



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL APPEAL NO. 131 OF 2006

- BETWEEN -

CHIVATSI SIMBA MWANGIRI..... APPELLANT

- AND -

BONIFACE MUSYOKA.....RESPONDENT

(Being an appeal from the Judgment of Senior Resident Magistrate Mr. C. O. Obulutsa, dated 10th August, 2006 in SRMCC No. 474 of 2005 at Kilifi Law Courts)

JUDGMENT

The appellant had initiated suit by plaint dated **8th August, 2005**, claiming general and special damages in respect of injuries sustained in an accident allegedly occasioned by negligent driving. It was pleaded that the defendant was, at all material times, the registered and/or insured and/or beneficial owner of the subject motor vehicle, Reg. No. KAK 484D, Toyota Saloon.

On the material date, **21st January, 2005** the plaintiff was a pillion passenger on a bicycle on the Mombasa-Kilifi Road, when an overtaking car, the said Toyota Saloon, knocked him, causing him “*serious harm*”; he sustained a fracture of the right ankle.

The relevant finding of the trial Court was set out as follows:

“From the evidence it is not disputed that PW 4 ... was riding the bicycle carrying *Chivatsi*. It is also admitted the defendant overtook them in his [motor] vehicle. According to *Chivatsi* and [PW 4] the vehicle hit them, whereas the defendant and his passenger say it is the rider who jumped on the motor vehicle and let the bicycle fall down with the [pillion] passenger. Each blames the other. The Police investigations did not help much, as the conclusion by I.P. Noor is that it could not be ascertained who was at fault.

“He said when the scene was visited it had been disturbed, as the bicycle and [motor] vehicle had been moved. If it was the cyclist who had sued the driver of the [motor] vehicle the Court ... would have apportioned liability equally between them. However, it is the case of the pillion passenger suing the driver of the [motor] vehicle. It would have been prudent for him to have sued the rider

and the driver of the [motor] vehicle jointly and severally, so that the two can sort out the issue of liability as between themselves. If the defendant had joined the rider as a third party, that would have settled the plaintiff's agony. It did not happen. In the absence of the cyclist as a party to the [suit], the plaintiff [has] failed to establish negligence against the defendant on a balance of probability."

The learned Magistrate went on to state the award he would have made, had he been able to ascertain liability: Kshs. 250,000/= as general damages, and Kshs. 5,550/= as special damages; but he went on to rule: *"Since no liability is established the Court will dismiss the suit with costs the defendant."*

In the Memorandum of Appeal filed on 5th September, 2006 the appellant asks that the Judgment and orders of the trial Court, be set aside, and judgment be entered against the respondent. The following grounds for the appeal are stated:

- (i) that, the learned Magistrate erred in law in failing to find that the evidence of the appellant and the appellant's witness was believable, and that the case had been proved on a balance of probability;***
- (ii) that, the learned Magistrate erred in law and fact, in failing to find that the appellant had proved his case on a balance of probabilities against the respondent, and in failing to give judgment for the plaintiff;***
- (iii) that, the learned Magistrate erred in law and fact, by failing to find that the respondent contributed to the accident, and the respondent is liable either 100% , or in a certain named proportion;***
- (iv) that, the learned Magistrate erred in law and fact in holding that there was a non-joinder of parties which defeated the appellant's case;***
- (v) that, the learned Magistrate erred in law and fact by dismissing the plaintiff's suit.***

Counsel for the appellant submitted that: it was common ground that the appellant was injured in an accident involving him as a pillion passenger, and the respondents' motor vehicle No. KAK 484D, on 21st January, 2006; the learned Magistrate dismissed the cause due to non-joinder of the bicycle-rider.

Counsel urged that such a reason for dismissing the suit was not tenable, in view of the terms of Order I, Rule 9 of the Civil Procedure Rules, which provides:

"No suit shall be defeated by reason of misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

Counsel urged that the trial Court erred in law and fact, in **failing to deal with the matter in controversy**; and whereas there was evidence that an accident had taken place, and both parties blamed each other, the trial Court *"failed to deal with the issue of who was to blame for this accident."*

Learned counsel submitted that the trial Court had erred, in failing to find that notwithstanding the fact that the bicycle-rider had not been joined in the suit, the Court had the power to apportion liability for the accident between the parties enjoined. This failure on the part of the Court, counsel submitted, was an error in law, for which the appeal should be allowed.

Counsel did not contest the quantum of damages assessed by the Court (Kshs. 250,000/= and Kshs. 5,550/= for general and special damages respectively), but submitted that the Court was in error, in not apportioning the same.

Learned counsel for the respondent asked the Court to regard as the reason for the dismissal of the suit, the fact that *"the plaintiff had failed to establish negligence against the defendant."* Counsel, in this

regard, relied on the evidence of the Police Officer (PW 2), that “it ... could not be ascertained who was at fault.”

Counsel contested the relevance of Order I, Rule 9 of the Civil Procedure Rules, “since the appellant did not amend the plaint in the Subordinate Court as required.”

