



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 635 OF 2004

PETER WANDERI MWANGI

CECILIA WANJIKU WANDERI

FRANCIS KIMANI

JAMES MALESHE.....APPELLANTS

VERSUS

KENYA BUS SERVICE LTD

ALFONCE WATUKA KIITI.....RESPONDENTS

(Appeal from the original judgment and decree of Hon. Mrs. H. A. Omondi (P.M.) in Milimani Commercial Court CMCC No. 12993 of 2003 delivered on 28th July, 2004)

JUDGMENT

1. The Appellants' allegations against the Respondents before the trial court were that they were on 7th October, 1989 travelling aboard motor vehicle registration number KLS 745 along Nairobi - Thika road when the 1st Respondent's motor vehicle registration number KXX 708 which the 2nd Respondent drove negligently violently collided with Motor vehicle KLS 745 as a result of which the Appellants sustained injuries as follows:-

1st Appellant

- Fracture of the distal end of the radius left hand with dislocation of the wrist.
- Cuts on the face, extending across the left eyelid
- Injuries to the chest.

2nd Appellant

- Fracture of the left tibia mid-shaft.
- Laceration on the right side of the forehead.

3rd Appellant

- Head injury leading to unconsciousness for over 24 hours right frontal lobe, with contusion of the right frontal lobe.

- Injury to the left hand.

4th Appellant

- Head injury with loss of consciousness for three days.
 - Cuts on the forehead, right cheek and lower lips
 - Loss of three upper teeth and two chipped lower teeth
 - Injury to both knees.
2. It was alleged that one of the claimants in the trial court case died as result of the said accident. For purposes of this appeal, evidence with that regard shall not be delved into.
 3. The Appellants also claimed special damages of KShs. 8,985/=, KShs. 5,920/=, KShs. 33,018/= and KShs. 22,072/= respectively.
 4. The Respondent filed a statement of defence in which it admitted the occurrence of the accident but denied that the accident was solely or in the alternative substantially caused by the negligence of the driver of motor vehicle registration number KLS 745. It was also contended that the Appellants suffered no injuries or loss as alleged.
 5. On trial, the 1st Appellant (PW1) recounted that safari park hotel, a Kenya bus carelessly got onto the road from the bus stop and entered into their lane. Their driver swerved towards the bus stop but unfortunately the bus had seen the vehicle and stopped such that the bus was partly into the left hand side and partly on the bus stop. Motor vehicle KLS 745 then collided with the bus. He stated that he lost consciousness and found himself at M.P. Shah hospital where he was admitted for five (5) days. He produced treatment documents as P. Exhibit 1 and 2. He stated that he was issued with a police abstract (P. Exhibit 3). He produced medical reports as P. Exhibit 5 and 6 and receipts for medical expenses as P. Exhibit 7. The 1st Appellant alleged that he gave evidence at the inquest No. 73 of 1990 but does not agree with its findings that the driver of KLS 745 rammed into the rear of the bus while stationary.
 6. The 2nd Appellant (PW2) testified that while approaching the bus stop after passing safari park hotel, Kenya bus moved out of the stage onto their lane. Their driver swerved to avoid it and hit the rear part of the bus. He lost consciousness which she regained at Kenyatta National Hospital. She was transferred to M.P. Shah hospital where she was admitted for five (5) days. She stated that she sustained an injury on the leg, deep cut on her forehead and hands. She produced a p3 form (P. Exhibit 9), and medical reports by Dr. Shame and Dr. Kodwalla (P. Exhibit 10 and 1B respectively). She also produced receipts for medical expenses as P. Exhibit 11. It was her testimony that she had not fully recovered from the injury to her leg since it was painful and the scar on it was numb and painful.
 7. The 3rd Appellant (PW3) testified that when they had just passed safari park hotel, a bus pulled out to the road and KLS 745 rammed into the bus. He thereafter lost consciousness and found himself at Nairobi Hospital. He was admitted on 7th October, 1989 and discharged on 12th October, 1989. He stated that he had a head injury and had to go for further follow up at medical injury and therapeutic centre. He also stated that his finger had an injury. He produced a report from Medical Injury Unit as P. Exhibit 12, a police abstract (P. Exhibit 13), p3 form (P. Exhibit 14), medical report by Dr. Kodwalla (P. Exhibit 15) and receipts for medical expenses (P. Exhibit 16). He stated that the bus driver was liable for the accident by entering the road while there was a vehicle on the right hand lane. He stated that their driver therefore had to swerve to the left but the bus stopped he rammed into it.
 8. Daniel Mulwa Kazoo (DW1) who stated that he was at the material time the conductor of KXK 708 testified that he heard a sound at the rear of the bus and alighted to go and check. He stated that KLS 745 was under the bus and that it rammed into their bus while it was stationary. He stated that the driver of KLS 745 had died and passengers aboard the said vehicle were injured. He denied that the bus was driven at a high speed and stated that it was still stationary as passengers were still alighting. On cross examination he stated that he did not witness the collision but only heard a sound. He stated that the part of the front side and driver's side of KLS 745 was severely damages. He also stated that KXK 708 was roadworthy.
 9. The trial court heard the matter and apportioned liability between the driver of KLS 745 and the

