



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 95 of 2006

PAUL KARANJA.....1ST APPELLANT

DOROTHY WAMBUI.....2ND APPELLANT

VERSUS

DAVID MAINA MWANGI.....1ST RESPONDENT

JAMES KARIMI WAMARWA.....2ND RESPONDENT

MARY WAMBUI MAINA.....3RD RESPONDENT

BENEDETTA NAJALA SIMIYU.....4TH RESPONDENT

JOHN MWANGI MUGO.....5TH RESPONDENT

DAVID YATOR.....6TH RESPONDENT

POSTAL CORPORATION.....7TH RESPONDENT

JUDGMENT

By way of an amended memorandum of appeal Paul Karanja and Dorothy Wambui who were the 3rd and 4th defendants in CMCC No. 1401 of 2005 have appealed against the judgment and decree of that court dated 19th June 2006. The appeal is based on two grounds; the apportionment of liability between the owners of the two motor vehicles which were involved in the accident. The other ground of appeal is on the assessment of damages awarded to the various plaintiffs.

This being a first appeal this court is mandated to consider the entire judgment the proceedings by the trial court and arrive at its own independent decision while bearing in mind that it never saw the witnesses testify and make due allowance for that. The principles to be followed by the first appellate court have been set out in several decisions by the Court of Appeal and one such authority is the case of **Peter vs. Sundy (1958) E.A. page 429** as follows:

“It is a strong thing for an appellate court to defer from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the

conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”

Briefly stated several plaintiffs in the suits which were consolidated were travelling in motor vehicle registration number KAN 234U which was driven by the 1st appellant. When the vehicle reached Kwawanyeki along Nakuru Nyahururu road the plaintiffs alleged that the 1st appellant negligently drove the vehicle and caused it to collide with motor vehicle KAS 931Z on the rear. As a result of the collision the plaintiffs suffered injuries. During the hearing of the matter the plaintiffs testified how the accident occurred. They blamed the driver of KAS 931Z for the accident. The driver of motor vehicle registration number KAS 931Z denied liability. He testified that he was correctly overtaking motor vehicle registration number KAS 931Z which was moving slowly and the road was clear but in the process of overtaking motor vehicle KAS swerved off. He applied brakes but he hit the rear right side of the vehicle. The evidence by the driver of KAS 931Z was that he slowed down and signalled that he wanted to enter the rightside but his vehicle was suddenly hit from the back on the boot. He produced photographs that showed the damage on the right front side. Several plaintiffs also testified and after considering the evidence as well as the photographs of the two vehicles the trial court apportioned liability between the two vehicles and awarded damages to the plaintiffs as follows:

In CMCC 1366 of 2005 – James Karimi Wamarwa – general damages – 55,000/= and Special damages Kshs 2,000/=

In CMCC 1399 of 2005 Benedeta Nanjala Simiyu – general damages – 60,000/= and special damages Kshs 2,000/=

In CMCC 1400 of 2005 – John Mwangi Mugo – general damages – 60,000/=, special damages Kshs 2,000/=

In CMCC 1401 of 2005 – Mary Wambui Maina – 55,000/=, special damages Kshs 2,000

In CMCC 1402 of 2005 David Maina Mwangi – Kshs 50,000/=, special damages Kshs 2,000/=

Counsel for the appellant further submitted that it was clear from the evidence that the accident was caused by the driver of motor vehicle registration number KAN 234U who drove the vehicle at a high speed and disregarded the appellants signal on his intention to turn to the right as a result David Yator rammed into the rear of the appellants motor vehicle registration number KAS 931Z as a result of which the plaintiff suffered various injuries. Moreover David Yator was charged with the offence of careless driving. However this case has not been concluded which on a balance of probability showed that it is the driver of KAN 234 U who was to blame for the accident. There was overwhelming evidence from the plaintiffs witnesses and even from defence witness No. 2 that the accident was caused by the driver of motor vehicle registration number KAN 234U. The court also is faulted for not taking into account the evidence by the injured people who were independent witnesses. Counsel for the appellants relied on the decision by the Court of Appeal in the case of ***Mwangi vs. Wambugu [1984] KLR page 453*** where it was held:

***“2. A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding; and an appellate court is not bound to accept a trial judge’s finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.*”**

3. In this case, there was no sufficient reason for the trial court to have rejected absolutely the evidence of the inspector who saw the scene of the accident and made a sketch plan and was able to locate the point of impact without assuming anything; and the trial court’s impression based on the

demeanour of the two witnesses was inconsistent with the evidence in the case generally; and for these reasons, the appellate court would interfere with the findings of fact by the trial court.

