



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO 87 74 OF 2013

(FORMERLY NYERI HC CIVIL APPEAL NO 36 OF 2010)

(APPEAL FROM THE DECREE PASSED ON 24/02/2010 IN MURANG'A PMCC 199 OF 2008 – J. GATHUKU, RM)

DAVID NDUATI WAMBIRI _____

PAUL KURIA WAMAE.....APPELLANT

VERSUS

CAROLINE MUTHONI KABAE.....RESPONDENT

A M E N D E D J U D G M E N T

(Amended by Order entered on 15/07/2015)

1. The Appellant herein was the plaintiff in the court below. His claim against the Respondent (defendant) was in negligence. He sought general and special damages in respect of personal injuries received in a road traffic accident involving motor vehicle KAB 562 H which he was driving and the Respondent's motor vehicle KAW 591 N that was being driven by her servant or agent. His case was that his motor vehicle was hit from behind by the other motor vehicle causing it to veer off the road and overturn. Both vehicles were being driven in the same direction, one following the other, along Makuyu-Murang'a road. After a full trial the lower court dismissed the Appellant's case with costs. The Appellant then appealed to this court.
2. The grounds of appeal relating to the finding on liability are that the trial court erred in finding that the Appellant had not proved to the required standard the alleged negligence of the Respondent's driver; that the court further erred in holding that the Appellant was under a duty to call the police officer who investigated the accident to produce the police file whereas there was other sufficient evidence proving the Respondent's driver's negligence; and that the judgment was against the weight of evidence on record.
3. An order was entered for the appeal to be heard by way of written submissions. The Appellant filed his submissions on 01/12/2014 while the Respondent filed hers on 25/02/2015. The respective Advocates for the parties subsequently made oral submissions. I have considered those submissions, including the cases cited. I have also read the testimonies of the witnesses in order to evaluate on my own the evidence placed before the trial court. Finally, I have read the judgment of the trial court.
4. In dismissing the Appellant's claim the trial court stated in its judgment as follows *inter alia* -

“This claim is the subject matter of an accident which was subject to another...Civil Suit 520/2007 which was heard and determined in this court. There the court found no liability against the defendant, the main reason being that though there was sufficient evidence that the defendant (was)...negligent in driving motor vehicle KAW 591 N...the plaintiff failed to discharge his onus of proof that the defendant’s agent was negligent. No police file was obtained and the investigating officer was not called. Likewise in the present suit, although P.C. John Kuria testified that he had gone to the scene at around 9.30 pm and was involved in the investigations, he gave no measurements and neither did he produce a sketch plan.

Even though the witness was not the investigating officer, there was no reason why the police file could not be produced taking into account that it was claimed that one Joseph Kibunja the driver had been charged with the offence of careless driving. At the same time, the matter was still pending in court and at the time of the trial it had not been concluded. This means that the proceedings were not available.

It then means that with insufficient evidence that the defendant’s agents or driver was careless or negligent how can any blame be attached to her? I find that I am unable to attach any liability on her part”.

5. Of course it was the duty of the Appellant to establish on a balance of probabilities the alleged negligence of the driver of the Respondent’s motor vehicle. Although evidence from the police investigation of the accident would have been useful, that was by no means the only evidence that could have established such negligence. From the pleadings of the parties and the testimonies of the witnesses, there appears to be no dispute at all that the Appellant’s motor vehicle was hit from behind by the Respondent’s motor vehicle as both were being driven in the same direction. The particulars of negligence of the Respondent’s driver alleged in the plaint included that he was driving too fast in the circumstances without keeping a proper look out and without due care and attention; that he failed to brake in time or at all in order to avoid the accident; and that he failed to slow down, stop or swerve or otherwise so control his motor vehicle in order to avoid hitting the Appellant’s motor vehicle.

6. In her statement of defence the Respondent counter-alleged negligence on the part of the Appellant, the particulars pleaded being that he ventured into the road and abruptly stopped in the middle of the road without and any or proper look out and without due regard to other road users.

