



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL 671 OF 2012

VICTOR MURIUKI KAROBIA APPELLANT

VERSUS

MARTIN INGECHA WAMBURU RESPONDENT

(From original conviction and sentence in criminal case Number 420 of 2009 in the Chief Magistrate's Court at Thika - Before D.A. Orimba on 6th November, 2013)

JUDGMENT

The respondent was the plaintiff in the lower court while the appellant was the defendant. The respondent is said to have been involved in a road traffic accident that took place on 7th October, 2008 along Nairobi - Thika Road.

He was a passenger in motor vehicle registration No. KAX 311E owned and driven by the appellant at the time of the accident. He blamed the accident on the negligence of the appellant. The appellant denied the allegations of negligence on his part and stated that the accident was caused by another unidentified motor vehicle that swerved abruptly onto the lane he was driving along, whereupon he was forced off the road to avoid a collision.

He also stated that notice of intention to sue was never given. After the full trial the magistrate found that the appellant was liable to the respondent to extent of 100% and went ahead to award the respondent a sum of Kshs. 300,000/= general damages and Kshs. 2,200/= special damages.

Aggrieved by the said judgment the appellant filed this appeal. The trial magistrate is faulted for finding that the respondent was injured as a result of the alleged accident when there was no report to the police regarding the alleged injury. He was also faulted for failing to give any weight to the fact that there appeared to be two contradictory police abstract issued in connection with the same accident. Finally, it is contended that the magistrate erred in the assessment of damages awarded.

The record shows that the respondent gave evidence and called six witnesses including himself while the appellant did not call any witnesses.

In this appeal, both parties have filed written submissions which I have read. As the 1st appellate court, it is my duty to consider the evidence adduced in the lower court, evaluate the same and come to independent conclusions. This I have done.

In finding for the respondent the magistrate had this to say,

“The plaintiff testified and called 5 witnesses. The witnesses have given an account of how the accident occurred. The defendant did not call any witness, the evidence by the plaintiff was therefore not challenged by any witness from the defence.

The plaintiff testified that he had repaired the defendant’s motor vehicle near Safari Park hotel and the defendant therefore offered to give him a lift to Thika town together with P.W. 2 who was the plaintiff’s assistant in repairing the defendant’s vehicle. He was therefore lawfully travelling as a passenger in the defendant’s said motor vehicle when the accident occurred. This was not disputed in the statement of defence filed herein.

There is no dispute that an accident occurred on the material day. It is also not disputed that out of the said accident the plaintiff sustained injury. The motor vehicle..... belongs to the defendant. It is further stated which is not disputed that the said motor vehicle was being driven by the defendant at the time of the said accident.....From the evidence on record, this court finds the defendant liable to compensate the plaintiff for the injuries sustained. I therefore hold the defendant 100% liable.”

The accident in which the respondent was said to have been injured was reported at Ruiru Police Station and received by P.C. Odera. This police officer was called as P.W. 5 in the lower court proceedings. He produced the police file Exhibit 5 which contains a copy of the police accident abstract, the OB entry and the investigation diary. He is also said to have produced Exhibit 3 which is yet another police accident abstract.

When an accident takes place and reported to the police station, it is expected that there shall be an OB entry whose particulars would tally with the entries in the police accident abstract. The duplicate of the police accident abstract No. 0109538 dated 19th May, 2005 contains some material particulars which tally with the OB entry and the investigation diary in the same file Exhibit 5.

In particular, it mentions the motor vehicle registration NO. KAX 311E and the owner Victor Muriuki Karobia who is the appellant herein. It also has the particulars of the insurance company that covered the said motor vehicle, the policy number, commencement date and expiry date. More importantly, it has the names of persons injured in the said accident. These are Victor Muriuki Karobia, classified as the driver, John Ngecha and James Njuguna classified passengers.

The OB entry and investigation diary contain the names and classification of the three people named above. The other police accident abstract said to have been produced by the same officer as Exhibit 3 bears number 0139283 and is dated 17th March, 2009. It also bears the particulars of the said motor vehicle and the owner. It also has the same insurance particulars. The name of P.W. 5 PC Odera is also contained in that abstract. Curiously however, it has only the name of the respondent as the injured person classified as a passenger. There are no other names.

In his evidence in chief, the respondent said that after repairing the appellant’s motor vehicle he and his apprentice, one Eric Ochieng, got into the motor vehicle driven by the appellant towards Thika. After the accident, he was injured. Eric was also injured and one Pastor Matiba who from the evidence of the respondent, was a friend of the appellant was also badly injured.

It would be expected that the names of these people would be contained in police accident abstract Exhibit 3 but which is not the case. P.W. 5 PC Odera said in his evidence that he received a report of the accident and went to scene. Part of his evidence reads as follows,

“I found M/V Reg No. KAX 311Q Toyota Corolla driven by Karobia which had lost control and as a result the driver and two passengers’ sustained facial and hand injuries. I found the driver at the scene. The two passengers had already been rushed to hospital. The vehicle lost control. It is a driver who gave me the information on the passengers and he gave the names as John Njuguna and one Igecha. The accident was self involving. The injuries were bruise according to the driver. I later entered the information on the OB

I later issued a police abstract No. 0102518 to driver. Igecha No. 0139283. The nature of injury is given as grievous harm.”

Under cross examination he said as follows,

“I visited the scene. I talked to a person called Karobia at the scene. He told me about the passengers and the injuries. The injured are Muriuki, Karobia, John Igecha, James Njuguna. The extract shows the names. There is no Martin Igecha Wamburu on the OB abstract. According to the OB Martin Igecha was not injured. I do not know of an OB abstract relating to Martin Igecha. The 0109538 police abstract in the file was issued by me and shows that the injured were Victor Karubia, John Igecha, and James Njuguna. (Shown another abstract for the plaintiff). It is not me who issued this abstract. An OB can be issued by any officer if the details are in the OB. If the details are not in the OB it is not possible to issue an abstract. “

It has not been easy to determine whether or not the respondent was injured in this accident leading to these proceedings. This is because of the production of two police accident abstracts; one contained in the police file Exhibit 5 and the other produced as exhibit 3. The one produced in Exhibit 5 and which P.W. 5 P.C. Odera confirms he issued is in all material particulars tallying with the OB entry and the investigation diary.

It bears serial no. 0109538 and dated 19th May, 2009. Exhibit 3 on the other hand, bears serial No. 0139283 and is dated 17th March, 2009. It does not tally at all with the OB entry and the investigation diary. In relation to the dates of issue of the two documents, one would expect that the one issued earlier, in this case exhibit 3 on 17th March, 2009 would have a serial No. earlier than the one issued later in this case, the one issued on 19th May, 2009. It is curious that the reverse is the case here.

It is clear to me that there is more than meet the eye in the entire proceedings. Notwithstanding the evidence presented by the respondent in these proceedings, I have come to the conclusion that he was not in the appellant’s motor vehicle and if he was, then he was not injured. The police records are against him.

I may be wrong, but I believe I am right. If it is true that he sustained the injuries complained of, the assessment of damages by the learned trial magistrate was correct. There was no evidence that she relied on wrong principles in doing so and in any case, comparable cases confirm the award was within the correct range.

That notwithstanding, I find that this appeal must succeed. It is therefore allowed with costs to the appellant.

Dated, signed and delivered at Nairobi this 13th Day of June, 2016.

A.MBOGHOLI MSAGHA

JUDGE