



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU

CIVIL APPEAL NO. 97 OF 2019

MBURU SAMSON.....1<sup>ST</sup> APPELLANT

PHYLIS WAMBUI MWANGI.....2<sup>ND</sup> APPELLANT

-VERSUS-

BOAZ MASITA OSINDI.....RESPONDENT

(Being an appeal from the judgment/decree of Hon. Nancy Makau, Senior Resident Magistrate, Nakuru, delivered on 27<sup>th</sup> May, 2019 in Nakuru CMCC No. 585 of 2015)

**JUDGEMENT**

1. This appeal arises from a suit filed by the plaintiff/respondent on 9<sup>th</sup> June 2015 in the lower court against the appellants seeking general damages, special damages, costs of the suit and interest for the injuries sustained on 3<sup>rd</sup> March, 2015 when he was knocked by motor vehicle KBH 012N while he was riding his bicycle along Sewage Jua Lako road area.
2. From the plaint filed by **M/s Gekong'a advocates** in Nakuru CMCC of 585 of 2015, the 1<sup>st</sup> appellant was sued as the registered owner of motor vehicle KBH 012N while the 2<sup>nd</sup> appellant was the co-owner, beneficial owner, and/or insured.
3. By defence filed on 28<sup>th</sup> August 2015, the appellants admitted the occurrence of the accident but averred that the accident involved motor vehicle registration no. KBH 012N, an unidentified motorcyclist, and the respondent. The appellants denied collision between the respondent and the said motor vehicle and stated that the respondent was knocked down by the unidentified motorcyclist after he had knocked the front side of the subject motor vehicle and veered onto the path of the respondent. The appellants stated that the doctrine of *res ipsa loquitor* is not applicable.
4. The appeal proceeded by way of written submissions.

**APPELLANTS' SUBMISSIONS**

5. The appellants submitted that the fact the trial magistrate erred in holding the appellants liable and ignoring the appellants' and the police evidence adduced during the trial and submitted that the finding were not based on the evidence and were a misapprehension of the evidence.
6. The appellants submitted that the trial magistrate failed to analyze the facts and apply the principles of law to the facts placed before her and cited the case of Court of Appeal in **Standard Chartered Bank Ltd Vs Intercom Services & Ltd & 4 others (2004) 2 Klr 183** where the Court held that the trial Court had a duty to analyze the contradictions and inconsistencies in the evidence of the witnesses...a duty which the court did not fulfill.
7. The appellants submitted that they are entitled to a fair hearing as envisaged in **Article 50(1) of the Constitution of Kenya 2010** and the rules of natural justice which extends to being informed of the reasons for their judgment.
8. They submitted that further under **Order 21 Rule 4 of the Civil Procedure Rules 2010**, a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon, and the reasons for such decision but the trial magistrate failed to do so and her findings should be set aside for being technically unsound and irregular.
9. The appellant further submitted that the trial magistrate ignored the testimony of the investigating officer who stated the O.B indicated that the unknown motor vehicle knocked both the motor vehicle and the bicycle and urged the Court to examine PEXH 11 O.B which narrate the

occurrence of the accident as hereunder: -

**“After the scene was visited by PC Kitili. After the accident, the said motorcycle which is still unknown hit the said motor vehicle registration no. KBH 012N Mazda Saloon, it lost control and also hit a bicycle which was with a pedal cyclist by the Boaz Masinda”**

10. The appellants submitted that the testimony of PW3 differed with the contents of the occurrence Book (O.B) yet he was not the investigating officer; that he distorted the information on the O.B. and urged this Court to find that the evidence of PW3 was unreliable and biased.

11. The appellants submitted that during the trial, they were not granted sufficient time to call the investigating officer **P.C. Kitili**, but the evidence of DW1 and DW2 was corroborated by the events on the O.B. while the evidence of the respondent and that of PW2 differed.

12. The appellants further argued that the respondent failed to prove any negligence on the part of the appellants that led to the occurrence of the accident and therefore the respondent failed to prove that the injuries sustained were occasioned by the subject's motor vehicle; he failed to prove his case.

13. The appellants submitted that the trial magistrate misapprehended herself by finding that the driver of a motor vehicle has a higher duty of care by tilting the balance of probabilities and stated that there is no rule of law to the effect that a driver of a motor vehicle must be held 100% liable even when she was not negligent; that the injuries sustained conform to a slight knock by a motorcycle traveling in the same direction and the appellant should not be blamed for not enjoining a party that the police and the respondent did not find. Appellants urged this Court to allow the appeal and set aside the trial magistrate's ruling.

### **RESPONDENT SUBMISSIONS**

14. The respondent submitted that the trial court applied its mind in finding the appellants 100% liable and stated that PW1 testified that he was hit by an oncoming vehicle that was overtaking an oncoming bicycle and he fell in the ditch and his evidence was corroborated by PW3 and DW1.