7. The Appellant and his passenger testified (PW3 and PW4 respectively). Their testimony was that as they drove along heading to Nairobi their vehicle was hit from behind by the other motor vehicle causing their vehicle to overturn. They also testified that the police were called to the scene; they investigated the accident and subsequently the Respondent’s driver was charged with the offence of careless driving, though at the time of trial the traffic case had not been concluded. A police officer (PW2) similarly testified. When PW3 and PW4 were cross-examined by the Respondent’s advocate, it was not put to either of them that their motor vehicle suddenly veered into the road and/or stopped in the middle of the road as alleged in the statement of defence, thus causing the Respondent’s driver to hit it from behind. If that was intended to be a serious defence, why were PW3 and PW4 not challenged in cross-examination on that point at all?

8. It is also to be noted that the Respondent never called her driver to testify. The evidence laid before the trial court by the Appellant to the effect that his motor vehicle was hit from behind by the motor vehicle following him, was *prima facie* evidence of negligence on the part of the driver of that following motor vehicle. In those circumstances the Respondent was under a duty to call her driver to explain from his perspective how the accident occurred, and to provide evidence of the alleged negligence of the Appellant pleaded in the statement of defence. That requirement would not have shifted the overall burden of proof from the Appellant to the Respondent: the Appellant was still under a duty to discharge his burden of proof. By laying before the trial court evidence that he was hit from behind by the motor vehicle driving behind him, and without any offer of explanation by the Respondent how her motor vehicle came to hit the Appellant’s motor vehicle from behind, the Appellant discharged his burden of

proof. The learned trial magistrate's finding on liability was clearly wrong in fact and in law; it was against the weight of evidence placed before him.

9. As for damages, the Appellant suffered only relatively minor soft-tissue injuries as opined by the doctor who testified (PW1). Had the trial court found for the plaintiff on liability, it would have awarded him general damages of KShs 50,000/00 for pain and suffering. I find no reason to disturb that assessment. Special damages in the total sum of KShs 5,000/00 were proved.

10. In the result this appeal is allowed in its entirety. The judgment of the lower court is set aside. There will be substituted therefor judgment for the plaintiff in the sum of KShs 50,000/00 (general damages) and KShs 5,000/00 (special damages) plus costs and interest. The interest, at court rates, on the general damages will run from the date of the judgment of the lower court, and on the special damages from the date of filing suit. The Appellant shall have costs of this appeal. There will be orders accordingly.

DATED AND SIGNED AT MURANG'A THIS 23RD DAY OF JUNE 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 26TH DAY OF JUNE 2015

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO 74 OF 2013

(FORMERLY NYERI HC CIVIL APPEAL NO 36 OF 2010)

(Appeal from Decree passed on 24/02/2010 in Murang'a PMCC 199 of 2008 – J. Gathuku, RM)

PAUL KURIA WAMAE.....APPELLANT

VERSUS

CAROLINE MUTHONI KABAE.....RESPONDENT

ORDER

15/07/2015

Coram: Waweru, J in chambers

COURT: It has come to my notice that this appeal (**Murang'a HC Civil Appeal No 74 of 2013** – formerly Nyeri HC Civil Appeal No 36 of 2010 – **Paul Kuria Wamae -vs- Caroline Muthoni Kabae**) had been consolidated with **Murang'a HC Civil Appeal No 87 of 2013** – formerly Nyeri HC Civil Appeal No 37 of 2010 – **David Nduati Wambiri -vs- Caroline Muthoni Kabae** - by an order entered on 13/05/2014 in Civil Appeal No 87 of 2013. This fact was not brought to my attention when learned counsels made submissions before me on 09/03/2015.

As a result, I prepared judgment in respect of only one appeal – Civil Appeal No 74 of 2013 – Paul Kuria Wamae -vs- Caroline Muthoni Kabae. But because of mislabelling of the files at the registry, the title of the appeal in the judgment appeared erroneously as Civil Appeal No 87 of 2013 – David Nduati Wambiri -vs- Caroline Muthoni Kabae.

In the circumstances, and by the court's own motion, the necessary amendments to the judgment will be

made under **section 99** of the *Civil Procedure Act, Cap 21*.

A separate judgment will be prepared and delivered in respect to Civil Appeal No. 87 of 2013. It so ordered.

DATED AND SIGNED AT MURANG'A THIS 15TH DAY OF JULY 2015

H P G WAWERU

JUDGE