REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 364 OF 2013

DAVID GITHUKU NJAU.....1ST APPELLANT

IAN SAMUEL MIRIE NGUMI.....2ND APPELLANT

VERSUS

MICHAEL MUTHUMU GATUNDU.....1st RESPONDENT

FREDRICK NJAU MNUGUA.....2nd RESPONDENT

MUHU GITHIRI KIGOTO.....3rd RESPONDENT

(Appeal from the original judgment and decree of C.C. Oluoch (PM) in Kiambu Law Courts, CMCC No. 310 of 2007, delivered on 5th June 2013)

JUDGEMENT

1. **Michael Muthumu Gatundu** the 1st Respondent herein, filed a compensatory suit before Chief Magistrate's court, Kiambu, against **David Githuku Njau and Ian Samuel Mirie Ngumi**, the Appellants herein, for the injuries the 1st Respondent is alleged to have sustained as a result of a road traffic accident which occurred on 25th October 2007 involving motor vehicle registration no. KAT 394B. The Appellants filed a defence to deny the 1st Respondent's claim. **Hon. C.C Olouch**, learned Principal Magistrate heard and determined the suit. She dismissed the suit against the 1st Appellant but held the 2nd Appellant 40% liable. She further ordered that the 2nd appellant be indemnified by the 2nd and 3rd Respondents in ratio of 60% jointly and severally. Being aggrieved, by the aforesaid decision, the Appellants filed this appeal to have the same impugned.
2. The Appellants filed this on the grounds that:

1. ***The learned trial magistrate erred in fact and in law in basing her findings on irrelevant issues not supported by evidence adduced or the applicable law.***
2. ***The learned trial magistrate erred in law by finding the 2nd Defendant liable without finding the 1st Defendant liable.***
3. ***The learned magistrate erred in fact and law in holding the 2nd defendant liable and dismissing the suit against the 1st Defendant .***
4. ***The learned magistrate apportionment of liability in the face of the evidence on record and absence of any evidence by the third party is wholly erroneous and improper in the circumstances.***
5. ***The learned magistrate erred in fact and law in failing to make a finding on the evidence led by***

the defence on the issue of liability.

6. ***The learned magistrate erred in fact and law in finding the entire defence unconvincing and failing to consider the Defendant's submissions.***
7. ***The learned magistrate erred in fact and law by finding that the plaintiff has proved liability against the 2nd Defendant where evidence was produced to prove otherwise.***
8. ***The learned magistrate erred in fact and law in finding that the plaintiff had proved his case on a balance of probabilities in view of the evidence on record.***
9. ***The learned Trial magistrate's finding on liability was not supported by facts or law.***

