



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**CIVIL APPEAL NO. 61 OF 2016**

**MABUYA THUO GATHITU.....APPELLANT**

**VERSUS**

**DEDAN W. NJUGUNA.....RESPONDENT**

(Being an Appeal from the Judgment of Hon N. Njuki SRM delivered on 12<sup>th</sup> September, 2008 in Naivasha PMCC No 833 of 2005)

**JUDGMENT**

1. This appeal involving personal injuries resulting from an accident on 26<sup>th</sup> January, 2004 was first filed in Nairobi in 2008. In 2016 having not moved, it was transferred to Naivasha and assigned its present file number. The original trial in the subordinate court was concluded by the impugned judgment delivered on 12<sup>th</sup> September, 2009.

2. The appeal challenges both the liability apportioned at 70:30 in favour of Plaintiff and quantum of damages awarded in the subordinate court where there was a claim and counterclaim. The damages awarded were as follows:

Claim : General damages - Kshs 600,000.00

Special damages - Kshs 101,000.00

**Total - Kshs 701,000.00**

Counter claim : Vehicle Repair - Kshs 99,190.00

Special damages - Kshs 5,000.00

**Total - Kshs 104,190.00**

3. PW1 Dedan Njuguna (the Respondent in the appeal) testified that on 26<sup>th</sup> January, 2004 he was driving an Isuzu Canter KAC 168F, headed towards Njabini from Miharati. His destination was Nairobi. A slow moving vehicle, KAC 363C Mitsubishi Canter was ahead of him and he decided to overtake it after putting on his signal light. Suddenly, the vehicle turned right, without indicating, as he overtook, resulting in a collision. His vehicle overturned resulting in his injuries as pleaded, being:

- a. Fracture left femur.
- b. Mid shaft Right Femur fracture.
- c. Left open tibia and fibula fracture.
- d. Injuries to left ankle.

The plaintiff was taken to Kijabe Hospital, operated upon and plates fixed. He was in hospital for nineteen (19) days.

4. The plaintiff was charged in CM's Traffic Case No. 59 of 2005 Naivasha for reckless driving but was acquitted when the court found he had no case to answer. He produced the Traffic Case Ruling, and other exhibits, in support of his case. He was the only witness in this case for damages.

5. The defence had two witnesses. DW1 George Onzele was a motor vehicle assessor who assessed Registration Number KAC 563C Mitsubishi Canter. It had sustained both front and rear damage with repair costs amounting to Kshs 94,190/= awarded. DW1 produced the assessment report.

6. DW2 Kyalo Mbithi was the Appellant's driver. He was in control of KAC 563C. He stated that he was driving on his lane when his vehicle was hit from behind by the respondent's vehicle forcing him to lose control. He landed in a ditch. The other canter rolled on the left side of the road. He was also injured.

7. In re-examination he stated that he had passed a junction to the right side of the road. He admitted testifying in CM's Traffic Case No. 58 of 2005, but denied that he was turning to the right. He did not know how the traffic case ended.

8. DW3, the appellant, merely testified that he had sent DW2 to get shop goods. After the accident he went to the scene. His vehicle was in a ditch and the other vehicle had overturned about 80 - 100 metres behind him. His counterclaim was for the vehicle repair costs and assessor's costs.

### **On liability**

9. In cross-examination he stated that the point of impact was about 10 metres from the Githioro Naivasha junction. Nevertheless, he was not an eye witness. He could not tell whether DW2 told the Traffic Court that he was turning right.

10. The appellant complains that the trial court relied too much on the Ruling of the Traffic Court in coming to its conclusion and in apportioning liability at 70:30% in favour of the respondent. He says he was not a party to or an accused in the Traffic Case. Accordingly, the trial magistrate erred in relying on the proceedings in the traffic case to decide liability.

11. In his judgment the trial magistrate stated that he was able to look at the proceedings in the traffic matter. He restated some of the evidence that was given in that case such as:

**“.....(but) all the evidence given in the traffic matter indicates the accident occurred at the junction and not after the junction. This man (Kyalo) substantially contributed to the occurrence of this accident.**

**The sketch plan indicates that the motor vehicle KAC 563C moved for some 70 metres before it came to a halt after impact. This leads me to believe that the impact was a heavy one.....**

**.....I would state that both drivers were to blame for the accident and apportion liability at 30% for the plaintiff and 70% for Kyalo.”**

12. Notwithstanding the Traffic Court's sentiments above, the parties did not produce the proceedings of the traffic court during the hearing of this case. As such it is impossible to ascertain the content and nature of the evidence availed which the Magistrate in the Trial Court was referring to. Had the proceedings been produced, it would assist the court in determining credibility of witnesses, even if cross-examination had not been done in the Trial Court.

