



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 528” B” OF 2016

CITY HOPPA LIMITED.....APPELLANT

VERSUS

HARRISON KAMAU KARABI.....1ST RESPONDENT

BENARD OKWANI.....2ND RESPONDENT

KICHA TOURS AND CAR HIRE SERVICES LIMITED...3RD RESPONDENT

(Being an appeal of the Judgment of Hon. P. M. Muholi Mr. (Resident Magistrate) delivered on 13th July, 2016 in Civil Case No. 5162 of 2007 before the Chief Magistrates Court in Nairobi)

JUDGMENT

1. The 1st Respondent, Harrison Kamau Karabi who was the Plaintiff in the Lower Court sued the 2nd and 3rd Respondents (Defendants) as the driver and owner respectively of motor vehicle registration number KAW 212H. The 1st Respondent’s claim was for damages arising out of a road traffic accident involving the said motor vehicle wherein he sustained injuries. The accident was blamed on the negligent manner that the motor vehicle was allegedly driven at the time of the accident.

2. The 2nd and 3rd Respondents filed a Joint Statement of Defence and denied the claim.

3. Subsequently, the 2nd and 3rd Respondents served a Third Party Notice on the Appellant. In the said Notice, the 2nd and 3rd Respondents’ claim was for indemnity and or contribution on account of the manner in which the Appellant’s motor vehicle was being driven at the material time. The Appellant did not enter appearance and Interlocutory Judgment was entered.

4. The matter proceeded to a full trial and the trial magistrate found the Appellant to blame for the accident and did not find any negligence on the part of 2nd and 3rd Respondents. The Appellant was held 100% liable for the accident and a judgment for Kshs. 414,621 with costs was entered in favour of the 1st Respondent.

5. The Appellant was aggrieved by the said Judgment. In the Memorandum of Appeal, the Appellant raised 8 grounds of Appeal but condensed them into 2 grounds in his submissions as follows;

a) That the trial magistrate erred in law by entering Judgment in favour of the 1st Respondent against the Appellant when there was no direct claim by the 1st Respondent against the Appellant.

b) That the trial magistrate erred in failing to dismiss the suit when the 1st Respondent failed to establish a case against the 2nd and 3rd Respondents.

6. This being a first Appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make

due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)".

7. The Applicant's counsel submitted that there was no direct claim by the 1st Respondent against the Appellant. That the Appellant was joined in the suit as a Third Party. That the 1st Respondent's case was wholly against the 2nd and 3rd Respondents and that the Plaintiff did not contain any cause of action against the Third Party.

8. It was further submitted that the Appellant as the Third Party could only be called upon to indemnify and or contribute to the 2nd and 3rd Respondents for any Judgment entered against the 2nd and 3rd Respondents. That with the trial magistrate having found the case against the 2nd and 3rd Respondents not proved, the case against the 2nd and 3rd Respondents ought to have been dismissed without entering any Judgment against the Appellant.

9. The Appellant relied on the case of *Sammy Ngigi Mwaura Vs. John Mbugua Kagai & Another* [2006] eKLR where the High Court observed as follows;

"The Third Party has not been directly sued on its own right and has only been brought in by the defendant for indemnity should he be found liable. As against the Plaintiff, there being no suit between them, I would also find him not liable for purposes of this suit. His liability in this suit would only be through the Defendant and, to the Defendant in indemnity. The suit is dismissed with costs." On Appeal, the Court of Appeal upheld the decision and stated;

"We have no hesitation in deciding that the learned Judge was entirely correct in his decision as to the lack of any liability resting upon the Third Party in view of the state of the pleadings. We also share in his lack of comprehension as to why the lorry driver and his employer were not sued as sole defendants or co-defendants at the outset of the case..."

in our view, it should be noted that the three sub paragraphs (a), (b) and (c) of Order 1 Rule 14(1) are each in the alternative and that the only alternative chosen to be relied upon by the Defendant/Respondent in his Third Party Notice was a claim for "indemnity or contribution to any Judgment that may be entered in favour of the Plaintiff in respect of the Plaintiff's claims as is set out in the plaint.

If, as was the position in this case, there was no Judgment entered in favour of the Plaintiff against the Defendant for the very good reason that there was no evidence of any negligence by the Defendant or his employee, there could not be any amount in respect of which the Defendant could be indemnified by the Third Party or to which the Third Party could contribute however negligent the Third Party or its employee, driver of the lorry may have been.

This is a sad case for the dependants of the deceased arising from the suing of the wrong party in the first place which could not, in the circumstances, be properly remedied through the joinder of a Third Party. The blame for the said situation must lie wholly with the Appellant's legal advisors who chose to sue the wrong party."

10. Further reliance was placed on *Atkins Court Forms*, Volume 37, 2nd Edition Page 266;

"From the time of the service of the Third Party Notice the Third Party becomes a party to the action with the same rights in respect of his defence against any claims made against him in the action and otherwise as if he had been duly sued in the ordinary way by the Defendant by whom the notice is issued. The Defendant who issued the notice and the Third Party thus face each other in the relationship of Plaintiff and Defendant."

11. The 1st Respondent's counsel in his submissions referred the court to Order 1 Rule 17 which states as follows;

"If a person not a party (emphasis ours) to the suit who is served as mentioned in rule 15 (hereinafter called the third party) desires to dispute the Plaintiff's claim in the suit as against the Defendant on whose behalf the notice has been given or his own liability to the Defendant, the Third Party must enter an appearance in the suit on or before the day specified in the notice, and in default of his so doing, he shall be deemed to admit the validity of the decree obtained against such Defendant whether obtained by consent or otherwise, and his own liability to contribute or indemnify as the case may be to the extent claimed in the Third Party Notice."

12. The 1st Respondent's counsel also referred the court to the Third Party Notice issued herein which states;

"The Defendants now claim against you for indemnity and/or contribution on grounds that your duly authorized agent was liable for negligence being the driver of motor vehicle registration number KAV 001K at the time of the accident on 20th February, 2012. Take further notice that if you wish to dispute the Plaintiff's claim against the Defendant or Defendants' claim against you, you must appear within fifteen (15) days after service of this notice otherwise you will be taken to admit the Plaintiff's claim against the Defendant and/or Defendants' claim against you and your will be bound by the final Judgment given to the suit."

13. The facts in this case are not in dispute. The central issue herein is whether the trial magistrate erred in the circumstances of this case, in entering Judgment on 100% basis against the Appellant (Third Party) when the 2nd and 3rd Respondents who were the Defendants were not

held liable.

14. Order 1 of the Civil Procedure Code deals with parties to suits. Order 1 Rule 15(1) specifically deals with issuance of Third Party Notice.

Order 1 Rule 15 (1) stipulates as follows;

“Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them.

He shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a Third Party Notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

15. The Notice issued herein was in respect of the Defendants’ claim against the Third Party. It was the Defendants who were seeking indemnity and or contribution from the Third Party. The trial magistrate having found that the Plaintiff’s case against the Defendants was not proved, there was nothing for the Third Party to indemnify. The Plaintiff’s case was against the Defendants yet the evidence adduced did not blame the accident on the Defendants’ negligence but blamed the Third Party.

16. With the foregoing, the upshot is that the Appeal has merits and is allowed. Taking into account the circumstance of this case, each party to bear own costs of the Appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2021.

B.THURANIRA JADEN

JUDGE