court. His evidence was that on 6th September, 2007 at 1:00 p.m., while along the Mombasa - Nairobi road at a place near Corrugated Sheets Limited, he was hit by motor vehicle registration No. **KAK 466E**. It was his evidence that he was walking off the road when the said motor vehicle hit him as he was talking to a certain woman. He was hit from behind and sustained injuries on the left hand. He however did not see the motor vehicle as he became unconscious after the accident but one of the members of the public by the name Musembi gave him the registration number of the vehicle. The respondent's evidence was that he sustained a fracture on the left hand. He incurred Ksh. 4,550/= in medical expenses. He produced the receipts as plf. exh. 1. He was later treated by Dr. Sheth whom he paid Kshs. 6,000/= as per plf. exh. 2. On 9th April, 2008, he was treated at Coast General Hospital at the cost of Kshs. 9,140/= as per plf. exh. 3, he bought medicine as per plf. exh. 4. He later reported the accident to Changamwe Police Station where he was issued with a P3 form, which he produced as plf. exh. 6 and a police abstract, marked as MFI- 5. He informed the court that his Advocate conducted a search which showed that the motor vehicle in issue belonged to the appellant. He produced the search certificate as plf. exh. 7 and a receipt for Kshs. 1,600/= for the search as plf. exh. 8. He informed the court that he paid Dr. Ndegwa Ksh. 1,500/= for the medical report, which PW1 produced as plf. exh. 9 and the receipt for the same as plf. exh. 10. He prayed for general and special damages, costs and interest.

12. On cross-examination, PW1 stated that he never saw the motor vehicle that hit him. He denied that the registration number that he was given by Musembi was not for the vehicle that hit him. He denied having sued the wrong party.

13. This court notes that the Record of Appeal does not contain the evidence of PW2, yet the hand written

proceedings for the lower court civil case indicate that Aaron Musembi Musyoka testified as such. It was his evidence that on 6th September, 2007 at 1.00 p.m, he was at Changamwe area near Corrugated Iron Sheets Limited. While at the roadside along the Nairobi - Mombasa road, he saw a lorry and a canter approaching from the Nairobi direction. He then saw the canter overtaking the lorry but the former lost control and veered off the road. He stated that the canter swerved to the right lane and later knocked down a person who was standing by the roadside. He further recounted that the canter was moving on the right lane as one faces Jomvu direction. He testified that the canter which was registration No. **KAK 466E** and yellow in colour never stopped at the scene after the accident. PW2 stated that he wrote down the said registration number after the accident. He went to where the person who had been knocked down was and observed that he had sustained injuries on the left hand. He gave the said person the motor vehicle registration number which he had written down. He later recorded his statement at the police station. PW2 informed the court that he had already testified in a traffic case relating to this matter. He blamed the Driver of the canter for causing the accident.

14. On cross-examination, PW2 stated that the lorry was in front of the canter and that he saw the registration number of the canter but not of the lorry which was in front of the canter. He further stated that he wrote down the number of the canter as it was the one that knocked down the person in question.

15. PW3 was No. 66461 PC Pius Njiru. He informed the court that he was attached to Changamwe Police Station performing traffic duties. He had with him a police file in respect to a road traffic accident that occurred on 6th September, 2007 at Mabati involving the respondent and motor vehicle registration No. **KAK 466E**. He stated that the accident occurred when the Driver of the said motor vehicle knocked down the respondent who was off the road, while trying to overtake another motor vehicle. The Driver of the accident vehicle was charged but acquitted. PW3 stated that the Investigating Officer was PC Rashid who was transferred from the station. They issued the respondent with a police abstract which PW3 produced as plf. exh. 5 and a P3 form that he produced as plf. exh. 6. He produced a copy the police file as plf. exh. 12. PW3 informed the court that although the motor vehicle in issue was inspected, the inspection report was missing.

