



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 133 OF 2010

WILFRED O. OBWOCHA.....APPELLANT

VERSUS

DOUGLAS NYAKUNDI.....RESPONDENT

JUDGMENT

Introduction

1. The appeal herein arises from the judgment and decree of Hon. R.M.J. Macharia in Nyamira SPM NO. 83 of 2008, delivered on 3rd day of June, 2010. The appellant herein Wilfred O. Obwocha is aggrieved and dissatisfied with the trial court's finding that he was 100% liable for the accident which allegedly occurred on 26th day of April, 2008 along Nyamira-Mokomoni road at Mokomoni area and the judgment in favour of the respondent and against the appellant for kshs. 233,500 plus costs and interest of the suit. The appellant filed the following six (6) grounds of appeal:-

1. *That the learned trial magistrate erred in law and fact in deciding the case in favour of the plaintiff against the weight of the evidence tendered in court.*
2. *That the learned trial magistrate erred in law and fact by holding the appellant to be 100% liable for the alleged accident.*
3. *That the learned trial magistrate erred in law and fact by condemning the appellant to pay kshs. 230,000/- when no case was properly proved against him.*
4. *The learned trial magistrate erred in law and fact by failing to appreciate the relevant provisions of the law that the driver of the alleged motor vehicle was not a party to the suit before passing the judgment.*
5. *That the learned trial magistrate erred in law and fact by denying the appellant sufficient opportunity to avail the witnesses for his defence.*

2. The appellant is asking this court to allow the appeal with costs and that the respondent's suit in the lower court be dismissed with costs.
3. **The pleadings.**

The respondent filed the plaint in the lower court claiming general and special damages for injuries he sustained in the motor accident.

4. It was the respondent's case that the appellant was the owner of motor vehicle registration KAJ 467E, a Mitsubishi canter which was negligently driven along Nyamira-Mokomoni road where the respondent was a lawful passenger in motor vehicle registration No. KAJ 467E when he appellant's driver and/or/agent/servant so negligently controlled and/or managed motor vehicle

registration No. KAJ 467E that he caused the same to violently overturn and by reason of which the plaintiff sustained injuries and suffered pain, loss and damage. He claims that by reason of the said accident, the respondent suffered pain, loss and damage.

5. The appellant filed a defence denying each and every allegation contained in the plaint. The appellant in his defence also denied ownership of the motor vehicle KAT 407E, Mitsubishi canter and also denies that there was an accident on 26th April, 2008 on any other date of at all along Nyamira-Mokomoni road as alleged in paragraph(4) of the plaint and particularly all the alleged particulars of negligence of the defendant's driver, servant or agent as set out in paragraph 4(a) to (g) therein the respondent was therefore put to stick proof of all the averments that were made in the plaint and the respondent was blamed of being negligent thus wholly or substantially to blame for the accident. Particulars of negligence were itemized.
6. **The respondent's case.**

At the trial, the respondent(PW1) told the court that he was hired to load firewood on the vehicle KAJ 467E to Kegogi to take the firewood to Kebirigo Factory. Due to overloading the vehicle was unable to go uphill, instead it reversed. Efforts to stop the reversing by the driver and the conductor failed, the vehicle overturned and lay on the respondent's legs. He suffered injuries to his right hip joint which was fractured and suffered chest injuries. He also suffered injuries on both knees. He was admitted to Namira hospital for 4-5 days. He reported the accident to Nyamira police station. Dr. Ajuoga wrote a medical report for which he paid kshs. 3,500/- for medical examinations of which the receipt was given.

7. He blames the owner, the appellant for not maintaining the conditions of the vehicle, especially the brakes. He also blamed the driver for not controlling the motor vehicle but running away as the vehicle reversed backwards.
8. On cross examination, the respondent said the appellant knew that he was to be hired as he would hire him occasionally.
9. PW11- confirmed that the respondent was admitted to Nyamira District Hospital on 26th April, 2008 and discharged on 30th April, 2008 with a fracture of the hip-joint.
10. PW11- Dr. Ajuoga, he confirmed bruises and lacerations in the lower body of the respondent. He also had fracture on the pelvic bone. He also had bruises on the left palm and both legs.
11. **The appellant's case.**

DW1- the appellant testified that the respondent was not his worker. That his motor vehicle was used to transport bricks and other things. He denied that the respondent was injured on material day. Under cross-examination he admitted his motor vehicle was involved in an accident on material day, but his driver whose name he could not recall did not mention he respondent's name. The abstract however, indicated that the plaintiff(respondent) was a passenger in the lorry.

12. DW11- a clinical officer, at Nyamira District Hospital. He confirms that the respondent was admitted at Nyamira District Hospital with a fracture of Hip-joint and soft tissue injures and that he stayed in hospital for (4) days.

13. First Appeal.

This is a first appeal. As the first appellant court, this court is under duty to reconsider and evaluate the evidence a fresh with a view to reaching its own conclusions in the matter. It is to be remembered however, that this court neither saw nor heard he witnesses who testified during the trial. The court must therefore act with circumspection before concluding that the judgment of the trial court is to be overturned. See **Selle & Another –vs Associated Motor Boat Co. ltd & Others(1968) E.A. 123.**

14. Analysis of the Evidence and issues for determination.

After carefully analyzing the evidence on record, I find that there is no dispute that an accident occurred along Nyamira-Mokomoni road at Mokomoni area. It is also not in dispute that the said motor vehicle registration No. KAJ 467E belonged to the Appellant.

