



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL NO.31 OF 2015**

**JOHN MWANGI KARIUKI.....APPELLANT**

**VERSUS**

**MARBLE AUTO DEALERS LIMITED.....1<sup>ST</sup> RESPONDENT**

**SAMUEL WACHIRA MUREITHI.....2<sup>ND</sup> RESPONDENT**

**ANTONY NDIRANGU.....3<sup>RD</sup> RESPONDENT**

**[An appeal from the judgement in Kimilili Principal Magistrate Court case number 55 of 2010 delivered by HON G.R. SAGERO SRM on 9<sup>th</sup> April 2015.]**

**J U D G M E N T**

By plaint dated 2nd June 2010 the appellant sued respondents jointly for orders of general damages and special damages for injuries sustained in a road traffic accident that occurred on or about 28<sup>th</sup> August 2010 along Bungoma-Chwele road. When plaintiff was lawful fare paying passenger aboard motor vehicle registration number KAU 177M Toyota Hiace when the defendants authorized drivers driving motor vehicle registration number KAU 177M Toyota Hiace and motor vehicle registration number KBJ 435Y Fuso lorry respectively on defendants' behalf and benefit so negligently and or carelessly drove and or controlled the said motor vehicles causing them to lose control and rammmed into each other thereby inflicting serious personal injuries to the plaintiff.

The particulars of negligence on part of the defendants were set out in paragraph 8 of the plaint as follows;

- a) Driving without due care and attention of other road users safety and failing to brake, swerve, stop or in any other way to control motor vehicle KAU 177M and KBJ 435Y.***
- b) Failing to keep proper look out in a busy highway.***
- c) Driving suit motor vehicles recklessly.***
- d) Failing to give way to motor vehicle registration number KBJ 435Y by the driver of 1<sup>st</sup> and 2<sup>nd</sup> defendants.***
- e) Parking motor vehicle registration number KAU 177M dangerously.***
- f) Driving motor vehicle registration number KBJ 435Y recklessly and in excessive speed.***
- g) Trying to overtake carelessly and failing to give way to each motor vehicle.***
- h) Permitting the said accident to occur.***

The particulars of injuries sustained by the plaintiff were set out under paragraph 10 of the plaint.

The 3<sup>rd</sup> Respondent/Defendant entered appearance and subsequently filed his statement of defence dated 16<sup>th</sup> November 2010 denying the appellant's claim and setting out particulars of contributory negligence on part of the appellant under paragraph 8 of the statement of defence as follows;

- i. Jumping out of a moving vehicle knowing well it was dangerous.***

**ii. Failing to fasten seat belt and hanging carelessly on the said motor vehicle.**

**iii. Willing boarding an overloaded motor vehicle.**

The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not enter appearance or file statement of defence but request of judgement was entered against 2<sup>nd</sup> Defendant and judgement was entered against both defendants.

The case was fixed for hearing as against the 3<sup>rd</sup> defendant. The evidence before the trial court was that, Pw1, John Mwangi the appellant

Testified that that on 28/1/2010 he was from Kitale heading to Bungoma when he was involved in an accident.

He testified that he was a passenger in Nissan KAU 177M matatu and testified that the matatu was overtaking a Lorry registration number KBJ 435Y when the accident occurred injuring his hand and leg. He produced treatment notes as PMFI 1 and 2. He testified that he reported the matter to Bungoma Police Station and was issued with a P3 form and Police abstract which he produced in court. He testified that he went to Bungoma Hospital where he was treated.

On cross examination he said the names on treatment book were Disho George but do not belong to Disho George. He testified that he paid for the note book but doesn't have the payment receipt. He testified that accident occurred at 11 am and they arrived at the hospital at 10.40 am.

He testified that he was not knocked down as reflected in the patient book and he agreed that the date in police abstract was altered from February to January and according to the treatment note book he was in the hospital before the accident.

PW2 PC Patrick Nzoka testified that and produced police abstract in respect of the two suit motor vehicles and he blamed the driver of KBJ 435Y lorry for the accident.