16. On cross-examination by Ms. Mango, PW3 stated that the appellant's Driver was acquitted under section 215 of the Civil Procedure Code (sic). On cross-examination by Mr. Mutiso, PW3 stated that the accused in the traffic case said he was the Turnboy and that no accident took place. On re-examination, PW3 stated that according to PC Rashid, it was the Driver who was charged.

17. The appellant called no witnesses in the lower court. A medical report by Dr. Udayan Sheth dated 14th February, 2008 was by consent produced as def. exh. 1, and the Judgment in Traffic Case No. 10849 of 2007 was produced as def. exh. 2.

18. The Hon. Magistrate after considering the evidence adduced before her, the submissions made, authorities cited and the nature of the injuries sustained by the respondent made an award of Kshs. 500,000/= in general damages and special damages of Kshs. 25,510/=. He awarded costs and interest. The appellant was also found 100% liable for the accident.

19. In the plaint filed on 7th November, 2007, the respondent avers in paragraph 4 that the motor vehicle that knocked him down was registration No. **KAK 466E**. In the amended plaint filed on 12th May, 2008 the same averments are contained in paragraph 4 thereof with regard to the registration number of the motor vehicle in issue.

20. In its statement of defence dated 3rd December, 2007 the appellant in paragraphs 3, 4 and 5 of the said pleading makes reference to motor vehicle registration No. **KAK 466E** and does not attribute the accident to a 3rd motor vehicle registration No. **KAK 460E**.

21. Counsel for the appellant urged this court to rely on the Judgment of the traffic case in which its Driver was acquitted and the evidence of PW2 therein which stated that the motor vehicle that caused the accident was Registration No. **KAK 460E**. That Judgment in the traffic case was delivered on 8th March,

2011 whereas the judgment in the court below in the civil case was delivered on 5th March, 2015. If indeed the appellant's motor vehicle was not the one that caused the accident, the prudent thing that the appellant would have done was to seek leave from the court that heard the civil case, to take out third party proceedings against the owner of motor vehicle Registration No. **KAK 460E**. This was not done.

22. In the case of **Jotham Mugalo vs Telkom (K) Ltd Kisumu**, HCCC No. 166 of 2001, Warsame J (as he then was) held as follows:-

“Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle that caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document it is upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by Section 106 and 107 of the Evidence Act. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence”. (emphasis added).

23. The police abstract in this case shows that the accident was caused by motor vehicle Reg. No. **KAK 466E**. The appellant herein did not call evidence in the court below to controvert that of the respondent and therefore failed to prove the allegation that the accident was caused by motor vehicle registration No. **KAK 460E**. PW2 who testified in the civil case was cross-examined by Mr. Gor Advocate and he asserted that he saw the registration number of the vehicle that knocked down the respondent. He reiterated the same on re-examination. Mr. Gor did not put to PW2 the issue of motor vehicle Reg. No. **KAK 460E** as having caused the accident.

24. As was correctly pointed out by Counsel for the respondent, the outcome of a traffic case does not affect the outcome of a civil case as the two cases are put on a different scale of proof. This was so held by the Court of Appeal in **Kefa Omanyala Ingura vs Ibrahim Omerikit Papai** [2015] eKLR, where the court stated thus:-

*“However an acquittal in a traffic case does not absolve a party of negligence in a civil suit. See **Michael Herbert Kloss vs David Sevoney & Others** [2009] eKLR”.*

25. Inasmuch as Mr. Mwabonje implored this court to find the appellant not liable as a result of its Driver's acquittal in the traffic case, that position does not obtain here. A perusal of the receipts for medical expenses produced by the respondent show that on 6th September, 2007 he was treated at Coast General Hospital where an x-ray was taken. He also paid for plaster of paris and consultation at the said hospital. This was on the same day that he sustained injuries in a road traffic accident. The P3 form and police abstract show that accident in issue happened on 6th September, 2007.

