REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.106 OF 2011

BETWEEN

GEOFFREY GITHAGUI WACHIRA..... APPELLANT

AND

JOHN MWINGA MACHARIA …..... RESPONDENT

(Being an appeal from the Ruling of Hon. Muketi, CM, delivered

on 29th June 2011 in Nyeri CMCC No.904 of 2005)

JUDGMENT

By a plaint dated 2nd December 2004, the respondent John Mwangi Macharia sued the appellant together with two others in respect of a road traffic accident on 4th November 2002 involving motor vehicle Reg. No. KAN 146L registered in the name of the appellant, KAA 498L owned by the second and 3rd defendants as a result of which the respondent sustained injuries and damages particulars of which were stated in paragraph 7 of the plaint.

The appellant on 14th January 2005 filed a defence in which he denied ownership of motor vehicle Reg. No. KAN 146L and attributed the said accident to the negligence on the part of the 2nd and 3rd defendants.

On 23rd January 2005, interlocutory judgment was entered against the 2nd and 3rd defendants and the suit fixed for hearing of which the PW1 DR Mike Mugi Kibuku testified that the respondent sustained complete loss of right eyes, painful hip joints stiffness on all the four limbs and injury to the pelvis bone which degree of harm he assessed as grievous harm.

The respondent testified that on the material day he boarded motor vehicle Reg. No. KAN 146L which was involved in a road traffic accident with motor vehicle Reg. No.KAA 498L and KZF 400. It was his evidence that the driver of motor vehicle Reg. No. KAN 146L was driving at very high speed of over 100 KPH. He testified that he was sitting on the left side next to the driver and as a result of the said accident sustained the injuries as stated by PW1.

Under cross examination, the respondent stated that motor vehicle KAA 498L was on the right side travelling from Nairobi while KAN 146L was travelling on the opposite side to Nairobi and further stated that it hit motor vehicle KZF 400 after the accident.

The appellant in his defence testified that the motor vehicle was being driven by one Martin Wachira and that he was sued in Muranga CMCC No.515 of 2003 copy of the proceedings and

judgment which he produced in court in which the court of similar jurisdiction apportioned liability at 50%:50%. The trial court was therefore urged to adopt the same finding on liability.

In rendering himself the trial court, R. Nyakundi then CM had this to say:-

"The reference I drew from the evidence is that the defendant drove the vehicle at high speed, given the weather conditions and misjudged the distance and speed of the oncoming vehicle.....

the evidence on record if however does not provide an avenue while any of the three vehicles could shoulder a higher blame from the rest.

….. in the ultimate analysis of the evidence I am of the holding that the defendants are joint fortfeasors and as such are equally to blame for the accident. The liability in favour of the plaintiff is jointly and severally."

By an application dated 30th March 2011, the appellant moved the court for review of the said judgment on liability on the basis that the judgment was jointly and severally and therefore the plaintiff/respondent could elect to execute against one defendant only and therefore the court was urged to apportion liability.

The said application was opposed by the respondent through a replying affidavit sworn on 13th April 2011 on the basis that the applicant was trying to lodge another appeal after Nyeri Civil Appeal No.14 of 2007 was dismissed.

The application was heard by the late Justice S. Muketi then CM who dismissed the same …..... as follows:-

> **"The party having appealed and failed and the fact that the decision of the Muranga court was not binding on Hon. Nyakundi this application can not succeed. The matters being raised herein are matters that ought to have been raised before the trial court."**

Being aggrieved by the said ruling, the appellant filed this appeal and raised the following grounds of appeal:-

1. *That the learned magistrate erred in law and fact by not apportioning liability in the said suit at 50:50 amongst the defendants.*
2. *That the learned magistrate erred in law and facts in failing to follow the precedent set in a same series case at Murang'a Court where the same ratio was apportioned amongst the same defendants.*
3. *That the learned magistrate erred in both law and fact by failing to review the judgment of the said suit to in respect of liability at 50:50 between the defendants.*

Submissions

Directions was given that the appeal be heard by way of written submissions which have now been filed. On behalf of the appellant, it was submitted that there was no evidence tendered by the respondent to the effect that the appellant was to blame for the accident and that the trial court should have followed the judgment in Muranga SPMCC No.515 of 2003 where liability was apportioned on 50%:50%. The court was therefore urged to allow the appeal and apportion liability on the basis of 50%:50%.

