REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

HIGH COURT CIVIL APPEAL NO. 422 OF 2001

(From the original Civil Suit No. 53 of 2000 of SRMCC at Limuru)

STANLEY NDINGURI …….APPELLANT

VERSUS

S.F. MWANGI MUSHARA ……RESPONDENT

J U D G M E N T

On 19th April 2000 the appellant filed a suit in the court of the Senior Resident Magistrate at Limuru to claim special and general damages, costs of the suit and interest thereon arising from a road traffic accident which occurred on 28th November 1999 at Kiboko junction along Naivasha Nairobi road in which his motor vehicle registration number KWX 484 pick-up, was hit by the respondent's motor vehicle registration number KAH 962N.

The appellant blamed the respondent for negligence in this accident. The case was heard by the Senior Resident Magistrate (E.O. Awino) who wrote and delivered his judgment on 26th October 2000.

In the judgment the learned magistrate awarded liability at 40% against the defendant and 60% against the appellant and it is this apportionment which necessitated this appeal being filed in this court.

The memorandum of appeal filed herein on 10th August, 2001 listed 6 grounds of appeal. These grounds faulted the learned magistrate for apportioning liability at 60% against the appellant when there was no evidence to warrant this or when the respondent had admitted full liability or that this finding was against the weight of evidence. Counsel for the parties appeared before this court 23rd July 2002 to either urge or oppose this appeal.

Counsel for the appellant submitted that the learned magistrate should have found the respondent 100% blame worthy because he should have been able to see the appellant's motor vehicle much earlier so as to avoid hitting it and that his conduct after the accident was of a person who was running away so as to avoid incriminating himself.

According to counsel, the respondent had admitted liability and that this admission should not have been disregarded by the learned magistrate. And that the apportionment had no basis.

Counsel prayed that the appeal be allowed with costs.

Counsel for the respondent opposed the appeal and urged that the judgment of the lower court be

upheld.

Counsel submitted that the learned magistrate did not believe the testimony of the appellant as to the circumstances of the accident or he agreed with the respondent's version that he had entered Limuru road when he found the motor vehicle parked in the middle of the road without any warning sign.

According to counsel, the area, being known to be notorious for robberies, the respondent went to Tigoni Police Station to report the accident and he came back to the scene of the accident with police officers where they found patrol policemen with the appellant.

According to counsel, this was not a kin to running away and that the learned magistrate believed this version of the respondent as reasonable.

Counsel stated that the appellant's motor vehicle was not at a junction as alleged by the appellant, but was in the middle of the road, unlit, thus constituting a nuisance; hence apportionment of liability against the appellant at 60% was not against the weight of evidence.

He prayed that the appeal be dismissed with costs.

I have heard parties submit in this appeal and considered their submissions.

This was a case where there was only the evidence of the appellant as against that of the respondent, whom the learned magistrate had the benefit of seeing and hearing.

The magistrate was in a better position to assess their credibility.

When the learned magistrate said:-

"there is no way a motor vehicle entering Limuru

Town can collide with a motor vehicle, waiting to

join the Highway from Limuru Town,"

he was not constituting himself into a witness.

He, to my mind, was looking at an objective view of a road with an inlet and outlet which he had explained had a "V" shape with points of entry and outlet wide apart.\

I personally consider it something of common sense and that having seen and heard the witnesses the magistrate came to the conclusion that the appellant had not parked at the junction as he alleged but he had parked somewhere in the middle of the road along Limuru Highway without any warning.

Counsel for the appellant dwelt on submission that after the accident the respondent ran away from the scene, but the magistrate agreed with and believed the evidence of the respondent that after the accident he feared being attacked by robbers if he stopped and drove on to report the incident to Tigoni Police Station and this is why he was accompanied by police officers from that station back to the scene to find the appellant with patrol police. The magistrate was perfectly entitled to do this.

Thus the view that the respondent was running away from the scene was not sustainable.

That the respondent offered to buy the spares and have the appellant's motor vehicle repaired was not really evidence against him.

The evidence adduced in the case was sufficient for the learned magistrate to arrive at a reasonable decision and my observation is that he found, and correctly so, that the appellant, was more to blame for

this accident than the respondent and his apportionment of liability was proper

I am not quite sure the appellant proved loss of user of the motor vehicle as required by law but since there was no specific ground in the memorandum of appeal contesting this finding, I need not interfere with it.

I am satisfied the learned magistrate came to a correct decision as regards liability and assessment of damages and I do not have any reason to upself his judgment.

I dismiss this appeal with costs.

Delivered this 18th day of September, 2002.

D.K.S. AGANYANYA

JUDGE