



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appeal 78 of 2007

WAINAINA NGANGA GAKUU APPELLANT

VERSUS

Jael Oduor 1st RESPONDENT

CATHOLIC ARCHDIOCESE OF KISUMU.....2nd RESPONDENT

SEGA MISSION HOSPITAL 3rd RESPONDENT

JAMES ONSARE..... 4th RESPONDENT

(An Appeal from the Judgment and decree of Principal Magistrate's Court in Kisumu CMCC Number 392 of 2003)

JUDGMENT

The appellant, Wainaina Nganga Gakuo was sued by the first respondent Jael Oduor for damages arising from a road traffic accident which occurred on or about the 31st August 2001 along the Busia – Kisumu road involving the appellant's motor vehicle registration number KAL 139 L Mitsubishi –lorry and motor vehicle registration number KAB 265 A Nissan Sahara in which the first respondent was traveling.

The appellant's vehicle was at the time driven by the appellant's agent and / or servant John Ngugi Nganga.

In the course of the trial, the appellant took out third party notices against and enjoined the second, third and fourth respondents into the suit.

After the trial before the Principal Magistrate at Kisumu, the appellant was found wholly liable and judgment entered against him in favour of the first respondent who was awarded general damages in the sum of Kshs. 500,000/=.

Being dissatisfied with the judgment of the learned Principal Magistrate, the appellant lodged this appeal on the basis of the nine grounds contained in the memorandum of appeal filed herein on the 27th July 2007. He prays that the whole of the judgment be set aside and be substituted with judgment on liability and quantum wholly against the second, third and fourth respondents.

At the hearing of the appeal, the appellant's counsel, Mr. Musundi concentrated on grounds one, two, and

five of the appeal and abandoned grounds three and four. He argued that the evidence on record showed that the second, third and fourth respondents ought to have been found 100% liable for the accident. He said that the sketch plan showed that the point of impact was on the left side of the road facing Kisumu. He said that, that was the side being used at the time by the appellant's motor vehicle. He said that it was the second, third and fourth respondent's motor vehicle which veered into the path of the appellant's motor vehicle and therefore liability attaches to them at 100%.

The learned counsel went on to say that the trial court relied on the first respondent's testimony which was clearly contradicted by that of the appellant and was unreliable as the first respondent informed the police that she was asleep when the accident occurred. He said that the learned trial magistrate failed to consider the appellant's submissions and arrived at a wrong decision.

The first respondent opposed the appeal and her advocate, Mr. Ouma contended that the trial magistrate's finding was fair and based on the evidence of the witnesses on record. He said that the evidence of the first respondent was not challenged and clearly cast blame against the appellant. He said that the appellant's driver was charged with a traffic offence and convicted. He said that the police officer (PW3) agreed with the first respondent and confirmed that the appellant's driver was indeed charged. He said that the only concern to the appellant was that the trial court ought to have been bound by an earlier decision of the court. He contended that the said decision was not availed to the court and was not referred to by the appellant even though a third party was found liable.

Mr. Ouma also contended that the finding by the trial Magistrate regarding the appellant's evidence was correct as the same could not controvert that of the first respondent and the police officer (PW3). He further contended that the judgment of the trial court was not faulty. He stated with regard to quantum of damages that the same was not challenged at the hearing of the appeal and in any event, the award made by the trial court was reasonable.

The second, third and fourth respondents also opposed the appeal and agreed with the first respondent. Their advocate Mr. Odhiambo argued that the sketch plan and the fact that the vehicles ended up in one part of the road have no bearing on culpability. He said that in any event, the point of impact was almost in the middle of the road. He said that the police covering report recommended that the appellant's driver be charged with a traffic offence and was indeed charged and convicted. He said that the first respondent blamed the appellant's driver for the accident and said that it was the appellant's vehicle which veered towards the first respondent's side of the road.

Mr. Odhiambo further stated that the first respondent was not cross – examined by the appellant.

He said that PW3 was not cross- examined on issues relating to the investigations carried out which ended up with the appellant's driver being charged and convicted. He contended that the appellant's submission were duly considered by the trial court and urged this court to dismiss the appeal.

Having considered the arguments for and against the appeal, the obligation of this court is to consider the evidence afresh with a view to arriving at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See *Selle & Another vs Associated Motor Co Ltd & others* [1968] 123 and *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982-88] 1 KAR 278).

The evidence by the claimant first respondent Jael Oduor (PW1) is that she and others were on the material date traveling in motor vehicle registration number KAB 265 A and on reaching a place called Dudi – along the Busia / Kisumu road the vehicle was involved in a road accident. It violently collided with another motor vehicle registration number KAL 139 L belonging to the appellant.

After the collision, the first respondent fell unconscious and later found herself at the hospital. She had suffered bodily injuries and was treated accordingly at hospitals in Yala and Siaya. She was later examined by Dr. Antony Mubisi (PW2) who compiled a medical report (PEX7) showing that she had suffered a fracture of the right radius (colles fracture), broken teeth, cut wounds and soft tissue injuries.

The accident was reported to the police and necessary investigations were carried out by P. C. Samuel Odoyo (PW3).

After investigations, the appellant's driver was charged with a traffic offence of careless driving.

The first respondent eventually instituted the present suit against the appellant.

The appellant Wainaina Nganga (DW1) was at the material time the owner cum driver of the motor vehicle registration number KAL 139 L. He was traveling in the same vehicle at the material time and was the co-driver. The late John Ngugi who was the first defendant was driving the vehicle when the accident occurred.

