



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL APPEAL NO. 104 OF 2013

ALI ATHUMANI MWAHOKA..... APPELLANT

VERSUS

UKUNDA FILLING STATION.....1ST RESPONDENT

KOMBO KASSIM KOMBO.....2ND RESPONDENT

CONSOLIDATED WITH

MOMBASA HIGH COURT CIVIL APPEAL NO. 102 OF 2013

JAMES HARE KOMBE.....APPELLANT

UKUNDA FILLING STATION1ST RESPONDENT

KOMBO KASSIM KOMBO.....2ND RESPONDENT

AND

MOMBASA HIGH COURT CIVIL APPEAL NO. 103 OF 2013

MOHAMED ABDI YUSUF APPELLANT

VERSUS

UKUNDA FILLING STATION.....1ST RESPONDENT

KOMBO KASSIM KOMBO.....2ND RESPONDENT

(An appeal from the Judgment and decree of Hon. A.O. Aminga, Resident Magistrate in Kwale civil case Nos. 78, 158, and 157 of 2011 delivered on 17th July, 2013)

JUDGMENT

1. The appeals herein were consolidated on 29th September, 2016 with the lead file being Mombasa High Court Civil Appeal No. 104 of 2013. The appellants filed their appeals on 15th August, 2013. The

appellants in Mombasa High Court Civil Appeal Nos. 102 and 103 of 2013, James Hare Kombe and Mohamed Abdi Yusuf, respectively, filed similar grounds of appeal to the following effect:-

- i. The Learned trial Magistrate erred in law and in fact in holding the plaintiff 50% to blame against the weight of the evidence;
- ii. The Learned trial Magistrate erred in law and in fact in determining the issue of liability and failed to take into consideration the fact the net effect (sic) of the evidence before him;
- iii. The Learned trial Magistrate erred in law and in fact in failing to take into consideration the fact that no third party notice had been issued against the owners of motor vehicle registration No. KBM 354Y and as such any such liability cannot and should not be borne by the plaintiff who were mere passengers (sic) in the motor vehicle; and
- iv. The Learned trial Magistrate erred in law and in fact in attributing liability to a party who was not before him.

2. In Mombasa High Court Civil Appeal No. 104 of 2013, where the appellant is Ali Athumani Mwachoka, the 1st and 2nd grounds of appeal are similar to those in Mombasa High Court Civil Appeal Nos. 102 and 103 of 2013, save for the third ground of appeal to the effect that the Learned Trial Magistrate erred in law and in fact in failing to consider the Traffic Act and the Highway Code in making his decision.

3. The consolidated appeals proceeded by way of written submissions, which were highlighted. Mr. Nyabena Learned Counsel for the appellants informed the court that the appeal is on liability as the Hon. Magistrate apportioned liability at 50% against the appellants who were passengers.

4. It was his submission that the evidence from 2 witnesses indicated that motor vehicle registration No. KBM 354Y was hit behind by motor vehicle registration No. KAT 126U, a lorry. He explained that the Driver of the car they were in had slowed down to allow a matatu to join the road. Counsel stated that the Investigating Officer testified that the Driver of the lorry was charged but he was not convicted. He further stated that 2 defence witnesses testified to the effect that the car in which the appellants were overtook the lorry and suddenly stopped. He further stated on cross-examination that the Driver of the lorry conceded that he ought to have slowed down when he was being overtaken and if he had done so, the accident would not have happened.

5. Counsel submitted that DW2 admitted that at the time of the accident, there was a matatu joining the road and the car the appellants were in stopped suddenly, but the lorry could not stop suddenly as it was loaded.

6. Mr. Nyabena referred to the case of **George Ndiritu Kariamburi (deceased) vs Joseph Kiprono Ropkoi and Another**, Civil Appeal No. 345 of 2000, on the duty of the first appellate court.

7. It was submitted for the appellants that the vehicle they were in had slowed down to allow another motor vehicle to join the road, when their vehicle was hit from the back. They denied that their motor vehicle was overtaking another.

8. Mr. Nyabena argued that the Hon. Magistrate in her judgment introduced facts which were not in the evidence to the effect that the plaintiff (the appellant Ali Athuman Mwaka) had slowed down to reprimand the matatu Driver and that was one of the grounds of acquittal in the traffic case. Thus, the Hon. Magistrate misapprehended the evidence thereby relying on wrong principles. Counsel prayed for the 2nd respondent to be held 100% liable.

