



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

APPELLATE SIDE

CIVIL APPEAL NO.46 OF 2006

BETWEEN

DIAMOND SHIPPING SERVICES LIMITED..... APPELLANT

VERSUS

JULIUS ONGONGA ONGWECHRESPONDENT

[Appeal from Original judgment of SRM's Court at Winam in SRMCC No.427 of 2004

JUDGEMENT

This appeal is preferred against the judgment of Senior Resident Magistrate Winam in Civil Suit No.427 of 2004. It is an appeal against the entire judgment. The appellant who was the defendant, being aggrieved by the judgment filed this appeal based on the following grounds:

- 1. The learned trial magistrate erred in law and fact in entering judgment for the respondent when ownership of the accident motor vehicle was not proved.**
- 2. The learned magistrate erred in law and fact in entering judgement when liability was not proved.**

3. The learned magistrate erred in entering judgment when the respondent had failed to prove his case on a balance of probability.

4. The learned magistrate erred in law and fact in entering judgment for the respondent when there was no sufficient evidence to support his findings.

In the lower court the plaintiff had filed a plaint alleging that motor vehicle registration number **KAN 004E** Toyota Corolla belonging to the appellant knocked him while he cycled along Kondele-Kibos road on the 11th of April, 2004. He attributed negligence on the part of the driver and/or agent of the appellant. The respondent claimed to have sustained several injuries as follows:

- (a) a fracture dislocation of the left leg;**

- (b) left shoulder deep cut wound**

- (c) neck deep multiple cut forming ugly keloids;**

- (d) left cheek deep multiple cut leaving scars'**

- (e) right elbow deep cut wound;**

- (f) chest injury;**

The respondent sought for general damages, costs and interest.

On its part eh appellant, the defendant filed a defence dated 16th July 2004 denying ownership of the motor vehicle, occurrence of the accident and the allegation that the plaintiff was a lawful cyclist as alleged and the negligence attributed to the driver of the motor vehicle.

The trial magistrate entered judgment on liability and quantum against the Appellant awarding the Respondent Kshs.300,000/= plus costs.

At the hearing of the appeal the Appellant the appellant stated that:

- **It denied ownership of the motor vehicle;**

- **There was no proof of ownership.**

- **no evidence of negligence was adduced;**

- **the respondent did not prove his case on a balance of probabilities.**

The respondent's counsel on his part opposed the appeal for the following reason:

- **the abstract form was produced by consent of the parties;**
- **the respondent relied on its content and no evidence to the contrary was adduced;**
- **on issue of negligence that the respondent gave account of how the accident occurred;**
- **the appellant rode on his proper side of the road when he was knocked;**
- **the defence did not produce any evidence to the contrary.**

This being the first appellate court it has a duty to re-consider, examine, evaluate, and analyse the evidence on record and arrive at its own independent conclusion. See the case of **Selle & another versus Associated Motor Board Company Limited & Another [1968] E.A. at 123.**

The Respondent was the sole witness in this case. By consent of the parties the abstract form and medical reports were produced. The defence did not call any witness. It must therefore be appreciated that the evidence before court is the evidence of the respondent. The defence in the absence of any evidence remains mere allegation with no evidential value.

The respondent produced an abstract form giving details of ownership of the subject motor vehicle as **Diamond Shipping Services Limited** of P.O. Box 1158 Mombasa. The abstract was produced by consent. The defence counsel then did not object to the contents neither did he cross-examine on the same. The respondent sued the party whose name appears on the abstract. The plaintiff did not produce any other proof of ownership. Is the abstract adequate proof of ownership? In the case of *Lake Flowers versus Cila Francklyn Onyango Ngonga & Another* Civil Appeal No.2010 of 2006 the Court of Appeal stated in part:

“without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver for, it was difficult for it to contest the liability blamed against it by the Superior Court and/or attempt to partly or wholly blame the 2nd respondent for the accident on this appeal.

Neither can it deny the ownership of the Mitsubishi Canter without any evidence to counter the Police abstract produced by the 1st respondent which shows it to be the owner of the motor vehicle.”

The situation above is similar to the case before court and this court is guided by the sentiments of the Court of Appeal.

As regards the issue of negligence, the respondent stated as follows in his evidence in chief:

“The motor vehicle came from ahead of me and knocked me down. I was on the left side of the road.

The accident occurred at a junction. The motor vehicle was avoiding another motor vehicle from Manyatta.

I deny the particulars of negligence in the defence.

In cross-examination the Respondent stated:

“I was on the left side of the road. The motor vehicle was on the left side also. I was riding off the road. The motor vehicle was coming from the opposite direction and it came towards me..... It is the motor vehicle that should be on the highway.”

In this country motor-vehicle are driven on the left side so that if the respondent rode on the left an oncoming vehicle ought to have been on the right. The respondent testified that he was riding on the left and (the correct side) the motor vehicle was being driven on the wrong side, secondly he was off the road and the vehicle went towards outside the road.

The appellant did not adduced any evidence to rebut assertion above. The court therefore has no other evidence to weigh against that of the respondent. The trial magistrate believed the respondent and found on a balance of probabilities that he had proved his case. The trial court further found as a matter of fact and Law that the respondent as a road user ought to have been careful so as to avoid the accident. She found he had contributed to the accident, she apportioned liability at 80/20..

I see no basis for the reasons given above to interfere with the finding of the trial court on liability. As regards quantum the sum awarded appears reasonable and likewise I see no reason to disturb the same.

In the circumstances therefore I dismiss appeal with costs

Dated and delivered at Kisumu this 11th March, 2011.

ALI-ARONI

J U D G E

In the presence of:

.....**Counsel for Appellant**

.....**Counsel for Respondent**