On behalf of the respondent it was submitted that the appellant had lodged an appeal against the judgment in Civil Appeal No.14 of 2007 which appeal was dismissed by Justice Makhandia on 7th July 2011 and therefore the application was an attempt to circumvent the dismissed of appeal.

It was further submitted that the appeal was founded on the wrong order and for that the appellant had not sought the leave of court as provided for under **Order 43 Rule (2)**.

It was submitted that the appeal was never served upon the other defendants whereas the appellant sought to review judgment on liability which would have fundamentally and radically changed the judgment. It was submitted that there was a delay in filing the application for review against the clear provisions of **Order 45 Rule (1)**. It was submitted that the trial court was not bond by the judgment of the Muranga Senior Resident Magistrate.

From the proceedings herein the following issues have been identified for determination.

a. *Whether the appellant had a right to file an application for review of the judgment herein.*
b. *Whether this appeal is properly before the court.*
c. *Whether the lower court was right in dismissing the application for Review.*
d. *What order should this honourable court make.*

From the records it is clear that the appellant filed Civil Appeal No.14 of 2007 on 12th March 2007 which appeal was on 7th July 2008 struck out with cost to the respondent. Under **Order 45** an application for Review is allowed upon the following conditions:-

- *(i) Any person considering himself aggrieved by -*
    a. *by a decree or order from which an appeal is allowed <u>but from which no appeal</u> has been preferred or*
    b. *by a decree or order from <u>which no appeal is hereby allowed</u> and who from the discovery of new and important matter or evidence …. may apply for a Review of the judgment.*
        - *2. <u>A party who is not appealing</u> from a decree or order may apply for a Review of*
        - *judgment, not withstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant …. Emphasis added.*

The appellant having filed an appeal against the judgment herein, the same did not therefore have the right of Review of the judgment herein. It is however clear that the appeal was never heard on merits but was dismissed on technical ground that the appellant did not pay further court fees and therefore the court did not exercise its judicious mind on the issues raised on the appeal and therefore in view of **Article 159** of the **Constitution**, I take the view that the appeal has a right to be heard on merit.

The appellant herein did not require leave of the court to file this appeal since it is an appeal that arose out of **Order 45 Rule 3** and therefore the appeal is properly before the court.

Upon perusing the judgment of R. Nyakundi as set out in paragraph 7 herein in which he found as a fact that he could not blame one party over and above the other and whereas the judgment of the Chief Magistrate in Muranga CMCC No.515 of 2003, the same having been placed on record before the trial magistrate should have been taken into account so as to avoid a situation where different courts comes to different conclusions on the same issue of facts.

It is clear that the trial court was unable to blame either party over and above the other and therefore the only reasonable decision was to follow the finding of the Chief Magistrate in Muranga by apportioning liability on the basis of 50%:50% taking into account that interlocutory judgment had been entered against the 2nd and the 3rd defendant.

I would therefore allow the appeal herein and set aside the judgment of R. Nyakundi and substitute the same with liability at 50%:50% against the appellant and the 2nd and 3rd defendant with cost to the respondent in the lower court.

In the final analysis judgment is hereby entered for the respondent against the defendants as

follows:-

a. *Liability 50%:50% between the appellant and the 2nd and 3rd defendant*
b. *Loss of income …..... Kshs. 660,000.00*
c. *Medical report …..... Kshs. 20,000.00*
d. *General damages …..... **Kshs.1,700,000.00***

Total **Kshs.2,380,000.00**

Less 50%

Total **Kshs.1,190,000.00**

The respondent shall be entitled to cost and interest at court rate.

Signed and dated this day of 2014

J. WAKIAGA

JUDGE.

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014

J. NGAAH

JUDGE.

In the presence of:

---------- Appellant

---------- for Respondent