9. In reference to Civil Appeal Nos. 102 and 103 of 2013, it was submitted that the Hon. Magistrate awarded general damages of Kshs. 80,000/= with 50% liability being borne by the Driver of motor vehicle registration No. KBM 354Y, who was not a party to the two suits. Counsel submitted that this has

occasioned injustice to the said appellants who did not contribute to the accident.

10. Mr. Mulama, Learned Counsel for the respondents submitted that the liability apportioned in Mombasa High Court Civil Appeal No. 104 of 2011 was in order as the Hon. Magistrate found that there was a strong suggestion that the plaintiff (the appellant Ali Athuman Mwaka) had slowed down to reprimand a matatu Driver. Counsel stated that the defence witness, (2nd respondent) explained that the appellant in the said appeal who was driving motor vehicle registration No. KBM 354Y slowed down to allow the matatu to enter the road. The said respondent stated that he swerved to his right hand side in a bid to avoid hitting the Probox which went off the road to the left side and the lorry moved to the right hand side. Mr. Mulama further submitted that DW2 who was the appellant's Supervisor testified that the car (Probox) stopped abruptly and that the tanker was filled with fuel and the Driver could not apply emergency brakes.

11. It was his view that the accident was caused by the Driver of the Probox when he stopped suddenly, which led the tanker to swerve. He stated that apportionment of liability was justified. He added that the Driver of the vehicle stopped abruptly to allow a matatu to join the road.

12. Mr. Mulama conceded that in respect to Mombasa High Court Civil Appeal Nos. 102 and 103 of 2013, it was erroneous for the Hon. Magistrate to apportion liability on the Driver of motor vehicle registration No. KBM 354Y as he was not a party to the proceedings in RMCC Nos. 157 and 158 of 2011, but that did not mean that that DW1 (the 2nd respondent) should be held 100% liable. He submitted that the appellants failed to prove negligence against the 2nd respondent and that is why they were to bear 50% liability. He added that it was not true that the Driver of the tanker failed to keep a safe distance.

13. In response to the foregoing, Mr. Nyabena submitted that an abrupt stop of a motor vehicle should not lead to liability, which in this case should be borne by the respondents at 100%. He prayed for costs.

ANALYSIS AND DETERMINATION

The issue for determination is if this court should interfere with apportionment of liability.

14. Counsel for the appellants cited the case of **George Ndiritu Kariamburi (deceased) vs Joseph Kiprono Ropkoi and another** (supra) on the duty of the first appellate court, where the Court of Appeal had the following to say:-

“As the first appellate court we are not bound by findings of fact made by the superior court, and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial judge and the caution is always appropriate as O’Connor P., stated in Peters vs Sunday Post Ltd (1958) EA 424 at page 429:-

“It is a strong thing for an appellate court to differ from the finding of a question of fact of a judge who tried the case and who has the advantage of seeing and hearing the witnesses.”

The court however will interfere where the finding is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.”

15. In respect to Mombasa High Court Civil Appeal No. 104 of 2013 arising from Kwale SRMCC No. 78 of 2011, evidence in the court below was adduced by Dr. Adede who testified as PW1. He examined one of the appellants, Ali Ahtumani Mwahoka on 15th March, 2011 in connection to injuries he sustained in a road traffic accident on 3rd February, 2011 in which the appellant sustained soft tissue injuries to the chest, upper limbs and lower limbs. He stated that the examination was done 40 days after the injury and as at that time the appellant had tenderness on the chest, shoulders, upper and lower limbs. PW1 prepared a medical report which he produced as plf. exh. 1. He charged Kshs. 2,000/= for the said report as per the receipt produced as plf. exh. 2. He charged Kshs. 4,000/= for court attendance for which he produced the

receipt as plf. exh. 3. The treatment notes and P3 form from Diani dispensary were marked as MFI-4 and MFI-5.

16. Dr. Adede on 25th January, 2012 examined the appellant by the name of Mohammed Abdi Yusuf, the subject of Mombasa High Court Civil Appeal No. 103 of 2013 that arises from Kwale RMCC No. 157 of 2011 in respect to the injuries he sustained in a road traffic accident on 3rd February, 2011. He stated that the said appellant sustained a hairline fracture of the left shoulder wing scapula bone and blunt object injury to the left upper arm and left shoulder and a bruise to the left leg. An X-ray and arm sling were done at Msambweni District Hospital. He attended orthopaedic clinic.

