



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 318 OF 2000

GERALD MUKUHA WAGANA & ANOTHER APPELLANTS

VERSUS

ARVIND D. VIBHAKAR & ANOTHERRESPONDENTS

J U D G E M E N T

On 25th June, 1995 the first defendant was driving motor vehicle registration number KRE 650 owned by the second defendant along Mombasa Road towards Mombasa direction when it attempted to overtake another motor vehicle ahead of it.

In the process of doing so the driver of motor vehicle registration number KRE 650 realised there was motor vehicle registration number KAD 501 D being driven by the 3rd defendant from Mombasa to Nairobi direction.

The driver of KRE 650 veered off the road to the extreme right to avoid a collision.

However, the driver of motor vehicle KAD 501 D became unsteady and moved in a zigzag manner colliding with the plaintiff's motor vehicle registration number KJY 536 which had been following KRE 650 on its left side of the road.

In this collision the plaintiff suffered injuries for which he filed a suit in the court of the Principal Magistrate at Nairobi against the three (3) defendants to claim both special and general damages arising from the injuries sustained in the accident.

The case against the third defendant was withdrawn on 27th January, 2000 leaving only the first and 2nd defendants. And a defence filed in respect of the 1st and second defendants denied paragraphs 6(a), 7 and 10 of the plaint which related to particulars of negligence and injuries sustained.

The case was placed before the Senior Resident Magistrate (M.W. Wachira (Mrs.) on 27th January, 2000 when the plaintiff and one witness testified and then closed his case.

The plaintiff explained how the accident occurred as the motor vehicle moved in a zigzag manner after colliding with KAD 501 and came on to hit the right front side of his vehicle on the left side of the road.

He denied attempting to overtake the motor vehicle ahead of him when the accident occurred. Dr. R.P. Shah testified as to how he treated the plaintiff at his clinic after he was involved in a road traffic accident on 25th June, 1995. That he had suffered soft tissue injuries. The doctor compiled and produced a medical report in respect of the plaintiff.

The defence called no evidence and the judgement was delivered on 20th June, 2000 wherein the learned Senior Resident Magistrate found against the defendants on full liability and awarded the plaintiff Kshs.95,000/= general damages, Kshs.2,500/= for medical report and Kshs.4,250/= for treatment. It would appear this judgement also affected the 3rd defendant but I do not know how because I thought the case against him had been withdrawn as the case proceeded in the lower court.

The first and second defendant filed an appeal against the plaintiff in SPMCC No.8813 of 1997 and the third defendant in the same case on 30th June, 2000 in a memorandum of appeal which listed two grounds of appeal namely: that the first respondent testified that his car collided with that of the second respondent. The learned Magistrate erred in finding that the collision involved the appellants car and that the Magistrate erred in expecting a rebuttal of the evidence that did not exist.

The appeal was placed before this court on 25th June, 2002 for hearing when counsel for both parties appeared and submitted on it. Counsel for the appellant complained that though the suit against one of the defendants was withdrawn the learned Magistrate did not distinguish as to which defendants she blamed full liability upon.

According to his submissions, the appellants motor vehicle did not collide with that of the 1st respondent hence the Magistrate could not place full liability upon him. He prayed that the appeal be allowed with costs.

Counsel for the respondent agreed that the finding of liability against the appellant was an error and recommended a new trial or otherwise re-writing of the judgement by the learned Senior Resident Magistrate.

These are the submissions I have heard and recorded for consideration and/or decision. The evidence adduced was that the 1st respondents motor vehicle registration number KJY 536 was following motor vehicle registration number KRE 630 when the latter tried to overtake a line of vehicles ahead of it.

That when it realized that there was motor vehicle registration number KAD 501D driven by the 2nd respondent being driven in the opposite direction it swerved to the extreme right to give way to the said KAD 501 D to pass on in a zigzag manner and went on to collide with motor vehicle KJY 536. But 1st respondent testified that motor vehicle registration number KAD 501 D and KJY 536 collided before the latter veered off the road to the extreme right. But that was no support for this evidence.

The record of the lower court shows that on 27th January, 2000 counsel for the respondent applied for consolidation of Civil Case Number 8814/97 with civil case number 8813 of 97 and also to withdraw the case against 3rd defendant (2nd respondent herein). This prayer was allowed and the case proceeded on liability above in Civil case No.8814 of 1997. But when the learned Magistrate ruled on the issue of liability, she blamed full liability on the defendants without distinguishing which defendant.

At the same time though counsel for both parties say the case was withdrawn against the 2nd defendant the record shows that it was the 3rd defendant against whom the case was withdrawn. But it is this defendant whose motor vehicle actually collided with that of the 1st plaintiff and I do not know how the appellant came to be blamed on full liability.

At the same time, though on the issue of liability, only the evidence in civil case number 8814/97 was to be considered there was no assessment of damages in respect to civil case No. 8813/97. I do not know whether this was deliberate or there was some lapse on the part of the counsel and/or the court.

I feel the proceedings and/or judgement in this matter were unsatisfactory and that the best cure for this serious anomaly would be to order a retrial of the same case by a different Magistrate at the Chief Magistrate's court Milimani Commercial Courts, Nairobi.

Costs of this appeal and those in the lower court to be in the cause.

Delivered this 11th day of July, 2002.

D.K.S AGANYANYA

JUDGE