



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 635 of 2006

WILHELM CHRISTOPHER BRUCE. APPELLANT

VERSUS

DAVIS WELLINGTON NJAU. 1ST RESPONDENT

PAUL MUBEA. 2ND RESPONDENT

JULIE A ANDRADE. 3RD RESPONDENT

(From the judgment and decree of M/s Maina, Principal Magistrate in Milimani CMCC No. 379 of 2003)

J U D G M E N T

This appeal arises from a judgment of the Principal Magistrate in Milimani Law Courts in which the court entered a judgment in favour of the Respondents against the Appellant in the sum of Ksh.450,000/- in general damages and Ksh.126,000/- in special damages. The liability arose from motor accident along Ngong road in the early hours of 6th April 1997 involving the Respondent's motor car registration No. KPB 872 and Appellants car registration No. KAC 204L.

The facts of the case according to the Respondents were that the 1st Respondent Davis Wellington Njau,

was driving from Ngong Town towards Nairobi on 6th April 1997 after midnight after dropping an employee at Ngong town. Near a place called Cemetery, as he was closely being followed by PW 5, Patrick Githehu then also driving along the same road, he saw an oncoming car. Then he saw another car also on-coming, trying to overtake the first on-coming car. The two on-coming cars were too close to him to avoid a head-on collision. The result was indeed a head on collision with the overtaking car which was a red Toyota registration No. KAC 204L, driven by the Appellant.

It was the 1st Respondent's further evidence that the impact of the collision resulted in the 1st Respondent sustaining injuries and loss of consciousness. He was taken to Masaba Hospital where he was admitted until 15th April 1997. He got medical treatment required which revealed fractures on the 5- I ribs and a fracture of the left hand. He also sustained basal contusion and a small haemothorax and oblique fracture of the 3rd Metacarpal shaft with moderate displacement. The medical reports were produced by Dr. Wairagu as exhibit 17 and Exhibit 3C.

The 1st Respondent's accident motor car was assessed by PW 2 who gave it a pre-accident value of Ksh.85,2000/- and a salvage value of Ksh.5,000/-. The assessor was paid Ksh.3000/- for assessment and Ksh.7,500/- for the court attendance where he produced his report. He produced medical treatment receipts at Masaba Hospital as well as a follow-up treatment at Kenyatta National Hospital.

In his support the 1st Respondent called P C Oremo (PW 3) and PW 5, Patrick Githehu. P C Oremo produced two police Abstracts, one dated 1st April 1998 and another undated, Exhibits 6 and 7. PW 3 testified that both abstracts were issued out by Karen Police Station. He could not state how the accident took place or who was to blame as no sketch plans of accident scene were available. The Occurrence Book showed that neither of the two drivers was held responsible for the accident.

PW 4 Dr. Wairagu also testified. He had medically examined the 1st Respondent for more than one occasion in relation to the motor accident. He produced his report showing that he found no permanent disability on him. He established osteoarthritis which might have been caused by accident injuries or old age at the age of 54. He observed that the injuries on the ribs were healing well and the 1st Respondent will need to continue with some pain killers until he healed fully.

PW 5 also testified. He said that he met the 1st Respondent at a petrol station at Ngong Town before the accident. The 1st Respondent was driving his blue Peugeot saloon KPB 872. PW 5 was driving his car registration No. KLS 458. He closely followed the 1st Respondent towards Dagoretti Corner. At Ngong Hills Cemetery he saw the 1st Respondent get involved in an accident. A vehicle being driven towards Ngong town, was being overtaken by a Toyota car Registration No. KAC 204L. However, since KAC 204L was unable to successfully overtake, it came face to face with the 1st Respondent's car and there was a head-on collision which then pulled the 1st Respondent's car from its lane to the on-coming lane. That it extensively damaged the Respondent's motor car and injured him. PW 5 further said that he and other people pulled the Respondent out of his car and he was taken to hospital by another person who also knew him. He also followed the Respondent to Masaba hospital where he was admitted. He said that the accident occurred after midnight on 5th April 1997 which therefore, he said was actually on 6th April, 1997. PW 5 also said that the driver of KAC 204L, was in the process of overtaking another vehicle in front but that he failed to complete the overtaking. That as the said driver drove parallel to the vehicle in front, the head-on collision occurred and the impact pushed the 1st Respondent car to the right side of the road. The witness accordingly, testified that the Appellant was accordingly, the person to blame for the accident.

The Appellant who was the defendant in the lower court, denied the claim against him, stating that he was not to blame for occurrence of the accident. He testified that on the material time, he was properly driving on his left lane towards Ngong Town when a motor car belonging to the first Respondent and being driven from the opposite side, suddenly swerved onto his side of the road. That this occurred so suddenly that the Appellant could not and had no time to avoid a head-on collision with the said car. That the

impact fell on the front right side of either car. The Appellant further stated that the impact pushed the Appellant's car to the far left ditch while the other motor vehicle stood on its right middle road, making it to stand sideways and blocking the road. Thereafter he was pulled from the car and taken to Masaba Hospital. The Appellant confirmed that the part of road where the accident occurred, was straight and flat. That he was not charged with any offence and that he was not driving fast. That he drove carefully and maintained proper care and attention on the road and on his rightful lane. He denied that he was at the time of the accident, overtaking another motor vehicle. He said that the accident occurred, and that he failed to avoid it, because the oncoming driver suddenly swerved his car into his lane.

