



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 84 of 2006

IBRAHIM DENNIS MUSA 1ST APPELLANT

SECURICOR SERVICES LTD 2ND APPELLANT

VERSUS

JOSEPH MAINA MUCHUME RESPONDENT

**[Being an appeal from the judgment of Hon. G. M. utembei Chief Magistrate's Court, Nakuru
CMCC No.519 of 2004 delivered on 17th May 2006]**

JUDGMENT

The appellants were the defendants in CMCC 519 of 2004 in Nakuru. The respondent instituted a suit against in which he sought for general damages for injuries that the respondent contended he sustained on *4th February 2003* as a result of a road traffic accident involving the 2nd appellant's motor cycle registration number KAK 705M which was under the control of the 1st appellant and which collided with the respondent. The appellants denied liability in their written statement of defence and also denied particulars of negligence and injuries suffered by the respondent.

After a full trial, judgment was delivered on *17th May 2006* in which the learned trial magistrate found that the respondent had proved his case on a balance of probability. The trial court held that, the appellants were liable for the injuries. The respondent was awarded Kshs.180,000/- as general damages and Kshs.2,000/- as special damages.

Being dissatisfied with the said judgment, the appellant has appealed against the said judgment, and in their memorandum of appeal they raised four grounds of appeal as follows;

- 1. That the learned trial magistrate erred in holding the appellants liable without evidential basis at all and without critical evaluation of evidence.**
- 2. That the trial magistrate erred in law and in fact in finding the appellants liable against overwhelming evidence of the defendant and admission by the plaintiff of having been charged with a traffic offence of careless riding.**
- 3. That the learned trial magistrate erred in law in finding the defendants liable to the extent of**

100% without giving due consideration to the defence evidence, or at best by totally misapprehending the defence evidence.

4. That the learned trial magistrate erred in law and in fact in failing to consider and apply the principles of law applicable in a claim for negligence.

In further exposition of above grounds of appeal learned Counsel for the appellant, **Mr. Murimi** submitted that the evidence before the trial court by the respondent and his witnesses was contradictory. Secondly, the trial court failed to take into account that the respondent was charged with a traffic offence and therefore the court was in error by finding that the appellants were 100% liable for the accident.

Counsel relied on the case of **Barkley Steward & Ano. Vs Lewis Kimani Waiyaki [1982 -1988] 1 KAR 1118** where the court of Appeal quoted with approval the decision in the case of **Baker Vs 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 balance, 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 ...”

Based on the evidence on record, it was obvious that both parties were equally to blame for the accident and liability should have been apportioned on a **50:50** basis. And there was no basis of finding the appellant 100% liable.

Counsel for the appellant also faulted the trial court for relying on the evidence of the respondent when the respondent did not produce the police abstract form or call the investigating officer regarding this accident. For that proposition he relied on the decision in the case of **Nguku Vs Republic [1985] KLR page 413** where the Court of Appeal held

“Where a party fails to produce certain evidence, a presumption arises that the evidence, if produced, would be unfavourable to that party; this presumption is not confined to oral testimony but can also apply to the evidence of the a tape recording which is withheld.”

The attempt by counsel for the appellant to produce the ground of appeal that the judgment of the trial court did not comply with the provisions of Order 20 rule 4 was opposed by Counsel for the respondent on the grounds that, that ground was not one of the grounds of appeal. Learned Counsel for the respondent submitted that under the provisions of **Order 40 Rule 2 of the Civil Procedure Rules**;

“The memorandum of appeal shall set forth concisely and under distinct heads the ground of objection to the decree or order appealed against without any argument or narrative, and such grounds shall be numbered consecutively.”

In further arguments in opposition of this appeal, learned Counsel for the respondent **Mr. Mutonyi** submitted that the Judgment of the trial court can not be faulted, the court that heard the evidence, believed the evidence by the respondent and his witnesses and as far as the evidence as to where the accident occurred, the evidence of **DW 2** supported the respondent’s evidence, that the collision occurred on the respondent’s lane. The trial court also found that the 1st appellant and **DW 2** contradicted themselves and they gave conflicting evidence.

Regarding the traffic charge that was preferred against the respondent, Counsel submitted that nothing turns on it, as he was acquitted under **Section 210** of the **Criminal Procedure Code**. The investigations were carried out when he was in the hospital and the traffic file which was produced in court shows that he was charged with the offence of riding motor cycle registration number KAK 705N which motor cycle was being controlled by the appellant. As such, nothing turns on that traffic proceedings. Furthermore,

the appellants did not plead contributory negligence nor did they give any evidence in that regard, therefore there was no basis for the court to make a finding of contributory negligence.

Counsel relied on the case of **Maina Kaniaru Vs Another Vs Joseph Muriuki Wang'ondu CACA 14 of 1989 (unreported)** where the Court of Appeal approved the decision in the case of **Fookes Vs Slaytor [1978] 1WLR 1293** that contributory negligence as to be specifically pleaded by way of defence to a plaintiff's claim of negligence. The Court of Appeal held that the Judge had erred in law in finding that the plaintiff's negligence had contributed to the accident when there was no such pleadings.

This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court while bearing in mind that it never saw nor heard the witnesses and therefore make due allowance for that. The principles governing the considerations to be borne in mind have well been established particularly in the case of **Kiruga Vs Kiruga & Another [1988] KLR page 348** where the Court of Appeal held

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution.”

Having reconsidered the record from the trial court and the rival arguments, what comes across in this appeal is whether the respondent proved his case against the appellant and whether liability should have been apportioned. From the evidence of all the parties who testified, it is not at all in dispute that this accident occurred and that the respondent and 1st appellant were involved. What is in dispute, is **who was to blame?**

The trial court that heard and saw the witnesses believed the evidence of the respondent and his witness. The trial court also disbelieved the evidence by the 1st appellant which the trial court found was contradictory. The principles governing the circumstances under which the appellate court can interfere with the decision of the trial court are well settled in the case of **Peter Vs Sandy [1958] E.A 424** in which it was held as thus;

- I. ***“Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellant court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's collusion.***
- II. ***The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence;***
- III. ***The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.”***

In this case, I find no justifiable reason why the decision by the trial court should be disturbed. It is the trial court that heard the witnesses and the allegation that there were contradictions regarding whether the appellant fell on the tarmac or on the trench is not material.

On the issue of contributory negligence, Counsel for the respondent made reference to the case of **Maina Kaniaru (Suppra)** and the leading text by **Halsbury's Laws of England 4th Edition para 69**, the passage on contributory negligence where the learned authors have written;

“In order to establish contributory negligence the defendant has to prove that the plaintiff's negligence was a cause of the harm which he has suffered in consequence.”

The appellant did not plead contributory negligence and no evidence was adduced in that respect. I accordingly agree with the above principle of law.

Having reconsidered the entire record and the judgment of the trial court, I am not satisfied that the trial court misdirected itself and accordingly, I find this appeal has no merit. It is hereby dismissed with costs to the respondent.

Judgment read and delivered on this 20th day of April 2007.

MARTHA KOOME

JUDGE