



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL NO. 174 OF 2011
ERICKSON OUMA.....APPELLANT
-VERSUS-
SURGIT SINGH
MALKIAT SINGH.....RESPONDENTS

JUDGMENT

1. This judgment was necessitated by the dismissal of Butere Senior Resident Magistrate's Civil Suit No. 165 of 2009 (hereinafter referred to as ***“the suit”***) on 03/10/2011.
2. The trial court's thrust in disallowing the Appellant's claim was informed by the following observations:

“With all the conflicting information contained in the file, the evidence of PW3 and the police file cannot be of help to the Plaintiff's case as the same cannot be relied on.

Without the evidence of PW3 and the police file, the court has only the evidence of the Plaintiff to go by. The Plaintiff's evidence does not tell us much about the vehicle that hit him. What his advocate told him about the vehicle that was involved is basically hearsay and cannot be relied on. Without evidence linking the defendant's vehicle to the accident, the Plaintiff's claim cannot stand.

Consequently I dismiss the Plaintiff's suit with costs.”

3. In contesting the said decision, the Appellant herein preferred four grounds which were tailored as follows:-

“1. THAT the Learned trial Magistrate erred in Law in dismissing the appellant's claim in the wake of evidence.

2. THAT the learned Magistrate erred in dismissing the plaintiff's evidence despite the fact that the Plaintiff had adduced evidence to prove his case on a balance of probabilities.

3. THAT the learned Magistrate erred in Law and Judgment was unfair and biased as against the appellant.

4. THAT the judgment in this case was illegal.”

4. The hearing of the appeal was canvassed by way of filing of written submissions hence this judgment.

5. The role of this Court as the appellate court of first instance is well settled law. This Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278* and *Kiruga –versus- Kiruga & Another (1988) KLR 348.*

6. I have carefully perused the evidence of PW1 and PW3 and noted that the Respondents (then Defendants in the suit) did not tender any evidence. Whereas this Court concurs with the finding of fact of the trial court that the Appellant herein did not see the vehicle which hit him as he was hit from the back and lost consciousness only to regain while undergoing treatment in a health facility, that is not to say there was no evidence touching on the accident vehicle.

7. The evidence of PW3, who was a Police Officer from Ugunja Police Station and who produced the police file, goes a long way to answer what the trial court captured as conflicting evidence. When PW3 was being examined-in-chief he stated as follows:-

“ I have with me file No. AR 46/08. It relates to an inquiry into a serious RTA which occurred on 13/9/2009 at about 9:30 a.m. along Tigare-Saruku Road near Kadhonya's home.

It involved motor vehicle registration number No. KAU 901 V tractor trailer which was hauling a trailer Reg. No. ZA 9370 and a pedal cyclist by the name Erickson Ouma.

From our records the owner of the tractor trailer is one Surjit Singah and Malkiat Singh....

The witness statements were recorded. The pedal cyclist and the driver of the tractor both recorded statements. The driver confirmed he was employed by Surjit Singh and was in the cause of employment with him.....”

8. PW3 went ahead to reiterate the contents of the statements of the driver on how the accident occurred. The driver did not deny that an accident occurred involving the tractor he was driving number KAU 901V and the Appellant herein. The only difference in his statement to the police may have been on how the same occurred, but the defence never availed any witnesses to testify on the aspect. PW3 indeed confirmed that a Police Abstract was rightly issued to the Appellant which he produced together with the Police file as exhibits.

9. On cross examination, PW3 stated that on receiving the initial accident report the Police visited the scene and on return there was an OB entry that indicated tractor trailer number KAW 081V driven by one Hilary Yego as the one which had been involved in the accident with the Appellant. The said Hillary Yego was also arrested and booked in, but for driving without a driving license in respect to KAW 051 Y.

10. PW3 however explained the procedure on what happens when an initial report is made to the Police until the conclusion in a road traffic accident case. He stated in re-examination as follows:-

“After an initial report has been given, investigations start. The initial report is not always correct as the person reporting does not have all the information.

Investigations are done to confirm if the accident happened and who was to blame. The person is then taken to court.

After investigation the tractor was found to be Reg. No. KAU 901V.

The driver recorded a statement at Ugunja Police Station. His name is Dismas Oduori Tawa. He recorded his statement 2 days after the accident.

The name of the driver has been shown in the abstract as Dismas Oduor Tawa. The signal that was sent shows the tractor was Reg. No. KAU 901V.

Looking at the entire file the vehicle that was inspected was KAU 901V and its trailer.