3. The parties have filed their respective submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. The Appellants argued that the learned Resident Magistrate erred in holding the 2nd Appellant 40 % liable for the accident and at the same time dismissing the case against the 1st Appellant who was acting in his capacity as an employee of the 2nd Respondent. They contended that evidence was adduced by five witnesses who testified to the effect that, on the material day, the motor vehicle registration number KSK 098 belonging to the 3rd Respondent and being driven by the 2nd Respondent was coming from the opposite direction where it was overtaking another motor vehicle carelessly and at a high speed when the accident happened. They contended that PW3, the police officer who tendered evidence categorically said that the 2nd Respondent was to blame for the accident and this evidence was corroborated by DW1, a police constable. They argued that in light of the evidence adduced, negligence was not proved on their part and therefore the suit against them should have been dismissed. They further averred that the burden of proof lay squarely with the 1st Respondent, who did not prove they were to blame.
4. The Respondent on the other hand submitted that apportionment of liability by trial court is a pure exercise of judicial discretion based on evidence adduced at trial. He claimed that the Appellants have not shown that the trial Magistrate wrongly applied the principles.
5. The grounds of appeal as raised herein all touch on apportionment of liability. The question arising therefore is whether the Appellants were liable. I have examined the evidence tendered before the trial court in respect of liability. There were 5 witnesses who testified. The 1st Respondent, **Michael Muthumu Gatundu** (PW1) testified that he was a passenger in motor vehicle KAT 394B which had left Nairobi. He claimed that upon reaching Ruaka, the driver while negotiating a corner moved to the middle of the road in the process, occupying two lanes including the oncoming traffic lane. He asserted that as at that time, the motor vehicle registration KSK 098 pickup was trying to overtake the vehicle ahead of it hence encroaching on the lane that the 1st Appellants were in as result of which, the two vehicles collided.PW2, **John Njenga** who was also in the vehicle corroborated the evidence of PW1 that the 1st Appellant had encroached on the lane of the oncoming vehicles causing the accident that happened in the middle of the road. PW3, **Catherine Musembi**, a police officer adduced evidence in court to the effect that there were people who were injured including the 1st Respondent herein She claimed that she did not investigate the matter since she was not the investigating officer but averred that the circumstances surrounding the accident are recorded in the O.B. which O.B she produced in court. She testified that according to the O.B the KSK 098 pick up hit the KAT 394B and opined that the KSK 098 pick up was to blame for the accident.
6. The defence also adduced evidence by calling DW1, **Sergeant Alphonse Mwandigi** who testified that the accident did happen on the material day and according to the O.B, the 2nd respondent was overspeeding. He added that the impact was on the lawful lane of the Appellants and he concluded by saying that the Appellants were not to blame. The driver of motor vehicle KAT 394B, one **Josphat Mwaura Kimani**, also testified that the 2nd respondent encroached on his lane and that he could not swerve since there was a river on one side and another on coming vehicle on the other lane, the best he could was to apply the brakes which he did, but due to the 2nd Respondents excessive speed, the two motor vehicles collided.
7. Looking at the evidence adduced in court, it is clear that although the Appellant is alleged to have left his lane while negotiating a corner, the accident occurred on his lawful lane and not on the oncoming lane as per DW1's evidence. If the accident occurred on the oncoming traffic lane, then

liability would equally lie with Appellants but that was not the case. I note that the Trial Magistrate ruled out the evidence by the two Police Officers due to lack of a sketch map that would have shown the point of impact. However, even in the absence of sketch maps, the evidence of the witnesses and according to O.B extract produced in court there is inference that the 2nd Respondent was overtaking when the it was not clear to do so. It is also claimed that there was a chance that he was over speeding, I find this argument to be valid for the reason that, if he was not overspeeding he would have easily reverted to his lane upon seeing the 2nd Appellants motor vehicle but he instead rammed into him.

8. The trial Court seems not to have attached much weight to the Appellant's witnesses testimonies and that of PW3 regarding the cause of the accident upon which the claim was based. Had the Court addressed itself fully to the versions on how the accident occurred it would have found out that the Appellant was to be believed and that he had proved the aspect of negligence on the part of the 2nd and 3rd Respondent in the circumstances of the case. The upshot is therefore that the trial Court, with respect, came to a finding that was not in accordance with the evidence on record. The Court was in error to hold that the Appellants were to be held 40% liable. The Court ought to have found instead, that the 2nd Appellant had proved his case on a balance of probabilities and should have instead attributed the entire liability to the 2nd and 3rd Respondents.
9. I however wish to point out that I do not fault the Trial Magistrate for dismissing the suit against the 1st Appellant. I have perused the court record, including the exhibits, that is the police abstract, copy of records by Registrar of Motor Vehicles and the also the proceedings . It is clear that the decision behind the dismissal of the case as filed against the 1st Appellant was because he was neither the driver nor the owner of KAT 394B. It was therefore uncertain how he ended up as a party in the suit since the driver of the vehicle was one **Josphat Mwaura Kimani** contrary to the averments by the 2nd Appellant that the 1st Appellant was the driver at the time of the accident. This driver was not enjoined in the suit hence the dismissal.
10. In the end, I find that the 1st Respondent did not prove his case against the Appellants but proved his case on balance of probabilities against the 2nd and 3rd Respondents. I hereby set aside the judgement of the lower court as against the Appellants and hold the 2nd and 3rd Respondents wholly liable for the accident. The 1st Respondent and the Appellants to have costs of the suit and that of the appeal. The file to be remitted back to the trial court for assessment of damages.

Dated, Signed and Delivered in open court this 27th day of My 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellants

..... for the 1st Respondent

....for the 2nd and 3rd Respondents