15. The respondent submitted that evidence of DW1 contradicts that of PW3 as it states that the accident occurred on 3<sup>rd</sup> March 2015, and the police abstract he produced was dated 25<sup>th</sup> August 2017. That the removal of the appellant's vehicle from the accident scene was tantamount to interference with the taking of evidence by the police and thus the information on the occurrence book lies on the information that was given by the appellant and no independent witness was called to give an account of what had transpired.

16. The respondent further submitted that the appellant testified that she was driving at a higher speed of 60km/hr. instead of the required speed of 50km/hr., and it was most likely that she did not see what had happened before the accident; and further, the allegation that there was a handcart and another motorcycle that is to blame for the accident is an afterthought; that she was under a duty of care to other road users but failed to observe the same.

17. The respondent submitted that the appellant failed to present any evidence before the trial court to show that she did anything in an attempt to prevent the accident and cited the case of **Isabela W. Karanja vs W. Mabele (1982 - 88) Klr**, where the Court held that the appellant driving a lethal machine, appellant owed a higher duty of care to the respondent which she failed to exercise, and relied on **Section 49 (1) of the Traffic Act**.

18. The respondent submitted that he proved his case on a balance of probability and the accident was caused by the negligence of the appellant. And further under **Order 1 Rule 15 of the Civil Procedure Act 2010**, the appellants were responsible to enjoin the third-party owner of the motorcycle if their case was that the motorcycle caused the accident.

19. The respondent urged this Court to dismiss the appeal with costs to the respondent.

### **ANALYSIS AND DETERMINATION**

20. This being the first appellate court, I am required under **Section 78 of the Civil Procedure Act** to re-evaluate the evidence tendered before the trial Court and make independent determination. This I do with the knowledge that unlike the trial court, I did not have the advantage of analyzing the demeanor of the witnesses as they testified. This principle of law was well settled in the case of **Selle V. Associated Motor Boat Co. Ltd (1968) EA 123** where the Court held 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 and draw its 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.”**

21. I have perused the record of appeal, submissions by parties herein together with the authorities cited and find the following as issues for determination: -

a. Whether the trial magistrate erred in the finding on liability

b. whether this court should interfere with damages awarded.

(i) Whether the trial magistrate erred in the finding on liability

22. There is no dispute that an accident occurred on 3<sup>rd</sup> March 2015. The appellants have argued that unknown motorcycle is to blame for the accident as it hit both the motor vehicle registration no KBH 012N and the cyclist.

23. The appellants availed two witnesses. DW2 stated that on the day of the accident, she was moving uphill at 60km/hr. when on the opposite side of the road, a rider of a motorbike was overtaking a hand cart and hit the vehicle on the right side and the motorbike did not stop and she was not able to capture registration number of the motor cycle. She blamed the rider of the unknown motorcycle.

24. In matters where a defendant blames a third party, **Order 1 Rule 15 of the Civil Procedure Rules** provide as follows: -.

**“15. (1) 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.”**

25. From the above legal position, a party who apportions blame to the third party has a duty of enjoining the third party who was to blame for the accident in the proceedings. The court's duty is to determine dispute between parties already enjoined in a matter and the appellants ought to have brought the party they are blaming to court to enable court apportion liability if need be; the appellants failed to initiate proceedings against the third party whom they blame for the accident and liability cannot therefore be apportioned to a third party who is not party to this suit.

26. However in respect to liability as between appellants and the respondent, my view is that all road users have a duty to watch out for the other road users. The cyclist also had a responsibility of avoiding the accident by swerving. Efforts to avoid the accident or reduce impact have not been demonstrated. A smaller percentage of blame should have apportioned to the cyclist. I find 10% blame on part of the cyclist is appropriate.

(ii) whether this court should interfere with damages awarded.

27. On the issue of quantum, I have considered the injuries sustained and find amount of Kshs. 150,000/= general damages reasonable for the injuries sustained and I have no reason to interfere with the trial court award for general damage. From the foregoing the appeal partly succeeds.

**28. FINAL ORDERS**

1. Appeal partly succeed.
2. Liability is apportioned in the ratio of 90:10 in favour of the respondent.
3. Assessment of damages not interfered with save for apportionment of liability at 10:90 in favour of plaintiff/respondent.
4. Each party to bear own costs of appeal.
5. Costs in the lower court to the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 14<sup>TH</sup> DAY OF OCTOBER, 2021

.....

RACHEL NGETICH

JUDGE

**In the presence of:**

Jeniffer - Court Assistant

Ms. Chelule for Appellants

Mr. Gekonga for Respondent