They were at the time traveling from Busia when their vehicle collided with motor vehicle registration number KAB 265A in which the first respondent was traveling. The appellant blamed the driver of motor vehicle registration number KAB 265 A for the accident.

The suit against the first defendant was discontinued vide a notice of discontinuation filed on the 5th October 2005 and vide a consent letter signed by all the parties dated 15th September 2005. Third party directions were given to the effect that liability between the third party and the defendants be determined concurrently with the determination of liability between the plaintiff and the defendant.

The third parties are the second, third and fourth respondents herein. They filed a statement of defence denying the allegations of negligence made against themselves by the appellant / defendant and contending that the accident was wholly caused and/or substantively caused by the negligence of the appellant's driver. They did not however lead any evidence at the trial in support of their denial and contention.

The basic issue arising for determination is whether the accident was caused by the negligence of the appellant through his driver or the second, third and fourth respondents whose motor vehicle the first respondent was traveling in as a lawful passenger.

The occurrence of the accident and the ownership of the ill-fated vehicles are factors which were not at all or substantially disputed.

In her testimony, the first respondent (PW1) blamed the appellant's driver for the accident. She said that the road was straight and that she could see ahead. She said that the appellant's lorry was on the opposite side of the road from the direction of Busia. She said that the lorry came to their side of the road with full lights and moving in a zig-zag manner thereby causing a collision with their vehicle which had its body reaped off due to the impact. She was thrown off the vehicle and landed on the left side of the road. She said that their driver dimmed his lights, kept to his side and attempted to avoid the lorry.

In contrast to the first respondent's evidence, the appellant (DW1) blamed the driver of motor vehicle registration number KAB 265A for the accident. He said that the vehicle [KAB 265A] was on the opposite side of the road moving at a high speed. He implied that the vehicle veered to their side of the road because his driver swerved sideways to avoid a head on collision.

He contended that their vehicle did not hit the other vehicle (i.e. KAB 265A)

Neither the first respondent nor the appellant called independent witnesses to support their respective versions of who was to blame for the accident.

It was therefore the word of the first respondent against that of the appellant. The trial magistrate in believing the word of the first respondent held that the appellant's evidence did not contradict that of the first respondent thereby failing to establish that the driver of motor vehicle registration number KAB 265 A was to blame for the accident. The trial magistrate in upholding the first respondent's evidence based his belief on the evidence of the police officer P. C. Samuel Odoyo (PW3) who indicated that police

investigations confirmed that the appellant's driver was to blame for the accident and as a result was charged with the traffic offence of careless driving.

In his evidence, P. C. Odoyo (PW3) indicated that the investigations were carried out by himself and a CPL Langat. He said that the accident scene was visited and a sketch plan drawn. He did not produce the sketch plan but produced the police file (PEX 8) containing the sketch – plan.

The said police file (PEX 8) contains several copies of police abstracts showing that investigations pertaining to the accident had not been concluded at the time the abstract were issued.

The file (PEX 8) also contains notices of intended prosecution served upon the drivers of the two ill fated vehicles.

The fourth respondent was the driver of the motor vehicle registration number KAB 265 A.

The police file (PEX 8) does not contain any copy of a charge sheet showing that the appellant's driver was charged with a traffic offence of careless driving. And even if such a charge existed, there was no evidence to show that the appellant's driver was actually convicted.

The fact that both drivers were issued with notices of intended prosecution was a clear indication that the police were uncertain of culpability vis-à-vis the two drivers. The sketch –plan contained in the police file was drawn by a P. C. Wekalao who it would appear from the record was not called to testify.

Nonetheless, the sketch-plan was part of the evidence in as much as the police file was tendered as an exhibit (PEX 8) by P. C. Odoyo (PW3).

The sketch –plan shows that both vehicles rested on the left side of the road towards the Kisumu direction after impact i.e. the right side of the road towards Busia.

The point of impact is clearly shown to have been slightly on the left side of the road facing the Kisumu direction. This laid credence to the appellant's contention that it was the motor vehicle registration number KAB 265 A which veered into his rightful side of the road and caused the accident.

This court would in the circumstances be disinclined to believe the contention by the first respondent that it was the appellant's vehicle which veered into the side of motor vehicle registration number KAB 265 A.

The trial magistrate was clearly in error when he ignored and/or disregarded the evidence contained in the police file (PEX8) which established on a balance of probabilities that the fourth respondent/ third party was the culprit in the causation of the accident by his careless manner of driving which led to his vehicle veering into the wrong side of the road and into the path of the appellant's vehicle. The evidence contained in the police file together with that adduced by the appellant contradicted and discredited the evidence by the first respondent.

Consequently, this court would find in favour of the appellant and hold without hesitation that the accident was caused wholly by the negligence of the fourth respondent /third party.

The first respondent was therefore entitled to damages from the respondents/third parties rather than the appellant.

Regarding damages, it is evident that the first respondent suffered mainly soft tissue injuries and cut wounds. He also suffered a fracture of the right radius (colles fracture) and a broken upper incisor teeth and a cracked incisor tooth.

There is no indication of permanent incapacity.

Considering the authorities and comparable decisions cited by both counsel for the plaintiff and the defendant, this court would consider an award of Kshs. 350,000/= to be adequate compensation in terms of general damages for pain and suffering.

In the end result, this appeal is allowed to the extent that the judgment delivered on the 19th July 2007 against the appellant / defendant be and is hereby set aside and instead judgment be and is hereby entered against the respondents/third parties (i.e. respondents two, three and four) in the sum of Kshs. 350,000/= general damages plus costs and interest. The appellant shall also be awarded the costs of the appeal.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 21st day of November 2008.

J. R. KARANJA

JUDGE

JRK/aao