Counsel for the appellants is of the view that the trial magistrate erred for rejecting the evidence by the plaintiffs who are independent witnesses and by giving undue regard to the evidence of the damage caused to the vehicles. In this regard if the trial magistrate properly considered the plaintiffs evidence the 6th and 7th respondents would have been found 100% liable for the accident.

This appeal was opposed by the respondents. According to counsel for the 1st, 2nd, 3rd, 4th and 5th respondents there was conflicting evidence before the trial magistrate on how the accident occurred. The 6th respondent who was driving motor vehicle KAN 234U testified that it is the 1st appellant who abruptly turned to right hand side while the 1st appellant testified that he had not started turning to the right. In the face of this conflicting evidence the trial court exercised its discretion and apportioned liability between the two drivers. There is a long line of authorities by the Court of Appeal that an apportionment of liability is an exercise of discretion and cannot be interfered with on appeal save in exceptional cases where the apportionment is manifestly erroneous. Similarly on the assessment of general damages the Court of Appeal has expressed itself in numerous authorities. One such case is the case of **Butt vs Khan [1982 – 1988] 1KAR;**

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which is inordinately high or low.”

These lines of argument were taken further by counsel for the 6th and 7th respondents who supported the decision by the trial magistrate. Counsel argued that the two conflicting versions of how the accident occurred were not independently corroborated. The injured persons namely the plaintiffs cannot be regarded as independent witnesses. Moreover the evidence by the plaintiffs as to how the accident occurred was at variance with the pleadings which they filed. This affects their credibility as witnesses and the mere fact that they were saying the same thing is not in itself corroboration of the two versions of how the accident occurred. The trial court relied on the evidence of the damage on the two motor vehicles. The finding by the trial court is also founded under section 60(1)(m) and 119 of the Evidence Act. The final resting place of the two motor vehicles also guided the court in determining the point of collision and also the damage. All these factors did not support the contention by the driver of KAM 234U that he had slowed down indicating his intention to turn right. The Court of Appeal also relied on the case of **Berkley Steward Limited vs. Waiyaki [1982-1988]1 KAR page 1118**, while apportioning liability to the two motorists equal. The Court of Appeal cited with approval an English case **Baker v. Market Harborough Industrial Co-operative Society Ltd [1953] 1 WLR 1472 at 1476**, Denning LJ (as he then was) observed inter alia as follows:

‘Everyday, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them ...’

The trial court also opined as follows:

“Many things appear to have happened at the scene from evidence given before one. The fact is no independent witness was called to testify on what side and I must state here it is not possible to decide who was completely to blame for the accident”.

The principle issue for determination in this appeal is whether the trial court was guided by cogent evidence to arrive at the apportionment of liability at 50:50 between the appellants and the 6th and 7th respondents. Going by the evidence on record there were two versions on how the accident happened.

According to the 1st appellant who was the driver of motor vehicle registration number KAS 931Z he slowed down and put an indicator that he was turning right and he was hit from the rear by the driver of KAN 234U which vehicle was driven fast. The 6th respondent who was the driver of KAN 234U testified that he was overtaking KAS 931Z which was moving slowly. In the course of overtaking the driver of KAS 931Z swerved and knocked his vehicle. The learned trial magistrate found that there was no independent witness. The evidence by the plaintiffs who were passengers did not help the court and rightly so because they were not independent witnesses. They were parties to the suit. In any event their evidence is at variance with their pleadings in which they blamed both the drivers of the vehicle they were travelling in and motor vehicle registration number KAN 234U. The trial court considered the photographs that showed the damage on both motor vehicles. To resolve the variance in evidence on how the collision occurred and while bearing in mind the principle that where there is collision both parties are answerable. The court after listening to the evidence resolved the matter by finding both drivers liable for the accident. Accordingly I find no justifiable reason for interfering with the trial court's assessment of the evidence before the court and the apportionment of liability between the two drivers.

On quantum the appellant did not put up any opposition on these awards. In any event it is settled law that the assessment of damages is an exercise of the trial court's discretion. This court cannot interfere with the award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. The awards made by the trial court are reasonable in the circumstances of the injuries sustained by the plaintiffs. Accordingly I find the entire appeal herein lacks in merit. It is dismissed with costs to the respondents.

Judgment read and signed on 8th day of April 2009

M. KOOME

JUDGE