



IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO 87 OF 2013

(FORMERLY NYERI HC CIVIL APPEAL NO 37 OF 2010)

(APPEAL FROM DECREE PASSED ON 24/02/2010 IN MURANG'A PMCC 520 OF 2007 – J. GATHUKU, RM)

DAVID NDUATI WAMBIRI.....APPELLANT

VERSUS

CAROLINE MUTHONIRESPONDENT

J U D G M E N T

1. This appeal is related to *Murang'a HC Civil Appeal No 74 of 2013 (Paul Kuria Wamae –vs- Caroline Muthoni Kabae)* in that both lower court cases (*Murang'a PMCC No 199 of 2008* and *Murang'a PMCC Case No 520 of 2007*) arose out of the same accident. In fact both appeals had been consolidated for hearing together but some confusion later arose leading to the hearing of Murang'a HC Civil Appeal No 74 of 2013 alone. Judgment in that appeal was delivered on 26/06/2015 – and subsequently amended on 15/07/2015. An order for amendment of that judgment, and for preparation of a separate judgment in this present appeal (HC Civil Appeal No 87 of 2013), was made on 15/07/2015 in HC Civil Appeal No 74 of 2013. A copy of that order was placed in the record of this present appeal.
2. The Appellant herein was a passenger in motor vehicle KAB 562 H (and also the owner thereof) which was involved in the accident with motor vehicle KAW 591 N owned by the Respondent and driven by her servant or agent. Motor vehicle KAB 562 H was being driven by the Appellant in HC Civil Appeal No 74 of 2013.
3. The case of the Appellant herein as far as liability was concerned was the same as the case of the Appellant in HC Civil Appeal No 74 of 2013. They both blamed the driver of motor vehicle KAW 591 N. Both their cases were dismissed by the same trial court for the same reasons. In their respective appeals they advanced the same grounds on the issue of liability.
4. In the amended judgment delivered in HC Civil Appeal No 74 of 2013 this court said the following regarding liability –

“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 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 ventured 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."

5. I make the same finding in this appeal on the issue of liability.

6. Regarding damages the Appellant herein claimed general damages for injuries received, and special damages for medical report and police abstract (KShs 1,700/00); special damages for towing and recovery of motor vehicle KAB 562 H (KShs 3,500/00); costs of assessment of the damaged parts of the vehicle (KShs 5,500/00); and costs of repairs and spare parts (KShs 127,600/00). The Appellant also claimed costs of hiring a taxi for 20 days at KShs 1,400/00 per day (KShs 28,000/00) to take his children to school.

7. The trial court assessed general damages at KShs 50,000/00 for pain and suffering. It also assessed KShs 1,500/00 for the medical report and KShs 3,000/00 for the doctor's court attendance (though ideally this should have been costs!); and KShs 200/00 for the police abstract. The court rejected the claim based on the repair of the motor vehicle upon the basis that the vehicle had been assessed by a motor assessor as irreparable and thus a total loss (and that therefore that was an issue between the Appellant and his insurers). But it allowed KShs 5,500/00 as assessment fee and KShs 5,000/00 for the assessor's court attendance (again this should have been part of costs).

8. For non-user of the damaged vehicle the trial court assessed special damages of KShs 600/00 per day

for ten (10) days (KShs 6,000/00).

9. In his memorandum of appeal the Appellant merely complains that **the award of damages was inordinately low**. There is not any specific complaint regarding any of the various heads. However, I deem it in the interests of justice to deal with the issue of repair charges. Having refused this claim upon the basis that the Appellant's motor vehicle should not have been repaired as it was assessed uneconomic to repair and hence a total loss, the trial court should then have awarded that total loss! That would have been the pre-accident value of the motor vehicle less the salvage value. The assessor's report (Exhibit 9) gave the pre-accident value of the motor vehicle at KShs150,000/00, and the salvage value at KShs 50,000/00. The Appellant should thus have been awarded KShs 100,000/00 for the loss of his car. I will not disturb any of the other assessments by the trial court.

10. In the event, this appeal is allowed. 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 a total of KShs 121,200/00 (special damages), plus costs and interest. The interest, at court rates, will run from the date of judgment of the lower court on the general damages, and from the date of filing suit on the special damages. The Appellant shall have costs of this appeal. There will be orders accordingly.

DATED AND SIGNED AT MURANG'A THIS 6TH DAY OF AUGUST 2015

H P G WAWERU

JUDGE

DELIVER AT MURANG'A THIS 6TH DAY OF AUGUST 2015