



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 134 OF 2009

JOHN KINYANJUI MBUGUA.....1ST APPELLANT

JOSEPH MBUGUA KARIUKI.....2ND APPELLANT

VERSUS

FRANCIS MWANZIA MATATU.....1ST RESPONDENT

PATRICK KITHOME MUTHOKA.....2ND RESPONDENT

BENJAMIN NZANGO KIMUYU.....3RD RESPONDENT

(Being an appeal from the Judgment of Hon A.S. Lesootia – DMII (Prof),

in Kitui Principal Magistrate's Court Civil Suit No. 469 of 2008)

JUDGMENT

1. In the suit before the lower court, the 1st Respondent, Francis Mwanzia Matatu filed suit as the personal representatives of the Late Esther Mumbua Matatu who died on 16/1/2006 while being a passenger in motor vehicle registration number KAQ 192Z Mitsubishi Minibus. The said motor vehicle was involved in an accident with motor vehicle registration No. KAH 688U Mercedes Benz Lorry. The 2nd Respondent, Patrick Kithome Muthoka and the 3rd Respondent Benjamin Nzango Kimuyu were sued as the driver and owner respectively of motor vehicle registration number KAQ 192Z (minibus). The Appellants were sued as the owner and driver of motor vehicle registration number KAH 688U (lorry).

2. The 1st Respondent blamed the accident on the alleged negligent manner in which the two motor vehicles were being driven at the material time. The 1st Respondents claim was for general damages, costs and interest.

3. The claim was denied as per the joint statements of defence filed by the 1st and 2nd Appellant and by the 2nd and 3rd Respondent (Defendant 3 and 4).

4. During the trial, the Respondent's side called three witnesses. Pw1 (Amina Mutia) produced a copy of charge sheet with fifteen counts of dangerous driving which were preferred against the driver of motor vehicle registration number KAH 688U (lorry). The driver of the lorry was blamed for the accident. The proceedings and judgement in CMCC Machakos case no. 5/2006 were produced as exhibits. The lorry driver was convicted in thirteen (13) counts. The deceased, Mumbua Matata died on the spot in the accident. According to pw1, the point of impact was on the left lane as one heads towards Mombasa i.e the correct lane of the mini bus that the deceased was in. Pw1's further evidence was that both motor vehicles were inspected and had no pre-accident defects. No charges were preferred against the minibus driver.

5. Pw2 Elina Ndunge a passenger in the mini bus blames the lorry for over speeding and attempting to overtake in the wrong manner.

6. Pw3 Francis Mwanzia Matatu the uncle to the deceased and the administrator of the estate produced the death certificate as an exhibit. His evidence was that the deceased was about five (5) years old at the material time and was just about to join school.

7. The 2nd and 3rd Respondent (defendant 1 &2) did not adduce any evidence. The 3rd and 4th Defendant called two witnesses. Dw1 John Kinyanjui (1st appellant), the driver of the lorry blames the minibus for the accident. His evidence was that the minibus was moving at a high speed and in a zig zag manner. That he tried to avoid the accident by moving to the right hand side lane but the motor vehicles collided. He denied that he was overtaking at the material time and stated that there was no other vehicle ahead of him.

8. Dw8 John Mbugua Kariuki (2nd Applicant) who was a passenger in the lorry gave evidence that blames the minibus for moving in a high speed and in a zig zag manner and driving in their lane.

9. In his judgment, the Trial Magistrate held the Appellants 100% liable for the accident. Judgment was entered for the 1st Respondent at a sum of kshs. 210,000, costs and interest.

10. The Appellants were dissatisfied with the said judgment and appealed to this court on grounds that can be summarized as follows:

- a. That the judgment was against in the weight of the evidence.
- b. That the Trial Magistrate failed to appreciate that a conviction in a Traffic case does not necessarily mean the convicted driver was negligent.
- c. That the holding of one 100% liability basis was erroneous.
- d. That the Appellants submissions were ignored.

11. This being the first appellate court, the court's duty bound to re-evaluate the evidence on record and come to its own finding. See **Selle -VS- Associated Boat Co. Ltd. [1968] EA 123.**

12. Only the 1st Respondent and the interested parties participated in the appeal. The appeal was canvassed by way of written submissions which I have duly considered.

13. Pw1 produced the proceedings in the CMCC Machakos TR. No. 5 of 2006 where the driver of the truck was convicted of fifteen counts of causing death by dangerous driving. However the said conviction does not bar a civil court from finding the other driver was also guilty of being careless (***see for example Chemwono & Anor -vs- Kusende CA 103/1984***)

However, the evidence of the investigations carried out by the police as per the evidence of pw1 blamed the lorry driver for the accident and gave the point of impact as the middle of the left lane as one heads towards Mombasa direction i.e the correct lane for the minibus. Pw2 was a passenger in the minibus and an eye witness. Her evidence blames the lorry driver for driving at a high speed and overtaking and in the process encroaching on their lane. The evidence of pw1 and pw2 is corroborative.

14. On the other hand, the truck driver Dw1 blamed the minibus driver for driving at a high speed and a in zigzag manner. Dw1 conceded to having been convicted for the offence of causing death. He stated that the minibus moved to his side and he moved to the lane of the minibus. During cross examination, Dw1 did not explain why he failed to move back to his lane when he saw the minibus moving back to its lane. He conceded that the collision occurred on the lane of the minibus.

15. Dw2 who was a passenger in the lorry also gave evidence the blamed the minibus for driving at a high speed and in a zig zag manner. However the evidence of both Dw1 and Dw2 fails to explain why the collision took place on the correct lane of the minibus. According to Dw1 the driver, he was at a speed of about 40kph. His evidence failed to reflect why he could not swerve to his left side.

16. Although the minibus driver was not called as a witness, the evidence on record clearly shows that the collision occurred on his correct lane. Could the minibus driver have avoided the accident by swerving away from the lorry? The evidence of the minibus driver could have possibly shed light on this. I would blame apportion 15% liability to the minibus driver.

17. With the foregoing, the appeal is partially successful. Consequently I subject the judgment of the Lower Court to 15% contributory negligence. The judgment against the Appellant is therefore Kshs. 178,500/=. Appellants will bear 85% of the costs of the appeal.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 21st day of December, 2015

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B. THURANIRA JADEN

JUDGE