17. The Doctor further stated that on examination of the said appellant's shoulder he found that it had reduced movement with a deformity (the court has referred to the original medical report plf. exh.1 for clarity). The appellant's left leg had a 2 cm by 2 cm scar. The X-ray of the left shoulder showed a thin hairline fracture which would fully recover within 3 years of the accident.

18. Dr. Adede produced the medical report as plf. exh.1 in the said case. He charged Kshs. 2,000/= for the medical report and produced a receipt thereof as plf. exh. 2. He charged Kshs. 4,000/= for court attendance and he produced the receipt thereof as plf. exh. 3. It was his evidence that he also relied on the P3 form marked as MFI-4 and treatment notes marked as MFI-5 for the said appellant.

19. Dr. Adede also testified in Kwale RMCC No. 158 of 2011 which forms the subject of Mombasa High Court Civil Appeal No. 102 of 2013. He testified that he examined James Hare Kombe on 15th July, 2011 following a Road Traffic Accident on 3rd February, 2011. He stated that the said appellant suffered soft tissue injuries to the left hip together with bruises. The Doctor produced the medical report as plf. exh. 1. He charged Kshs. 2,000/= for the medical report and produced a receipt thereof as plf. exh. 2. He charged Kshs. 4,000/= for court attendance and produced a receipt thereof as plf. exh. 3. He relied on the treatment notes and P3 form marked as MFI-4 and MFI-5, respectively.

20. The appellant in Mombasa High Court Civil Appeal No. 104 of 2013, Ali Athumani Mwahoka, testified as PW2 Kwale SRMCC No. 78 of 2011. He was the Driver of motor vehicle registration No. KBM 354Y Toyota Probox that he was driving from Kwale to Ukunda. He was carrying Administration Police Officers who were escorting a cash transit van which was ahead of them. It was his evidence that at Tiwi area, he slowed down to allow a matatu to enter the road from the stage when the vehicle he was driving was hit by a lorry that was behind their car. He got injured on the legs and ribs. He was treated at Diani dispensary. He later went to Diani Police Station where he was issued with a P3 form and police abstract. His treatment book was marked as MFI-4 and his P3 form was marked as MFI-5. The police abstract was marked as MFI-6.

21. The said appellant testified before the lower court that the lorry that hit his vehicle belonged to Ukunda Filling Station, which information is in the police abstract. He was sent to Dr. Adede who examined him and prepared a medical report. He blamed the Driver of the lorry for failing to keep a safe distance. He stated that he had fully healed.

22. On being cross-examined, the appellant stated that he had worked as a chase car Driver for 6 years. He denied that chase cars drive at a very high speed and stated that the said cars are fitted with speed governors. It was his evidence that they have to keep sight of the lead car carrying cash. He indicated that he did not know why the lorry did not avoid hitting his vehicle. He denied that he was overtaking the vehicle ahead of him.

23. On being re-examined, the witness stated that the lead car was 500 meters ahead of his car.

24. In the said case, No. PCA Mohammed attached to traffic duties at Diani Police Station testified as PW3. His evidence cuts across the 3 appeals for he was the Investigating Officer in the accident. He testified that an accident involving motor vehicle registration Nos. KAT 126U an Isuzu tanker and motor vehicle registration No. KBM 354Y a Toyota Probox occurred on 3rd February, 2011 at 3.00 p.m., along the Likoni-Lunga Lungu road. He stated that the Driver of motor vehicle registration No. KAT 126U was

blamed for the accident and charged with careless driving in Kwale Traffic case No. 181 of 2011 but he was acquitted under section 215 of the Criminal Procedure Code.

25. He confirmed that Ali Athuman Mwachoka the Driver of motor vehicle registration No. KBM 354Y Toyota Probox was injured. He produced a P3 form and a police abstract issued to the said appellant as plt. exh.5(a) and 6, respectively. PW3 also testified that one James Hare Kombe was a victim in the said accident. He produced a P3 form and a police abstract for the said appellant as plt. exh. 5(b) and plt. exh. 6(b), respectively. Another victim of the accident was Mohamed Abdi Yusuf for whom he produced a P3 form and a police abstract as plt. exh. 5(c) and 6(c), respectively.