- Respondent at the ratio of 60:40. She awarded damages subject to liability to the 1st, 2nd and 3rd Appellants respectively at KShs. 72,000/=, KShs. 60,000/= and 140,000/=. Specials were awarded as prayed.
10. Being dissatisfied with the decision of the trial court, the Appellant filed this appeal on the following grounds:-
- i. ***That the magistrate erred in law and fact by apportioning liability between the Appellants and the Respondents while the Passengers were in the accident motor vehicle.***
 - ii. ***That the magistrate erred in law and in fact in holding a third liable whilst no third party proceedings were taken out by the Respondents.***
 - iii. ***That the judgment of the learned trial magistrate on liability was against the weight of the evidence on record.***
 - iv. ***That the magistrate erred by arriving at her decisions on liability on assumptions not supported by evidence on record.***
 - v. ***That the learned magistrate erred in law and fact in disregarding and failing to appreciate the evidence addressed, thus failing to arrive at her decision on the issue of liability in a judicious manner.***
11. This being a first appeal I am guided by the principle laid in **Selle v. Associated Motor Boat Co. Ltd 1968 E.A. 123.** I therefore am required to re-evaluate the evidence, assess it and make my own findings and conclusions though remembering always that unlike the trial Court, I did not have the benefit of observing or hearing the witnesses during the trial.
12. This appeal was canvassed by way of written submissions. It was the Appellant's submission that the Respondent's vehicle as per the Certificate of Examination and Test of Vehicle No. VT No. 265866 was found to be defective and unroadworthy and should not have been on the road. It was stated that the Appellant's testimony revealed the 2nd Respondent's negligence that he drove into KLS 745 lane. The Appellants faulted the sketch that indicated that the bus was moved 19 feet by KLS 745 which was a small car. It was the Appellants took issue that the 2nd Respondent did not testify and submitted that their evidence that KXK 908 pulled itself into the road blocking the route of KLS 745 was not challenged. The Appellants relied on **Muraya v. Mwangi (2004) eKLR** in illustrating whether a driver who has taken sudden evasion action to avoid an accident can be found liable for the eventualities. **Halsbury's Laws of England 4th Edition Vol 3** was quoted in the said case stating that "***driving a defective vehicle where the defects might reasonably have been discovered is a negligent act.***"
13. It was submitted that the standard to be applied on a prudent driver as observed in **Embu Public Road Services v. Riimi (1968) EA 22** quoted in **HCCA No. 705 of 2003 Boniface Waiti & Another v. Michael Kariuki Kamau** are; the was a probable cause of accident; the explanation should be consistent with the absence of negligence and it has to be shown that although perfect action is not expected of the driver, nonetheless he has to show that the emergency was so sudden and he could not have taken any amounts of corrective measure expected of a competent driver.
14. The Respondent on the other hand contended that liability was not apportioned between the Appellants and the Respondent. That the second ground fails since the trial court did not hold that a third party was liable for the accident. It was contended that Appellants did not prove that the trial court misapprehended the evidence that was presented before her.
15. I have considered the submissions of the parties, the only issue in contention is liability.
16. The particulars of negligence pleaded by the Appellants were that the 2nd Respondent was driving too fast in the circumstances, driving onto the wrong side of the road thereby colliding with KLS 745, failing to keep any or proper look out or to have sufficient regard for other traffic particularly on coming traffic, failing to have or to keep any proper control of the said vehicle and failing to stop, slow down, to swerve or in any other way so to manage or control the said vehicle as to avoid the said collision. Despite such serious allegations the Respondent opted to bring DW1 who was not blamed for the accident rather than the 2nd Respondent. To my mind such allegations having been made against the 2nd Respondent, it was incumbent to testify to controvert the Appellant's version of the story or explain how the accident occurred. It is not clear from the record why the Respondent failed to call such a crucial witness. It is a presumption in the law of

evidence that a party who has in his possession evidence which he fails to call, that evidence is presumed to have been adverse to him. It was never suggested that the driver could not be traced to clarify the issues. In the absence of such an explanation, my view is that the driver of the subject motor vehicle should have bore much more liability. Secondly, the Respondent in its statement of defence denied the Appellants' claim as to liability stating that the driver of KLS 745 was wholly or in the alternative largely to blame for the accident. It was again incumbent on the Respondents to lodge third party proceedings which they failed to do. In the circumstances I find and hold that the Respondents were 100% liable for the accident. In view of the foregoing, I find that the trial magistrate erred in apportioning liability while the Respondents lodged no third party proceedings.

17. I have noted that the trial court failed to award damages to the 4th Appellant. That must be so because he tendered no evidence at all. I find that the 4th Appellant's claim does not stand for failure to tender evidence. I therefore proceed to the issue of quantum. I have considered the law with regard to the award of damages particularly as laid down in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where it was held as follows:-

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)

I see no reason to interfere with the award of damages since no wrong principles were acted on in so awarding. The 1st 2nd and 3rd Appellants are therefore awarded general damages of KShs. 180,000/=, KShs. 200,000/= and 350,000/=. Special damages stands as awarded by the trial court. Plus costs and interest at court rates. Orders accordingly.

Dated, Signed and Delivered in open court this 13th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

N/A for the Appellants.

Miss Thuo h/b for Ochieng for the Respondents.