Learned counsel for the respondent asked the Court to regard as the reason for the dismissal of the suit, the fact that “the plaintiff had failed to establish negligence against the defendant.” Counsel, in this regard, relied on the evidence of the Police Officer (PW 2), that “it ... could not be ascertained who was at fault.”

Counsel contested the relevance of Order I, Rule 9 of the Civil Procedure Rules, “since the appellant did not amend the plaint in the Subordinate Court as required.”

Counsel urged that Order I, Rule 9 should be read together with Order I, Rule 10 (1), (2), (3) and (4); and Rule 10 (2) provides that —

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

And Rule 10 (4) provides that _

“Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

On the strength of the foregoing provisions, counsel submitted that since the bicycle-rider had not been joined as a party to the suit, the trial Court was not in a position to apportion liability, if any.

Counsel submitted that the defendant had stated in the pleadings it was the cyclist who was to blame for the accident, and that this had been established by the evidence on record.

Counsel contested the submission made for the appellant, that the trial Court could have apportioned liability: “that would not have been possible because the plaintiff was a pillion passenger, and liability could [only be] apportioned between the defendant and the cyclist, if at all.”

Counsel asked that the appeal be dismissed with costs to the respondent; and that, in the event liability is found to hold, it should be apportioned on a 50:50 basis. But counsel contested the assessed award of Kshs. 250,000/= as general damages — as being too high; in the trial Court counsel had urged that the figure of Kshs. 70,000/= be adopted instead; he had no objection to the special damages.

Dr. Obwanda (PW 1) prepared a report on the plaintiff’s medical condition following the accident.

IP Jamal Noor (PW 2) of Kijipwa Police Station testified that an accident had occurred on the Mombasa-Malindi Road, at Mtwapa, on **21st January, 2005**; a motor vehicle, Registration No. KAK 484D was overtaking a cyclist; the plaintiff, who was a pillion passenger on the bicycle, was knocked and injured; the Police officers were not able to ascertain who was at fault, as between the cyclist and the driver.

The plaintiff gave evidence as PW 3, saying he was a pillion passenger on a bicycle when the accident took place; a motor vehicle appeared from behind and, as it attempted to overtake, knocked the bicycle; his left leg was caught under the wheel of the bicycle, and he got injured; the motorist took the plaintiff to Coast General Hospital, where the plaintiff was treated and paid Kshs. 3,350/= for the medical care.

On cross-examination, the plaintiff described how the accident took place: **the motorist was turning off the road — and it hit the bicycle on the side.**

The cyclist himself (PW 4), **Ismail Hassan Menza**, also described the incident; in his words:

“I was riding a bicycle carrying *Chivatsi* [the plaintiff] when a [motor] vehicle overtook us and hit the bicycle as [the driver] was braking off the road to park. *Chivatsi* was injured and he took us to hospital.”

On cross-examination, PW 4 said he was cycling “*at the edge of the tarmac*”, at the material time. He went on to say:

“The vehicle did not indicate it was turning off the road. It happened suddenly. [The driver] did not indicate he was going to the left ... The bicycle was damaged.”

On re-examination, PW 4 said the driver of the subject motor vehicle “*was going to the parking*”, at the time of the accident.

Boniface Musyoka (DW 1), the defendant, was driving his taxi when the accident occurred; he said:

“... on reaching Mtwapa I indicated to turn left; *there was a bicycle ahead of me which [I] overtook and then turned left, stopped and, as the customer alighted, I heard a person holding the car; on checking, I saw the rider; the pillion passenger remained on the bicycle which had fallen down. I was not charged with any offence. The vehicle and bicycle were not damaged*”.

On cross-examination, DW 1 said as follows:

“The bicycle did not touch the vehicle. The rider is the one who jumped and held the vehicle. I was told of him. I had seen him. *I did not overtake him.* I had seen him ... I assisted in taking the person to hospital.”

Edwin Mwilu (DW 2), had been DW 1’s passenger on the material occasion. He said:

“On reaching my workshop within [Mtwapa] town, the vehicle stopped *off the road; as I was alighting, I heard a bang behind.* On checking, I saw a person on the ground, with a bicycle, and [another person] standing by the side. *It is not the vehicle that hit them [by its] side.* The taxi driver took him to hospital ... *I blame the bicycle riders. It is not the taxi at fault*”.

On cross-examination, DW 2 said:

“I was seated at the front [of the taxi]. No one was behind. *I heard the impact before I got out. I had not seen the bicycle then.*”

In the submissions, counsel for the plaintiff thus addressed the Court:

“... the plaintiff was a pillion passenger riding at the edge of the road, when a taxi overtook them dangerously, turned into a parking [lot] and caused an accident. The motor vehicle did not indicate. They blame the driver of the motor vehicle. The defence witness only heard the bang. His evidence is hearsay ... The evidence of [the] cyclist is consistent with [that of] the witness. The Court cannot take into account the driver’s testimony. Liability is in fact against the defendant. On quantum, refer to HCCC 1081/1991; for fracture, we seek Kshs. 250,000/=; and special damages, Kshs. 5,550/=, with costs and interest.”

