



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 110 OF 2014

BETWEEN

GEORGE OBWOGLI.....APPELLANT

AND

JEREMIAH ROMBO OLILO suing on

behalf of P J O (minor).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.T.Obutu, PM

dated 24th September 2014 at the Chief Magistrates Court

at Kisumu in Civil Case No. 176 of 2011)

JUDGMENT

1. The respondent, Paul Juma Ogumo (minor) filed suit through his next friend, Jeremiah Rombo Olilo, claiming damages against the appellant for injuries sustained as a result of an accident which took place on 26th July 2009 along Kiboswa Nyahera Road, Lady Gay Area. According to the plaint, appellant's motor vehicle registration number KAQ 281A was so negligently driven that it knocked the respondent thereby occasioning him serious bodily injuries which included a cut on the forehead and a fracture in the midshaft right femur.
2. In his statement of defence, the appellant denied sole liability and blamed the respondent who stated was so negligent and failed to exercise basic common sense rule while on the road such as paying attention to other road users and walking on the right side of the road.
3. After trial, the learned magistrate found the appellant 100% liable for the accident and awarded the respondent general damages of Kshs. 500,000/- plus special damages of Kshs 3,800/-.
4. The thrust of the appellant's case contained in the memorandum of appeal dated 21st October, 2014 is that the learned magistrate did not take into account the appellant's evidence and submissions and therefore arrived at an erroneous conclusion on liability. He contended that the trial magistrate misapprehended the evidence and therefore failed to making a finding on contributory negligence. The appellant did not contest the award of damages.
5. When the appeal came up for hearing, Mr Karanja for the appellant, submitted that the trial magistrate ought to have found contribution notwithstanding the conviction of the driver as the respondent was

pulling a cart on the wrong side of the road and the cart was partly on the road. The respondent opposed the appeal. Mr Otieno, counsel for the respondent, argued that the issue of contribution did not arise in the circumstances as the motor vehicle hit the cart as the driver tried to overtake another motor vehicle.

6. As this is a first appeal, the court must be guided by the principle that the duty of the first appellate court is to reconsider the evidence, evaluate it and reach its own conclusion bearing in mind that the trial court saw and heard the parties (see *Selle v Associated Motor Boat Co. [1968] EA 123*). This task calls for a summary of the evidence.

7. There is no dispute that the child was injured as a result of the accident. During the trial, the respondent (PW 2) testified that he and his brother R O (PW3) were pushing a cart loaded with maize off the road heading to Kiboswa from Lady Gay on the right side of the road when two matatu vehicles emerged from the direction of Kiboswa. According to PW 2, the first matatu passed then motor vehicle KAQ 281A hit the cart as it tried to overtake. He was injured, lost consciousness and only woke up to find himself in hospital with a broken limb and an injury on his head. PW 3 testified that he was able to jump off the road when the first matatu passed so he was not hit when the second matatu hit the cart and injured PW 2. In cross-examination, he stated that the motor vehicles both came from behind and the appellant's vehicle tried to overtake while it was not safe to do so.

8. Jared Onyango Otieno (DW 1) testified that he was the driver of the motor vehicle at the time of the accident. As he was driving from Kiboswa, he saw a cart being pushed. He tried to overtake it but hit it. On cross examination, he stated that both he and the cart were headed in the same direction but he denied that he was overtaking another vehicle as alleged as there was no other vehicle. He stated that the police investigated the matter and that he pleaded guilty when he was charged with the offence of careless driving.

9. Since the appellant had been convicted of the offence of careless driving, the only issue on liability was whether the respondent contributed to the accident (see *Robinson v Oluoch [1971]EA 376*). The appellant rightly complained that the trial magistrate failed analyse the evidence as demonstrated by the relevant part of the judgment where he stated that;

The evidence blames the driver DW 1 for causing the accident. The police visited the scene and did their investigations. They charged the driver DW 1 who pleaded guilty in Maseno Court, I also do find him 100% liable for causing the accident.

10. Notwithstanding the failure by the trial magistrate to analyse the facts, as the first appellate court, I have evaluated the evidence and I find that there is no dispute that motor vehicle KAQ 281A hit the cart that the respondent was pulling. From the evidence of PW2 and PW3 they were pushing their cart off the road and there was enough space on the road for the vehicle to overtake and pass. On the other hand, the defendant, whose burden it was to establish contributory negligence, admitted in cross-examination that he and the cart were headed in the same direction. He denied he was overtaking another vehicle but he nevertheless hit the cart. His evidence that when he tried to overtake the cart and PW 2 and PW 3 suddenly pushed the cart onto the road beats any logic. Since he was behind the vehicle, he ought to have had clear vision of the cart and the ability to avoid the accident unless he was driving too fast or carelessly. I do not see how the respondent could have avoided the accident.

11. Having reviewed the evidence, I find that the respondent did not contribute to the accident. The appellant was fully liable for the accident.

12. The appeal is dismissed with costs to the respondent.

DATED and DELIVERED at KISUMU this 20th day of November 2017.

D.S. MAJANJA

JUDGE

Mr P. Karanja, Advocate for appellant.

Mr R. Otieno instructed by Olago-Aluoch and Company Advocates for the respondent.