



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 177 OF 2011

ARNOLD MUSA MBALANYA.....APPELLANT

VERSUS

JACK AYIMBO.....RESPONDENT

J U D G M E N T

1). The appellant on 6-1-2009 rode on his friend's motor vehicle the respondent herein from Kisumu to Maseno. On the way they were involved in a road traffic accident. He sustained bodily injuries namely:

- (i) Injuries and swelling on the left upper limb.**
- (ii) Deformed left arm.**

He then proceeded to file his claim for compensation but he lost the suit hence this appeal.

In the Memorandum of Appeal dated 21-11-2011 the appellant has attacked the lower court judgment on 4 grounds which can be summarised as follows:

- 1. the trial court erred in finding that negligence was not established against the respondent.**
- 2. that the plaintiff ought to have enjoined the 3rd party, the owner of motor vehicle Reg. No. KAE 066J.**

3). The appellant called two witnesses. PW2 produced medical documents from Maseno Mission Hospital. PW3 the police officer from the traffic department produced the police abstract to establish that an accident indeed occurred. The respondent on the other hand did not call any witnesses.

4). The question that needs to be established is whether negligence was proved against the respondent. It is not in doubt that the appellant was traveling aboard the said motor vehicle. The ownership of the said motor vehicle was not a subject of dispute at the lower court. Neither was the occurrence of the accident an issue.

5). The appellant testified as follows:

“I agreed to take the lift and we left Kisumu at around 7.00 p.m Gilbert drove the car with speed. Near Maseno as we drove uphill, another motor vehicle joined the road from the left side in front of our car. Our car rammed into the vehicle....”

6). On cross examination he maintained that the respondent was speeding. The accident from the evidence on record occurred when another motor vehicle KAE 066J joined the road from a junction. Who was then to blame for the accident? Certainly the respondent was not in control of the vehicle but the driver who had allowed him to hike a lift. Was the driver of the other vehicle negligent? This question could have been answered by the respondent or his driver. There is no evidence to show that he was brought in as a 3rd party. The respondent at paragraph 16 of its defence stated as follows:

“Absolutely and without prejudice to the foregoing and in the alternative, the defendant hereby given notice that he shall apply to enjoin the owner driver, servant, agent or employee to motor vehicle Reg. No. KAE 066J to this suit as on the 3rd party”.

7). This of course was never effected. Contrary to the findings of the trial court, there was no objection for the appellant to bring the 3rd party as a defendant. It was incumbent upon the defendant to bring the said 3rd party in the proceedings to establish its culpability.

8). I do find that the assertion that the respondent was driving at a high speed by the appellant believable. If he was not then he would have rammed into the other vehicle which was joining from the junction. If the accident was caused by the other vehicle then there was nothing difficult in bringing it as a party to the proceedings. Equally, PW3 confirmed that he charged the driver of motor vehicle Reg. No. KBE 884Y with a traffic offence. Prima facie therefore, and regardless of the outcome of the said traffic offence, the traffic police believed that he was on the wrong. I do find that negligence was established against the defendants wholly.

9). My findings are further buttressed by the fact that the respondent hit the other vehicle from behind which shows that it was already properly on the road.

The other issue on quantum was not challenged. I have perused the medical reports as well as the treatment documents produced by PW2. The same supports the injuries. I have also perused the court's finding on quantum and the authorities relied on and I do not see any reason to disturb the same.

In the premise I shall allow the appeal. On quantum I do adopt the trial court's finding and order the appellant to be paid the sum of Kshs. 480,995/= together with costs and interest from the date of the judgment at the trial court. The appellant shall also have the costs of this appeal.

Dated, signed and delivered at Kisumu this 23rd day of July, 2014.

H.K. CHEMITEI

JUDGE