



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
Civil Appeal 349 of 2004

JOHN MWENDA MBAABU APPELLANT

VERSUS

ARCADE STATIONERS LTD 1ST RESPONDENT

STANLEY MWANGI MACHARIA 2ND RESPONDENT

(An Appeal from the Judgment of Hon. A. N. Owino, SRM

in Milimani Commercial Courts Civil Suit No. 9273 of 2003

delivered on 20th May, 2004).

JUDGMENT

On 8th July, 2002, at 2.00 am, the Appellant was walking on his way home, along Ojijo Road in Westlands, when he was suddenly hit by a motor vehicle registration no. KAL 143R, a Nissan Pick-Up, causing him severe personal injuries. He filed a suit in the lower court against the owner of the motor vehicle, who is the 1st Respondent in this appeal, and the driver, the 2nd Respondent before this Court.

His case in the lower court essentially stated that he was walking on the side road when he was suddenly hit. The 2nd Respondent, on the other hand, testified that at the material time he saw some five people on the side of the road when one of them (the Appellant) suddenly came onto the road, and although he applied brakes immediately, he hit the Appellant. He testified further that he was driving at 50 KPH, and after hitting the Appellant, he found the latter smelling of alcohol.

After hearing two witnesses, the Appellant and the 2nd Respondent on the issue of liability, the lower court came to the conclusion that the Appellant had not established any negligence against the Respondents, and had not proved his case on a balance of probability, and accordingly dismissed his claim for damages. It is against that Judgment, that the Appellant has preferred this appeal, on the following two grounds:

“1. The learned trial Magistrate erred both in law and fact in failing to appreciate that on the basis of materials placed before her (that is to say, the plaint, defence, evidence and documents produced, submissions) the plaintiff had properly established/proved his case on a balance of probabilities as required in civil cases contrary to the learned Magistrates finding in dismissing the case.

2. Failing to exercise her judicial discretion properly vis-a-viz the evidence before her hence arriving at an erroneous decision as she did.”

In his submissions before this Court, Mr Kariuki, for the Appellant, argued that the particulars of negligence outlined in the Plaint had not been controverted; that the defence did not attribute any negligence to the Plaintiff/Appellant; that there was no evidence that the Appellant had consumed any alcohol or miraa; that the lower court's conclusion that the Appellant "must have been tired" was erroneous in law; and the fact that the 2nd Respondent had not been charged with any offence was insignificant in so far as his negligence was concerned. In his view, the Appellant had proved his case on a balance of probability.

Mr Achoki, for the Respondents, argued that none of the particulars of negligence pleaded in the Plaint had been proved; that the Appellant was drunk at the material time; and relying on the case of Calistus Ochieng Oyalo vs Aoko (C. A. 130 of 1996) – a case that was actually cited by the Appellant, he argued that the onus of proving negligence was on the Appellant.

As this is a first appeal, it is my duty to assess and re evaluate the evidence before the lower court, bearing in mind that this court has neither seen or heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before her and that she has not acted on wrong principles in reaching her conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

There were two witnesses (apart from the Doctor) who testified on the issue of liability – the Appellant himself and the 2nd Respondent driver.

In his testimony before the lower court, the Appellant said that he was walking off the road at 2.00 am when he was hit by the front of the Respondent's motor vehicle which had its head-lights on. In cross-examination, he admitted that he was in the business of selling miraa, and that occasionally he consumed some.

The 2nd Respondent, on the other hand, testified that as he was driving on Ojijo Road he met more than five people. "One of them entered the road suddenly. I took brakes suddenly. My front bumper touched on the person ... the Plaintiff was found to be drunk by the Police ... (he) was smelling of liquor".

Based on this rather brief and sketchy evidence, the learned Magistrate chose to believe the Respondent, and held that the Appellant had not established his case on a balance of probability. The Magistrate had the benefit of hearing the witnesses first hand, and of observing their demeanour, and I have no compelling reason to reverse her findings of fact.

The onus is always on the Plaintiff to establish his case on a balance of probability. It is not enough for him to say at this appeal stage that the defence did not controvert the particulars of negligence pleaded in the Plaint, and is bound by his pleadings. True, parties are indeed bound by their pleadings. And here, the Respondents did specifically deny in paragraph 4 of the Defence the particulars of negligence. It was then up to him to prove his claim. The lower court found, as I do, based on the evidence available, that he did not establish negligence on the part of the Respondents. In certain circumstances, negligence may be inferred from the mere happening of an accident (See Calistus Oyalo case, supra). However, where the defendant then gives an explanation, as he did here, about the manner in which the accident happened, the onus remains on the Plaintiff to demonstrate negligence. The Respondent's evidence that there were five people on the road, and only one – the Appellant suddenly appeared on the road was not controverted, nor was the fact that he was not speeding. There would have been nothing easier for the Appellant then to have one of those five people give evidence to corroborate his case.

I must, therefore, not interfere with the findings of the lower court which had the benefit of hearing and observing the witnesses before it.

Accordingly, this appeal is dismissed with costs to the Respondents.

Dated and delivered at Nairobi this 19th day of September, 2005.

ALNASHIR VISRAM

JUDGE