REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 143 OF 2001

RICHARD TONGI NYAGAKA………………………….APPELLANT

VERSUS

CHARLES AWUOR ODIGA………………………….RESPONDENT

JUDGMENT

Richard Tangi Nyagaka who was aggrieved with the judgment of the Chief Magistrate Court in Kisumu CMCC No. 308 of 2000 appealed to this Court against the said judgment.

In his plaint Charles Owuor Odiga the respondent averred that on 25/11/98 he was riding his bicycle along Kisumu – Kakamega road near Migosi estate within Kisumu when the appellant's motor vehicle registration No. KAH 304 Q violently knocked him down from behind and that he suffered severe bodily injuries particulars of which he gave. On 22nd February 2000 the respondent brought an action against the appellant in the Chief Magistrate's Court seeking damages for the injuries he had sustained as a result of the said accident. He attributed the cause of the accident to the drive of defendant's motor vehicle.

The appellant who denied the respondent's claim filed a defence. He denied the allegation that the said accident arose out of the negligence of the driver as alleged but added that if any accident occurred it was caused by sole negligence of the appellant in his careless riding of bicycle.

In his judgment delivered on 7th August 2001 the learned Chief Magistrate held that the appellant was liable and he warded the respondent Shds. 150,000/- as general damages and shs. 1,200/- as special damages. That prompted the appellant to lodge this appeal.

In submission Mr. Masese stated that the particulars of negligence in the plaint were attributed to the appellant but when the case came up for hearing there was no evidence led proving that the appelant's negligence caused the said accident.

According to Mr. Masese there were contradictions in the respondent's evidence. Mr. Masese also submitted that the appellant was charged in Court but he was acquitted after trial. It was his contention that the judgment of the learned magistrate did not comply with Order 20 rule 4 of C.P.R. in that it did not contain points for determination and the reasons for his decision.

Mr. Onyango for the respondent in opposing the appeal submitted that the learned magistrate evaluated the evidence property and found that the appellant had been negligent consequently he held him liable. According to Mr. Onyango the Magistrate did not contravene the provisions of Order 20 rule 4 of CPR but he had reviewed the evidence as a whole and in view of evidence of PW2 who witnessed the accident the learned magistrate came to the proper conclusion. Mr. Onyango contended that the learned magistrate was right when held that the respondent had proved his case on the balance of probabilities. On the issue of the acquittal of the appellant in the traffic case Mr. Onyango stated that the Court was influenced by the long delay in the case.

This being the first appeal the appellant is entitled to this Court's exhaustive re-examination of evidence afresh as a whole and to this Court's decision thereon. This court is also expected to resolve any issues in conflict in the evidence and to give allowance to the fact that this court did not see and did not hear the witnesses.

In his testimony Charles Owuor Odiga the respondent said that on 25/11/98 at about 8.00 a.m he was riding a bicycle along Kisumu – Kakamega road within Kisumu towards town center when he was hit by a motor vehicle near Salina Wholesalers . He added that the vehicle hit him from behind and that on 3rd December 1998 he made a report at Central Police Station where he was issued with p3 . He also went on to say that the appellant was charged with the offence of failing to report an accident. PW2 said that on 25/22/98 at about 8.30 he was walking along Kakamega road within Kisumu from Donna Restaurant towards Salina soda Distributors when he saw a cyclist from Kakamega directions hit from behind by a motor vehicle. PW2 said that he was 50 metres away when he witnessed the incident. He added that the cyclist and the motor vehicle were both on the left side of the road as one comes from Kakamega towards town center Kisumu. According to PW2 the cyclist was on the edge of the tarmac and that the motor vehicle which hit him was reg. KAH 304Q, Nissan Sunny Saloon, White in colour. The witness said that the driver of the motor vehicle did not stop after the accident and that before the accident it had been driven fast. PW2 admitted that he knew the respondent before the accident.

The appellant in his testimony said that on 25th November 1998 he was coming from Kakamega where he had met a doctor who provides AAR Health Services but on 22nd December 1999 he received a demand letter from M/S Wasuna & Co. advocates who alleged that he had caused an accident. The appellant admitted that at the material time he had a white Nissan Sunny Saloon reg. No. KAH 304 and that he was the only person who drove it. The appellant also claimed that in November 1999 police went to his house and informed him of the said accident and that they had the vehicle inspected but there was no dent on it. He added that he was charged for failing to report the accident but was later on acquitted. He admitted that the respondent testified in the traffic case. The appellant admitted that when the alleged accident occurred he lived in Kakamega where his wife stated and he used to commute to Kisumu daily.

On reviewing the evidence adduced as a whole I agree with the learned Chief Magistrate that the respondent had proved his case on the balance of probabilities. The appeal has no merit and the same is dismissed with costs to the respondent.

Dated and delivered this 22nd day of October 2003.

B.K. TANUI

JUDGE`