For the defendant, learned counsel, **Ms. Munyari** thus addressed the Court:

“The plaintiff has failed to prove the case. [The taxi driver] blames the cyclist. The [pillion] passenger jumped from the bicycle. The testimony of the defence witness is corroborated ... *The [motor] vehicle was turning left.* There was no reason to charge the driver ... The plaintiff is at fault. The injuries are not as serious as alleged; Kshs. 70,000/= is adequate: refer to HCCC

397/1988 (Nbi) and HCCC 2631/1983. The plaintiff's authority deals with more serious injuries."

There is nothing on record to show that the trial Court had at any time invoked Order I Rule 10 (2) of the Civil Procedure Rules, and directed joinder of the bicycle-rider on the material occasion, for the reason that such action would enable the Court to arrive at an effectual and complete determination of the dispute; so no such obligation was placed on the plaintiff; in which case, the applicability of the terms of Order I, Rule 9 cannot be challenged. I am, with respect, in agreement with counsel for the appellant, that the trial Court was in error in dismissing the suit for non-joinder.

But the main basis for determining this appeal, as foreshadowed in the grounds of appeal, and as clearly emerges from a reading of the trial-Court proceedings, is the mode of assessment of the **evidence**. As the very essence of the judicial task is invariably application of the law, and assessment of evidence, a focused attention to these matters is vital; and this is especially so for **evidence**, because it nearly always unfolds differently for every case. What is sought in the evidence is the **true story**; and an effective scrutiny of the evidence given, however long or short it is, will always illuminate the true position; the Court's orders must be founded on the truth.

PW 3 and PW 4 are wholly consistent in their evidence, which DW 1 also acknowledges to be true: it is the cyclist, and his pillion passenger, who were **in front** of the defendant's taxi; the taxi driver overtook the bicycle and turned left, into a parking lot; although the taxi driver says he was showing by the motor vehicle's indicator that he was turning left, this is consistently denied by both PW 3 and PW 4; but in any event, even if PW 1 had shown by his indicator-light that he was turning left, he turned in when he was **too close to the cyclist** for safety; he caused a dangerous situation, for there would be a collision between his car and the bicycle. The plaintiff (PW 3) is clear in his evidence: "*the motorist was turning off the road, and [his motor vehicle] hit the bicycle on the side*"; and this evidence is entirely consistent with that of the cyclist (PW 4) himself. Interestingly, the truthfulness of that account emerges also from DW1's evidence: "*there was a bicycle ahead of me which I overtook.*" Now although this Court concludes that what is set out above **is** the truth, DW1, when cross-examined, says something different: "*I had seen him. I did not overtake him.*" I have to conclude that DW1 is **not** a truthful witness: his evidence is inconsistent, and lies several removes from the **natural course of events**.

Unlike the evidence adduced by the plaintiff, which appears simple and consistent with reality in the occurrence of events, the evidence given by both DW1 and DW2 is **discordant**, apparently contrived, and in departure from the **flow of reality**. DW2, though admitting that the defendant's taxi left the road and pulled into the siding, does not acknowledge that **already**, the bicycle was on that same left side of the road: and so the scene was perfectly set for an accident to happen. At one point DW 2 says he was already alighting when he heard a bang, behind; then he says: "*It is not the motor vehicle that hit them*" — even though he also gives the impression of having been inattentive, and not having noticed very much.

The defendant's position is made more untenable by the sweeping blame which he and his witness readily attribute to the cyclist and the pillion passenger. DW2, for instance, said: "*I blame the bicycle riders; it is not the taxi [that is] at fault*"; obviously, this was bare suspicion and rumour, being placed before the Court, and the Court should have recognized it as such.

This analysis leads to the conclusion that the trial Court, with respect, came to a finding that was not in keeping with the evidence on record. The Court was in error to hold that the plaintiff's evidence was not believable. The Court ought to have found that the plaintiff had proved his case on a balance of probabilities. The trial Court should have attributed the entire liability to the defendant.

Consequently, I allow the appeal, finding that the defendant was 100% liable for the accident and for the injuries occasioned thereby. As the cyclist himself had made no claim, I hold the defendant's liability to be towards the plaintiff, entirely.

Although the parties have apparently been guided by certain precedents in their estimations of general damages, such authorities were not canvassed before me; this lessens their weight as yardsticks to guide this Court. However, as counsel had addressed the trial Court on the matter, and that Court made a

determination of the same, I will adopt the figures on the Court's record; I will order as follows:

- (1) The defendant shall pay to the plaintiff general damages in the sum of Kshs. 250,000/= — to bear interest at Court rate as from today.**
- (2) The defendant shall pay to the plaintiff special damages in the sum of Kshs. 5,550/= — to bear interest at Court rate as from the date of filing suit.**
- (3) The defendant shall pay costs of the suit and of the appeal — under each head, with interest at Court rate as from the date of filing.**

Decree accordingly.

DATED and DELIVERED at MOMBASA this 18th day of March, 2011.

**J. B. OJWANG
JUDGE**