13. Sections 43 to 47 of the Evidence Act give an indication on how to treat material and evidence contained in judgments in other cases when dealing with a particular case. The relevant section is Section 44 (1) and (2) of the Evidence Act which provides:

**“(1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.**

**(2) Such judgment, order or decree is conclusive proof-**

**(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;**

**(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;**

**(c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;**

**(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.”**

14. In the present case, the only conclusive and admissible material from the judgment in the Traffic court is its final determination which conferred or took away from any person any legal character or which declared any person to be entitled to any such character in any specific thing. The Traffic case merely declared the accused - the Respondent in this appeal - not to have a case to answer, and therefore not guilty of reckless driving.

15. The proceedings of the Traffic Case were not produced as an exhibit in the lower court's trial on damages, and none of the parties referred to were cross-examined on the statements they made there - whether an accused or as a witness. Thus, the analysis of the traffic magistrate on the evidence before him cannot stand as evidence in the present case on damages particularly since there are discrepancies between such analysed evidence and the evidence availed in the present case. It was therefore improper for the trial magistrate in the lower court in the civil case impugned to rely on the analysis of the trial magistrate in the Traffic Case.

16. It is apt to concretise and exemplify this reliance by the trial magistrate on the proceedings in the Traffic case as being clearly problematic. Whilst he relied on the “*sketch plan*” to conclude that the impact of the accident occurred at a junction, and that “*vehicle KAC moved for some 70 metres before it came to a halt after impact*”, the trial magistrate in the Traffic case, on the contrary, stated:

**“In that instant case out of his investigations we cannot tell the exact point of impact, as the investigator did not show it on the rough sketch. It is unfortunate that the rough sketch plan before the court does not help the court at all. It has no key and or legends; and it would be safe to say that these were just papers that have been placed before the court, and have been of no assistance to this court.”** (Emphasis added)

17. The undisputed evidence before this court that the respondent was driving behind the appellant's vehicle. He said he tried to overtake, and the appellant's vehicle moved to the right. DW2 however said he was hit from behind as he was driving slowly due to repairs going on along the road, and the respondent's vehicle overturned. If the impact had been solely from behind there would be no logic in its overturning.

18. On the other hand, the appellant's vehicle landed in a ditch which is consistent with loss of control. However, from the exhibited photographs, assessment report and replacement parts, there is no damage of impact indicated to the back of the appellant's vehicle except to right hand rear body. Clearly therefore, from the evidence, the impact was on the right rear as the respondent's vehicle was overtaking.

19. Based on that finding, it appears to me that the driver who had better visibility of the impending collision was the respondent. He should have immediately slowed down to allow the appellant's driver to complete negotiating the repairs on the road. Whilst I agree both parties were to blame, I would however apportion liability at 60%:40% in favour of the appellant.

#### **On Quantum of damages**

20. The injuries suffered by the respondent (plaintiff) are not disputed. Similarly, there are no submissions by the appellant challenging the actual quantum of damages awarded. Therefore, no basis has been laid before me to interfere with the quantum of damages awarded in the claim. They will remain as awarded by the trial court.

21. The respondent/plaintiff did not file a defence to the counterclaim filed by the appellant/defendant. Accordingly, the counterclaim is not contested, and the award thereon remains as awarded by the trial court.

22. Ultimately, the appeal succeeds on liability. The award I make is as follows: The plaintiff/respondent was 60% liable for the occurrence of the accident and will bear 60% of all damages and costs. The defendant/appellant was 40% liable for the accident and will bear 40% of all damages and costs incurred. The resulting award is as follows:

- To claimant's award Kshs 701,000/= of which he is liable for 60% and entitled to 40% being Kshs 280,400/=.
- To Respondent's award Kshs 104,190 of which he is liable for 40% and claimant liable for 60% being Kshs 62,514/= to be set off from claimant's award.

Total award to claimant after set off is:

Kshs 280,400/=

Kshs (62,514/=)

**Kshs 218,986/=**

23. No award as to costs of the appeal is made.

#### **Administrative directions**

24. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder,

who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

25. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

26. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 15<sup>TH</sup> DAY OF MARCH, 2021**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Modi for the Appellant
2. Wachira for the Respondent
3. Court Clerk – Quinter Ogutu