26. The P3 form and the medical report by Doctor Ndegwa show that the respondent sustained a fracture of the lower 1/3 of the left humerus. I have taken into consideration the submissions and authorities relied upon by both parties in the lower court to ascertain if the amount awarded in general damages was fair. Counsel for the appellant had in the lower court proposed general damages of Kshs. 250,000/- on the basis of 100% liability. He relied on the case of **James Musau Kimweli vs Bernard Ndegwa Kireru & another**, HCCC No. 133 of 1999 where the plaintiff was awarded Kshs. 250,000/- for general damages and loss of amenities. The appellant had also relied on the case of **Dinesh Kantilal Barkania & another vs Joseph Njegi Kagau**, Nairobi Civil appeal No. 21 of 2002 where the plaintiff was awarded Kshs. 120,000/- as general damages for pain, suffering and loss of amenities. The Judgment therein was delivered on 18th March, 2004. The third case that was the appellant cited in the lower court was that of **Stanley Mugambi & another vs John Kiraithe**, Meru Civil Appeal No. 127 of 2002 where the plaintiff was awarded Kshs. 200,000/- as general damages for pain, suffering and loss of amenities on 3rd May,

2006.

27. The respondent herein had in the court below relied on the cases of **Nderitu vs Paul & another**, Civil case No. 171 of 2001 where an award of Kshs. 1,800,000/- was made on 30th September, 2011, the case of **James Thiong'o vs Nduati Njuguna**, Civil case No. 344 of 2010 where an award of Kshs. 1,800,000/- was made, Civil suit No. 192 of 2001, **Samuel Mwangi Kamau vs Joseph Kirema and another** where an award of Kshs. 960,000/- was made on 22nd October, 2004 and Civil suit No. 45 of 2000 and **Misheck Musili Mutiso vs Mombasa Linear & another** where an award of Kshs. 960,000/- was made on 30th July, 2004.

28. I have considered the authorities that were cited by the respondent's Counsel in the lower court and it is clear that the plaintiffs therein suffered injuries that were way too serious and not comparable to the injuries suffered by the respondent herein. The respondent was examined by Doctor Ndegwa on 3rd October, 2007 and Doctor Sheth on 14th February, 2008. Dr. Sheth found that the respondent had suffered a deformity of the left arm due a fracture sustained in the road traffic accident of 6th September, 2007, as the fracture had not united. He thus needed surgery to fix the bone with a plate and screws. This court bears in mind the decision in the case of **Agility Logistics Limited vs John Wambua Musau & another** [2017] eKLR where the plaintiff suffered a fracture of the left proximal 1/3 humerus, was admitted to hospital twice and a metal plate and screws inserted which would require removal in future. In the said appeal, Kamau J., set aside an award of Kshs.750,000/- general damages and substituted it with Kshs. 500,000/- on 20th April, 2017. Taking into account that the judgment that was basis of the appeal before the said Judge was delivered on 23rd November, 2015 and the Judgment that forms the basis of this appeal was delivered on 5th March, 2015, I find no basis to interfere with the award herein.

29. The appellant in his grounds of appeal raised the issue that the Hon. Magistrate erred in finding that PC Njiru was the Investigating Officer. The Judgment by Hon. Ekhubi evidently shows that he was aware that PC Njiru was not the Investigating Officer. The Hon. Magistrate stated thus:- ***“evidence of the Investigating Officer was presented by PW3, PC Njiru was clear as to the circumstances leading to the accident.”*** (emphasis added). In my view, the foregoing statement does not indicate that the Magistrate treated PW3 as the Investigating Officer but that the Investigating Officer's findings were adduced through PW3.

30. It is my finding that the respondent discharged his burden of proof on a balance of probabilities, therefore the appeal herein is devoid of merit and must fail. It is hereby dismissed with costs of the lower court case and this appeal being awarded to the respondent. Interest is also awarded to the respondent at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of October, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the appellant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant