



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. 94 OF 2012**

**SHENGLI CONSTRUCTION CO. LTD.....APPELLANT**

**VERSUS**

**SERAH WAIRIMU MUTHAIGA.....RESPONDENT**

***(Being an appeal from the judgment and decree of the Honourable D.G. Kimani Senior Resident Magistrate in Gatundu SRMCC 6 OF 2010)***

**JUDGMENT**

The appellant herein had been sued by the Respondent who sustained injuries following a road traffic accident along Thika Road on 15<sup>th</sup> November 2009. The Appellant's motor vehicle, Registration Number KBJ 239J driven and/controlled by the Appellant's driver and/or agent hit the motor-vehicle Registration Number KAU 420M she was lawfully travelling in thereby occasioning her injuries. The Respondent contended that the said motor vehicle was so carelessly or recklessly driven, managed and/or controlled such that it went out of control, veered off the road and hit KAU 420M while it was still in motion.

The Respondent therefore filed suit against the appellant praying for general as well as special damages.

The appellant filed a statement of defence denying the claim and contending that if the accident occurred as alleged, then the same was wholly occasioned and/or substantially contributed to by the negligence of the driver and/or owner of KAU 420M for which it would take out third party proceedings against. The appellant therefore prayed for the dismissal of the suit as against it.

After a full trial, Judgment was entered in the lower court for the Respondent. Aggrieved by the orders made in the said judgment, the appellants lodged this appeal citing the following grounds in their memorandum of appeal dated 8<sup>th</sup> March 2012 –

- i. That the learned Magistrate erred in law and fact in by holding the Appellant liable for acts of a driver of a third party yet the appellant did not have direct contact with the Respondent;
- ii. That the learned Magistrate erred in law and fact in disregarding the police abstract tendered in court which was prepared by the police officers who investigated the accident;
- iii. That the Learned Magistrate erred in law and fact in disregarding the findings of the police officers who investigated the accident which was wholly blamed on the third party;

- iv. That the Learned Magistrate erred in law and fact by not taking into account the Plaintiff's admission that the third party's driver was to be taken to court the following day;
- v. That the Learned Magistrate erred in law and fact by disregarding the police abstract in court by Appellant's witness and assuming the role of the investigating officers
- vi. That the Learned Magistrate erred in law and fact in failing to acknowledge that the police abstract tendered by the Respondent contradicted the contents of the Occurrence Book, was not conclusive and was prepared by an officer who did not investigate the accident.

The appeal was heard by way of written submissions. Those on behalf of the Appellant were filed on 29<sup>th</sup> September 2015 while the Respondent's were filed on 6<sup>th</sup> August 2015.

The obligation of this court after having heard the rival arguments is to reconsider the evidence afresh and make its own conclusion taking into account the trial court had the advantage of seeing and hearing the witnesses. The Appellant called a Police Officer (DW1) working at the police station where the accident was reported (Ruiru Police Station). The Respondent on the other hand is the one who testified and was the only eye-witness to the accident.

This means that the appellant, apart from denying liability in their defence, attempted to rebut the evidence of the Respondent using the evidence of DW1. However, DW1 was neither an eye-witness to the accident nor did he investigate it. He was actually at pains to explain how the police station issued two police abstracts with conflicting information.

The Respondent, an eyewitness to the accident, adduced evidence on how the accident occurred. This was sufficient to point to negligence on the part of the Appellant as motor-vehicles don't ordinarily veer off the road and hit other motor-vehicles. The evidence adduced by the Appellant to rebut the testimony of the Respondent was not sufficient as the driver of the KBJ 239J was not called to testify. In its defence, the Appellant in the lower court attributed negligence to the driver of KAU 420M but failed to take out third party proceedings against him. It was therefore justifiable and accurate for the Learned Magistrate to attribute 100% negligence on the Appellant.

In the end the entire appeal fails. The decision of the Learned Magistrate is upheld in every respect.

The Respondent shall have the costs of the appeal and the suit in the lower court.

Orders accordingly.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of July, 2016.**

**A.MBOGHOLI MSAGHA**

**JUDGE**