The honourable trial magistrate, who heard this case, noticed that the date of the accident was contested. She however, concluded that the contest did not affect the fact that the accident actually occurred and the issue finally cleared when it was established that was the accident occurred after midnight of 5th April 1997, which meant the 6th April 1997.

The honourable magistrate found the main issue to be this: who was to blame for the accident? The magistrate concluded that the Appellant was to blame. She accepted and relied on the evidence of 1st Respondent who was the driver of the collision vehicle KPB 872. She also heavily relied on the evidence of PW 5 who was the eye witness. She believed the evidence of PW 5 that before the accident, PW 5 had seen two parallel headlights coming on which confirmed that one of them was overtaking the other.

I have carefully perused the several grounds of appeal. They can be reduced into two, where the first one attacks the quality of evidence proving liability, and the second one questions the level of quantum of damages.

I have also carefully considered the evidence on the record. It is my view that this court as an Appellate court has a duty to properly reconsider and re-evaluate the evidence. It can in the process, come to a different conclusion. I however, find that the trial magistrate believed the evidence of 1st Respondent who was the main plaintiff in the lower court. She also believed the evidence of PW 5, whom it regarded as an eye witness.

I have as well considered the evidence of the two witnesses. I too prefer and accept their evidence. The 1st Respondent version is that his motor car collided head-on with that of the Appellant because the latter was at the material time trying to overtake a motor vehicle which was in front of him. PW 5's evidence supported the overtaking version of evidence. PW 5 had testified that he was driving behind the 1st Respondent's car and saw how the accident occurred. He said that he was about 50 metres behind the first Respondent. Both he and the witness were not driving fast. Then he saw headlights of two motor vehicles approach from Nairobi way. That the red Toyota car KAC 204L was trying to overtake a small car in front but did not manage to do so. The result was that it collided with the 1st Respondent's car in front of the witness and the impact pulled the said car from its lane to his oncoming lane. That the Appellant had broken to give the vehicle he was overtaking a chance to advance. He said that the breaking gave the other vehicle an opportunity to move on before the accident occurred. PW 5 insisted in his evidence that it was before the Appellant's red car KAC 204L returned to its lane that the collision took place.

The honourable trial magistrate had the advantage to see and evaluate the demeanour of all witness at close range. He decided to believe the 1st Respondent's and PW 5's evidence. I find no ground for disbelieving the same evidence. Indeed as above stated, I believe it also because it reasonably explains how the accident occurred.

On the other hand the Appellant's evidence as to how the accident occurred, does not add up. It does not explain why the 1st Respondent who was not driving fast could without cause, if not to avoid a collision swerve from his lane to the middle of the road where the Appellant was allegedly lawfully driving along. In this court's view, the 1st Respondent, as his evidence and that of PW 5 shows, was hit and pushed to the right side of the road by the impact of the Appellant's motor vehicle.

The result, as also found by the trial court below, is that the Appellant, who was at the material time

driving his red Toyota car KAC 204L, was solely to blame for the accident. He shall accordingly, bear the legal consequences following and arising from the same. In doing so, I accept and confirm the trial court's finding on liability.

Turning now to the award of damages, the Appellant complained that the 1st Respondent failed to plead and prove special and general damages and also that the general damages of Ksh.450,000/- awarded by the lower court, were excessive in the circumstances.

I have carefully examined the Amended plaint dated 15th November, 1999. I am satisfied however, that the Respondent's plaint contained sufficient and proper pleadings in so far as general damages are concerned. The Respondent had pleaded the facts and mode of Appellant's conduct in driving the relevant motor vehicle that led to the occurrence of the accident. The Respondent also, as already shown, produced evidence enough to prove his case on the balance of probability. The Appellant's ground of appeal aforesaid, therefore, has no merit. Nor is the figure of ksh.450,000/- in general damages manifestly excessive. Indeed they were not comparatively so high as to require interference by this court.

As to the special damages, the Respondent properly pleaded the particulars of and specific items of damage to his accident motor vehicle. He also particularized other items of specific loss under the heading, "**Particulars of Special Damages**" including transport and medical expenses. During the hearing the 1st Respondent produced documents and receipts in proof, to the satisfaction of the trial court. The Appellant did not produce any evidence to show that the figures in the receipts and other documents were not correct. In the circumstances, this court, after carefully examining those documents, finds no fault with them and dismisses the Appellant's complaint thereto.

The end result is that this court finds no merit in this appeal and dismisses it, with costs to the Respondents, here and below. Orders accordingly.

Dated and delivered at Nairobi this 18th day of May, 2012.

.....

D A ONYANCHA

JUDGE