26. Mohamed Abdi Yusuf the appellant in Mombasa High Court Civil Appeal No. 103 of 2013 testified as PW2 in Kwale RMCC No. 157 of 2011 where he informed the court that he was a Police Officer attached to the DO's Office, Diani. He testified in the said court that on 3rd February, 2011 he was on duty attached to a wells Fargo cash in transit vehicle. He stated that he was in motor vehicle registration No. KBM 354Y, Toyota Probox heading to Diani from Kwale when they were involved in an accident near Kenol Petrol station, Tiwi. They were hit by motor vehicle registration No. KAT 126U. He informed the court that the vehicle hit their vehicle from behind after their Driver slowed down to allow a Nissan which suddenly emerged to enter onto the road. He was injured on the left hand and the leg. He was taken to Msambweni District Hospital. His treatment book was marked as MFI-4. It was his evidence that he was issued with a P3 form and a police abstract which were marked as MFI-5 and MFI-6, respectively. He blamed the Driver of the lorry for the accident for failing to keep a safe distance. He prayed for compensation for the injuries he sustained and costs.

27. On being cross-examined, the said appellant stated that he was seated behind the co-driver when he saw a matatu emerge. Their driver could have seen it as he slowed down. He does not know if the Driver applied emergency brakes. He was in a chase car but it was not being driven at a high speed to catch up with the head (sic) car which had the cash. He indicated that he had healed.

28. James Hare Kombe the appellant in Mombasa High Court Civil Appeal No. 102 of 2013 was the plaintiff in Kwale RMCC No. 158 of 2011. He testified that he was a Police Officer attached to Kapenguria. On 3rd February, 2011 he was based at Diani. He was assigned duties in a chase car registration No. KBM 354Y, it was his evidence that they got involved in an accident at Tiwi area when their vehicle was hit from the back by a petrol tanker registration No. KAT 126U. He stated that they had overtaken the trailer a few minutes prior to the accident. On reaching a bridge they saw a Nissan motor vehicle emerging onto the road and the Driver of the vehicle he was in slowed down. The lorry hit their car from behind. It was his evidence that the Driver of the lorry was overspeeding and failed to keep a safe distance. He sustained injuries on the thorax and chin area. He was taken to Msambweni District Hospital for treatment. He produced his treatment book as plf. exh. 4, he was issued with a P3 form and a police abstract which were marked as MFI-5 and MFI-6 respectively.

29. The said appellant informed the court that the vehicle that hit theirs was being driven by Kombo Kassim Kombo who was charged in Kwale Traffic case No. 226 of 2011 for careless driving. The appellant testified that he was examined by Dr. Adede who filed a medical report, plf. exh. 1. The said appellant stated that he had healed save for occasional pain on the loin area. He prayed for compensation.

30. On being cross-examined, the appellant denied that the Driver of their vehicle was overspeeding. He denied that the chase car hit the lorry in the process of speeding to catch up with the vehicle carrying the cash. He stated that he was on the rear seat and he was with other Officers who also got injured.

31. The 2nd respondent, Kombo Kassim Kombo, testified as DW1. He stated that he was employed by the 1st respondent Ukunda Filling Station as a Driver. On 3rd February, 2011, he was driving motor vehicle registration No. KAT 126U, Isuzu lorry along Likoni Ukunda Road on the left lane. A Toyota Probox overtook him and suddenly stopped. He applied brakes but it was too late. He tried to veer to the right in vain. The lorry hit the Probox on its rear. The Turns-boy side of the lorry hit the Probox. He indicated that he was driving at 70 kph., and the lorry was ferrying petrol thus it was heavy and it could not stop on the spot after he applied brakes.

32. He added that there was a Nissan matatu ahead of the Probox that had stopped off the road to pick or drop a passenger. After the accident, the lorry stopped on the opposite lane facing Ukunda direction. The Probox went off the road on the left. He was charged with careless driving but was acquitted.

33. He stated that a Wells Fargo van ferrying cash had overtaken him before the accident. The Driver of the Probox which was a chase car, overtook him carelessly and suddenly stopped on seeing the matatu emerge onto the road.

34. The 2nd respondent denied overspeeding as the lorry was fitted with a speed governor. He stated that he tried his best to avoid the accident but explained that a loaded trailer cannot stop on emergency brakes being applied. He prayed for dismissal of the case.

