

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Appeal 125 of 2003

PETER ODHIAMBO APPELLANT

- Versus -

ALI BAKARI HELEFI RESPONDENT

J U D G M E N T

This is an appeal from the judgment of the Resident Magistrate at Kilifi given on the 3rd July 2003 in Kilifi SRMCC No. 304 of 2001 in which he dismissed the Appellant's (the plaintiff's) claim for failure to prove negligence against the defendant.

Before the learned trial magistrate in that case was a claim for damages for injuries the plaintiff suffered in a road traffic accident. The plaintiff testified that on 5th January 2001 he was traveling as a passenger in the defendant's Nissan Matatu registration number KAL 987G from Malindi to Mombasa. On the way, while climbing a hill, the defendant attempted to overtake a lorry. There was an oncoming vehicle and to avoid a head-on collision with it he swerved to his left having just managed to overtake the lorry. The vehicle overturned and the plaintiff suffered injuries. The defendant was thereafter charged and convicted of careless driving.

The defendant's driver, Ali Bakari Elefi, gave a different version. According to him it is the oncoming matatu that attempted to overtake a car thereby going to his side of the road and hitting the right side of his vehicle causing it to overturn. He claimed that he was unfairly convicted in the traffic case but he did not appeal against that conviction.

The learned trial magistrate preferred the evidence of the defendant's driver to that of the plaintiff and dismissed the case holding that the plaintiff did not make mention of a third vehicle having been involved in the accident and yet there was one whose owner he should have sued. He criticized the plaintiff for failure to produce the traffic case proceedings in which the defendant was convicted to show which offence out of "the 100 or so traffic offences" the defendant was charged with.

I have carefully perused the lower court record. To start with, I do not think that the learned trial magistrate's criticism of the Appellant was fair. The Appellant testified that the Respondent's driver was convicted of the offence of careless driving. The Respondent's driver, while admitting that he was convicted in the traffic case, did not dispute that fact. He did not say he was convicted of a different offence. All he said was that he was unfairly convicted.

The Respondent's driver did not say why he thought his conviction was unfair. If indeed it is the driver of the other matatu who was overtaking and went to his side I cannot understand why the police could have charged him and not that other driver. If indeed it is the other driver who was overtaking and the police unfairly charged the Respondent's driver he could have come to the High Court screaming.

After re-evaluating the evidence tendered before the learned trial magistrate, as I am obliged to, I find that it is the Respondent's driver who attempted to overtake a lorry as stated by the appellant. Just after overtaking the lorry but before he could revert to his lane he collided with the oncoming matatu and landed on his left hand side of the road.

The fact that the Appellant may not have seen the collision with the other matatu does not change the position. The Respondent's driver having not appealed against his conviction in the traffic case that is conclusive evidence of his guilt as provided in section 47 of the Evidence Act and the Respondent is

therefore vicariously liable to the Appellant for damages.

In the circumstances I find that the learned trial magistrate erred in dismissing the Appellant's case. I therefore allow this appeal set aside the trial magistrate's finding and substitute therefor a finding that the Respondent is 100% liable to the Appellant. As the Appellant abandoned the appeal against the quantum of damages which the trial magistrate had assessed at Sh. 100,000/= if he had found for the plaintiff I hold that the Respondent is liable to pay to the Appellant that sum plus interest at the court rate from the 3rd July 2003. It is up to the Respondent to seek indemnity from the third party against whom he had obtained judgment in default of appearance after paying the Appellant in full.

The Appellant shall have the costs here and in the court below.

DATED and delivered this 20th day of May 2005.

D.K. MARAGA

JUDGE