REPUBLIC OF KENYA

High Court at Kitale

Civil Appeal 23 of 2007

NATION MEDIA GROUP

JARED SANDE KHAMATI :: APPELLANTS.

VERSUS

DAVID MBUGUA GACII :: RESPONDENT.

J U D G M E N T.

This appeal arises from the decision of the chief magistrate at Kitale in SPMCC No. 145 of 2006 in which the appellants, had been sued by the respondent for damages arising out of a road traffic accident which occurred along the Kitale/Eldoret road involving the appellants' motor vehicle Reg. No. KAU 678A and which occurred on the 27th September, 2005. It was alleged that on the material date, the appellants' vehicle was so carelessly and/or negligently driven and/or controlled such that it knocked down and injured the respondent who was at the time lawfully rinding his bicycle on the road. The appellants filed a statement of defence denying the allegations of negligence made against themselves and contending that the accident was solely occasioned and/or contributed to by the respondent's negligence in the manner that he rode his bicycle.

The appellants relied on the doctrine of "**Resipsa-Loquitor'** and denied that the plaintiff was seriously or at all injured and that he suffered loss and damage as alleged.

After a full hearing of the case, the learned trial magistrate concluded that the appellants were responsible for the accident at a ration of 85% against the respondent's 15% contribution. Consequently, the respondent was awarded general damages in the sum of Ksh. 350,000/=, less 15% contributory negligence i.e. Ksh. 298,000/=.

Being dissatisfied with the decision of the learned trial magistrate, the appellants filed the present appeal on the basis of the grounds of appeal contained in the memorandum of appeal filed herein on the 3rd October, 2002. There are six (6) grounds of appeal but at the hearing, learned counsel for the appellants, **Mr. Mokua,** abandoned all the grounds save ground one which is a contention that the learned trial magistrate erred in law and in fact in holding that the appellants were 85% liable for the accident which finding was unsupported by the evidence on record.

In their submissions, the appellants stated that the evidence adduced by the second appellant and the respondent was at variance and that the respondent's evidence was not supported by an independent witness. It was therefore wrong for the second appellant to have been held responsible for the accident at 85%. the appellants submitted that the trial court acknowledged that evidence of an independent witness

was vital to determine whose version of the evidence was correct as between the appellants and the respondent and so, it was not clear why the trial court decided to disbelieve the second appellant and apportion him a high degree of blame.

The appellants contended that both themesleves and the respondent were equally to blame for the accident and as such, a proper finding should have been equal apportionment of liability.

In that regard, the appellants relied on the first and second authorities listed in their list of authorities dated 17th October, 2012.

For all the foregoing reasons, the appellants pray that the appeal be allowed to the extent that liability be apportioned equally between them and the respondent.

The respondent has on his part opposed the appeal by submitting through his learned counsel, **Mr. Ombui**, that the learned trial magistrate had the advantage of seeing and hearing the witness in arriving at the finding on the apportionment of liability. In that regard, the judgment of the trial court clearly indicated that the respondent was very consistent in his evidence both in this case and in an earlier traffic case. He was therefore found to be more truthful and firm than the appellants.

It is the respondent's contention that the trial court dealt with the deamenours of the parties adequately.

As to the traffic case, the respondent contended that the second appellant was acquitted for the simple reason that a material witness was not called to testify. In any event, the said finding had nothing to do with the respondent.

The respondent submitted that assessment of liability was an issue purely for the discretion of the court and herein, it was clear that the appellants were to blame for the accident and that is why liability could not be apportioned between them and the respondent.

The respondent urged this court to dismiss the appeal and contended that there is no reason for the decision of the trial court to be interferred with as all the issues raised herein by the appellants were fully considered by the trial court.

The role of this court is basically to revisit the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

Briefly, the evidence by the respondent who was the plaintiff in the lower court was to the extent that he was on the material date at about 8.00 a.m. Riding his bicycle along the Kitale/Eldoret road and on reaching a bend (corner) the appellants' vehicle suddenly emerged and hit him. He was at the time riding uphill and the vehicle, a Toyota pickup was on the opposite side of the road.

The respondent testified that the accident caused him injuries to his forehead, left knee and right leg. He was taken to the hospital by the driver of the vehicle and was admitted for some days before being discharged. A report of the accident was made to the police.

PC Timothy Ringera (PW2), based at the traffic section Kitale Police Station confirmed that a report of the accident was received and investigations carried out. Thereafter, the driver of the vehicle was charged with the traffic offence of careless driving.

The necessary traffic case filed No. 1488 of 2005 was produced in court on behalf of the appellants by **Richard Kaino (DW1)**, of the traffic registry in the Chief Magistrate's Court Kitale. The file indicated that the driver of the material vehicle (i.e. the second appellant) was acquitted by the traffic court after being found to have no case to answer.

In his evidence before the trial court, the second appellant (DW2) indicated that he was driving his vehicle downhill when the respondent who was rinding his bicycle on the opposite side came riding

towards him (DW2). He hooted and made the respondent to become shaky. The respondent then rode his bicycle in a zig-zag manner and was as a result hit by the vehicle. He was rushed to Kitale District hospital and a report made to the police at Kitale Police Station.

From all the foregoing evidence it is clear to this court that the occurrence of the accident was an undisputed fact. The issue that presented itself for determination was who between the second appellant and the respondent was to blame for the accidents. Neither of them called an independent witness to confirm and fortify their respective versions of the circumstances leading to the accident.

Each of them blamed the other for the accident. Each of them indicated that the other entered the other's path of the road thereby resulting in the collision between the vehicle and the bicycle.

In the absence of independent witnesses from either side, the trial court had no alternative but to rely on the credibility of both the respondent and the second appellant in order to make a finding on liability.

It is without doubt that the trial court was better placed than this court to make findings of fact based on the credibility of witnesses since it had the advantage of seeing and hearing the witnesses. In that regard the trial court found the respondent's evidence to be more credible than that of the second appellant. However, the trial court also found that the respondent was partly to blame for the accident but at a lower level of 15%.

It is trite law that it is a very hard thing for an appellate court to interfere with the findings of fact by a trial court particularly if such findings are based on the demeanor of the witnesses as observed by the trial court and its general appreciation of the evidence in the case unless, of course, if such finding is based on no evidence or on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings it did (see, **Ephantus Mwangi & Another vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278** and **Joyce Mumbi ngugi vs. the Co-operative Bank of Kenya Ltd & Others C/APPEAL No. 214 of 2004 (C/A)**

In sum, this court does not see any good reason for it to interfere with the decision of the learned trial magistrate in this matter. This appeal is therefore devoid of merit and is hereby dismissed with costs to the respondent.

Ordered accordingly.

[Delivered and signed this 23rd day of April, 2013.]

[In the presence of M/s. Limo h/b for Mr. Mokua for appellant.)

J.R. KARANJA.

JUDGE.