35. On cross-examination, the 2nd respondent said he had 10 years driving experience and he knew the traffic law on overtaking in that one has to slow down on being overtaken. He stated that he started slowing down on noticing the Probox overtaking but the Probox slowed down suddenly. He blamed the passengers of the Probox because they ought to have warned the Driver not to stop. He indicated that the lorry stopped about 50 meters from the point of impact. The Probox was pushed ahead.

36. On being re-examined, the 2nd respondent stated that it was the Probox that caused the accident.

37. DW2 was Jamal Khan a Supervisor at Ukunda Filling Station. He recalled that on 3rd February, 2011 at around 3:00 p.m., he was a passenger in motor vehicle KAT 126U being driven by the 2nd respondent. His evidence was that a Toyota Probox passed them and suddenly stopped at Tiwi area, next to a matatu which had stopped. Their Driver tried to apply brakes but the vehicle could not stop instantly because it was loaded. They hit the Probox on the rear. He added that the Probox had been moving at a high speed as it was a chase car for a Wells Fargo van. The lorry was being driven at 70 kph. He stated that the driver of the Probox caused the accident by stopping suddenly.

38. On being cross-examined, DW2 stated that he saw the Probox about 10 meters ahead of them and it was hit by the lorry's left mid body. He agreed that the accident could not have occurred if the lorry Driver had brought his vehicle to a stop.

39. It is clear after a review of the evidence adduced before the lower court that the Hon. Magistrate erred in apportioning 50% liability against the appellants Mohamed Abdi Yusuf and James Hare Kombe who were passengers in motor vehicle registration No. KBM 354Y Toyota Probox. The evidence tendered in the lower court does not at all indicate that they contributed to the accident in any manner.

40. I therefore vary the Judgment passed by the lower court only to the extent that I set aside the apportionment of liability as against the appellant James Hare Kombe with the end result of an award of damages as follows:-

General damages-Kshs. 80,000/=

Special damages-Kshs. 2,000/=

Gross award =Kshs. 82,000/=.

41. In respect to the appellant Mohammed Abdi Yusuf, I set aside the order for apportionment of liability against him. The end result is that I make the following award of damages:-

General damages-Kshs. 120,000/=.

Special damages-Kshs. 2,000/=

Gross award=Kshs. 122, 000/=.

42. The court notes that the owner of motor vehicle registration No. KBM 354Y was not made a party to the proceedings. In regard to the Driver of motor vehicle registration No. KBM 354Y Toyota Probox, one Ali Athuman Mwaka, it is evident that the Hon. Magistrate misdirected himself by apportioning liability against the said Driver at 50%. As was submitted by Counsel for the appellants, the respondents failed to take out third party proceedings against the owner of motor vehicle registration No. KBM 354Y. The respondents in paragraph 6 of their defence averred that the negligence was solely caused by/and or substantially contributed to by the negligence/recklessness of the Driver, agent, legal and/or beneficial owner of motor vehicle registration No. KBM 354Y make Toyota Probox.

43. Having failed to join the owner of the said vehicle whose particulars were available on the police abstract, as a 3rd party to the proceedings, the respondents relinquished their right to have the said owner being considered for apportionment of liability.

44. It is also clear that the Hon. Magistrate introduced an extraneous matter into the Judgment by stating that there was a strong suggestion that the appellant Ali Athumani Mwahoka had slowed down to reprimand the matatu Driver oblivious to the danger of obstruction to the vehicle behind. No witness adduced such evidence in the court below.

45. The evidence adduced clearly indicates that the 2nd respondent failed to keep a safe distance between the vehicle he was Driving and the Toyota Probox which was ahead of them. This resulted in his vehicle ramming into the Probox. For the said reason he is wholly liable for having caused the accident.

46. I therefore vary the decision of the Hon. Magistrate by setting aside the apportionment of liability made against Ali Athumani Mwahoka and hereby make the following award in respect to the said appellant:-

General damages-Kshs. 90,000/=

Special damages-Kshs. 2,000/=

Gross award=Kshs. 92,000/=

47. The upshot of the foregoing is that the appeal is allowed in its entirety. The costs of the case in the court below and the appeals herein are awarded to the appellants. Interest is awarded at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 24th day of November, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Nasimiyu holding brief for Mr. Nyabena for the appellants

Mr. Mulama for the respondents

Mr. Musundi - Court Assistant