According to the statement of Erickson Ouma he was hit by the left rear wheel. When Hillary Yego was brought in, investigations had not been completed. After investigations we got the correct person to be charged.

That is all.”

11. The foregone evidence of PW3 clearly explains how the driver known as one DISMAS ODUOR TAWA came into play. I have equally perused the Police File and in particularly the statement of the said DISMAS ODUOR TAWA. As stated earlier he admits the occurrence of the accident involving the tractor KAU 901V and the Appellant. It is that vehicle that was taken for inspection. PW3 also confirmed that when the said Hillary Yego was arrested, investigations had not yet commenced. The file was admitted in evidence as an exhibit indeed by the consent of the Counsels then on record. It did contain all the investigations into the accident in issue including the statements recorded from witnesses.

12. Accordingly upon full investigations, it was confirmed that it was tractor registration number KAU 901V which was involved and that the same was being driven by one DISMAS ODUORI TAWA. This evidence was not controverted by the then defence or at all. The investigations likewise settled the issue of the other tractor number KAW 081V. Resulting from the investigations, it is obvious that the information was relayed to the Appellant's Counsel who in turn shared with the Appellant noting that indeed it is the Appellant's Counsel who brought in the Police as a witness. The statement by the Appellant that he was told by his Advocate that it was tractor trailer KAU 901V that caused the accident cannot therefore be said to be far-fetched. To the contrary, it is reasonable and has some sound basis.

13. With a lot of respect to the learned trial court, I do not see how the issue of conflicting information in the Police file and the evidence of PW3 come into play. Indeed the Police file tends to support the Appellant's case as opposed to creating some alleged confusion. To that end, I find that the trial court fell into error in finding that there was no clarity on which tractor was involved in the accident. It is clear that the trial court may not have addressed itself to the contents of the police file which included the witness statements which file was part of the record. Had the court so done, it would have realized that there was indeed ample, credible and sufficient evidence that it was tractor number KAU 901V that caused the accident as a result of which the Appellant was injured. The order dismissing the suit cannot therefore stand and it is hereby set-aside.

14. From the record, it is clear that the tractor KAU 901V was owned by the Respondents and was being driven by then authorized driver during which the accident occurred. Further to the evidence from the Kenya Revenue Authority on the ownership of the accident vehicle, there is also the Police evidence on how the accident was reported through the police signal system. The record states that:-

“In the file there is a signal from Nairobi, Police Provincial Headquarter Nyanza and Police Headquarter Siaya. It reports the accident. It was reported by a driver from Surgit Singh...”

15. This signal clearly shows how the said driver came into the picture and corroborates the driver's statement which partly stated that: -

“.....I reported the matter to my supervisor who came and we helped the side victim and we took him to Mumias St. Mary Hospital where he was admitted and later I reported the matter to Tingare Police Post. The officers then informed traffic police from Ugunja who arrived to the scene and took there measurements. I availed myself to Ugunja Police Base to record my

statement.....” (emphasis added).

16. The said Dismas Oduor Tawa signed his statement at 10:00 a.m. on 15/09/2008 which was two days after the occurrence of the accident, but had reported the accident earlier on.

17. The trial court went ahead and found that had the Appellant been successful in proving his claim, it would have held the Respondent's driver 100% liable and the Respondents so vicariously liable. That was because the Appellant's evidence was uncontroverted. I fully concur with the trial court on the aspect of liability to the extent that the Respondent's driver be held 100% liable and so the Respondents' vicariously liable. I so find.

18. I have also looked at this trial court's analysis of the issue of damages and being guided by the various relevant judicial precedents, I wholly agree with the trial court that an assessment of Kshs. 350,000/= on general damages would serve as adequate compensation. I so also find.

19. The Appellant equally proved that he had incurred Kshs. 14,000/= on special damages which I hereby grant.

20. Consequently, this Court makes the following final orders:

a. The appeal be and is hereby allowed and the judgment delivered on 3rd day of November, 2011 dismissing the suit is hereby set-aside.

b. Judgment be and is hereby entered in favour of the Appellant as wholly against the Respondents jointly and severally for:-

(i) General Damages - Kshs. 350,000/=

(ii) Special Damages - Kshs. 14,000/=

c. Interest on the general damages will run at Court rates from the date of judgment in the suit; that is 03/11/2011 whereas interest on special damages shall run from the date of filing of the suit;

d The Appellant is entitled to the costs of the suit as well the costs of this appeal.

Order accordingly.

DATED and SIGNED at MIGORI this 30th day of October, 2015

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at KAKAMEGA this 25th day of November, 2015.

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JUDGE