



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 710 OF 2016

PAUL NJAGI KAMAU.....APPELLANT

VERSUS

STANLEY GACHOMO KARIUKI.....1ST RESPONDENT

JOSEPH MURIITHI HUNGI.....2ND RESPONDENT

(Being an appeal from the Judgment delivered on 11th November, 2016 by Hon. D.O. Mbeja (SRM) Milimani Commercial Courts in CMCC No. 1652 of 2015)

JUDGMENT

1. The Appellant who was the Plaintiff in the lower court sued the Respondents for damages arising out of a road traffic accident. The Appellant blamed the accident which resulted in the amputation of his right leg to the negligent manner in which the motor vehicle registration No. KAP 420B was driven at the material time and collided with motor vehicle registration No. KAX 308R. The 1st Respondent was sued as the registered owner of motor vehicle KAP 420B and the 2nd Respondent as the authorized driver/servant or agent of the 1st Respondent.

2. The Respondents filed a joint statement of Defence and denied the claim. The Respondents in the alternative blamed the accident as solely caused by the negligence of the driver of motor vehicle KAX 308R and/or the Appellant's negligence.

3. After hearing the case, the trial magistrate dismissed the same as not proved on a balance of probabilities. The damages that could have been awarded had the case succeeded were assessed at Ksh.4,000,000/=.

4. The Appellant was aggrieved by the said judgment and appealed to this court. Although the Appellant raised 15 grounds of appeal, the same can be summarized as follows:

- a) Whether the trial magistrate erred in not finding the Respondent's liable for the accident.
- b) Whether the trial magistrate erred in holding that the Appellant has sued the wrong party.
- c) Who should bear the costs of the suit.

5. The Appeal was canvassed by way of written submissions which I have considered.

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 Appellant (PW1) in his evidence stated that he was involved in a road traffic accident and admitted in hospital for four months. He produced the police abstract as an exhibit. The police abstract blames motor vehicle registration No. KAX 308R for the accident and also states that the accident is P.U.I (pending under investigations). The police abstract also names motor vehicle registration No, KAP 420B Nissan matatu as one of the two vehicles involved in the accident. Joseph Muriithi Hungi the 2nd Respondent is mentioned in the police abstract as a driver and the Appellant as a passenger in the said vehicle who sustained grievous harm in the accident. Other documents produced as exhibits include a search Certificate for Motor Vehicle Registration No. KAP 420B which reflects the registered owner as Stanley Gachomo Kariuki the 1st Respondent.

8. It appears the Plaintiff's witness statement which was filed herein was not adopted as his evidence. However during cross-examination, the contents of the said statement in were brought out. The Appellant during cross examination blamed the accident on motor vehicle registration No. KAX 308R which he stated left it's lane and went to their lane and hit motor vehicle KAP 420B in which he was a passenger. The Appellant during cross-examination also referred to the police abstract and stated that motor vehicle No. KAX 308R was to blame for the accident.

9. The Respondents' side closed their case without adducing any evidence.

10. Whether the Respondents called any witnesses or not, it was the Appellant's burden to prove his case on a balance of probabilities. The Appellant's uncontroverted evidence through the documents referred to above proved that the 1st Respondent was the owner of the motor vehicle Registration No. KAP 420B and the 2nd Respondent the driver thereof. The Appellant's evidence does not blame the Respondents for the accident. The particulars of negligence stated in the plaint against the Defendants, that is driving too fast, losing control of the motor vehicle, failing to slow down or swerve and failing to exercise due care and control are not supported by any evidence. In the circumstances, I am in agreement with the finding by the trial magistrate that the Appellant failed to prove his case on a balance of probabilities against the 1st and 2nd Respondents.

11. On whether the trial magistrate erred in holding that the Appellant sued the wrong party, the Appellant's counsel argued in his submissions that the Respondents having blamed motor vehicle registration No. KAX 308R in their statement of Defence ought to have issued a Third Party Notice to bring the said Third Party on board.

12. Order 1 rule 15 Civil Procedure Rule which provides for third party notice provides 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 arising 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 *ex parte* supported by affidavit.”

13. The Respondents did not issue any Third Party Notice. If the Respondents had been found liable for the accident, then there would have been nobody to receive any contribution or indemnity from. In the case at hand, the Respondents have been found not liable for the accident. The cases of **James Gikonyo Mwangi v D.M. (Minor suing through his Mother and next Friend, I M O)[2016] eKLR** and **Stella Nasimiyu Wangila v Raphael Oduro Wanyamah [2016] eKLR** which have been cited by the Appellant are distinguishable from the case herein. In the said authorities, there was evidence of negligence in respect of the drivers who were sued. In the case at hand, there is no iota of evidence of negligence adduced against the Respondents herein.

14. On whether the Appellant as a passenger could be blamed for the accident, there is no evidence on record that blames any negligence on the Appellant. The problem with Appellant's case is that he failed to adduce any evidence to establish the Respondents negligence.

15. The upshot is that I find no merits in the appeal and dismiss the same. The Appellant lost his leg in the accident as per the doctor's evidence herein. This court's view is that the Appellant is a victim of circumstances. Although costs follow the event, this court orders that each party bear own costs in this Appeal and in the lower court.

Dated, signed and delivered at Nairobi this 6th day of May, 2020

B. THURANIRA JADEN

JUDGE