PW3 Elias Edoke produced treatment book number 1326/010 which he stated had been issued to PW1 during treatment. He confirmed that on 28.1.2020 pw1 was involved in accident and sustained injuries. He testified that PW1 was treated at Bungoma District Hospital. On cross examination he testified that the book had been given to Diso George and then changed to John Kariuki and he was unaware of how changes were done. He testified that it is not a practice to have records changed but at times it happens and he does not have records that should have been of help to the court.

Pw4 Oliver Makhasu testified that he is a clinical officer at Kitale District hospital. He testified that had treatment notes of PW1 aged 25 years old and he was involved in road traffic accident. He produced p3 form for pw1 and stated that he had history of RTA and who was treated at Bungoma District Hospital.

Pw5 doctor Samuel Chege testified that on 19.3.2010 he gave history of RTA on 28.10.10. He indicated that he had sustained injuries on left hand and leg and chest. He testified that pw1 had already received treatment at Bungoma District Hospital on 28.1.2010 and was treated at Kitale District Hospital.

On the defence hearing the 3<sup>rd</sup> defendant testified calling one witness. DW1 Antony Maina testified that he owner of motor vehicle registration number KBJ 435Y and it was involved in an accident on 28.1.2010 but he was not present. He testified that he visited the scene and found the suit motor vehicles at the scene .He testified that the police took measurements they accompanied the police to Bungoma Police station. He testified that they called inspection officer from Kakamega who inspected the vehicle and it had no defect.

DW2 Moses Abdalla testified that he is a turn boy. He testified that on 28<sup>th</sup> he was going to Chwele to pick sand and when they reached Sikusi they indicated they were turning. He testified that from behind there was a Nissan whose registration number he cannot recall was over speeding from behind and it hit their driver's side. He testified that he blamed the driver of the Nissan for not following traffic rules.

After full hearing and consideration and upon the above evidence the trial magistrate stated;

***“I find that the plaintiff was not a lawful passenger in motor vehicle registration KAU 177 M at the time of the accident he cannot therefore get the prayers he is seeking. His case against the 3<sup>rd</sup> Defendant is dismissed”.***

The appellant being dissatisfied then filed this appeal citing the following grounds:

***i. The learned Magistrate erred in law and fact by dismissing the Plaintiff's case.***

***ii. The learned Magistrate erred in law and fact by finding that the plaintiff was not lawful passenger in the suit motor vehicle.***

***iii. The learned Magistrate erred in law and fact by failing to take into account all material and relevant facts as to causation of and liability for the accident.***

***iv. The learned trial Magistrate erred in law and fact in completely disregarding the evidence tendered by the appellant and that he had not proved negligence against the defendants.***

***v. The learned trial Magistrate erred in law and fact by taking into account trivial facts with regard to cancellation of name on the treatment book and as a result reached wrong decision.***

By order of the court, this appeal was canvassed by way of written submissions. The appellant submitted through Gacathi Advocate. He submitted that court erred in finding that the appellant was not a passenger in suit motor vehicle. He submitted that the appellant evident was in consonance with the evidence of PW3. He submitted that his evidence was corroborated and proved on balance of probability.

He submitted on time of the accident that the accident occurred between 10.00am and 12.00noon and therefore accuracy of time was immaterial.

He submitted that with regard to cancellation of names on treatment record PW3 confirmed in his testimony that sometimes patients' names can be changed on the book.

He Submitted on the trial court erred on finding in liability in failing to find appellant's case against 1<sup>st</sup> and 2<sup>nd</sup> respondents yet there was already an interlocutory judgement against them.

He submitted that it was evidence of PW2 and PW3 that after accident the driver of the lorry and turn boy disappeared thereof that disappearance connoted guilt of negligence relying on case law in ***Rodgers Wanambisi Vs Agricultural Development Corporation, Kitale HCCC. No. 35 of 2013 (eKLR) 2016***

The 3<sup>rd</sup> respondent submitted through Onyando Advocate. He submitted the evidence of the appellant is contradictory and inconsistent on how the accident occurred. He submitted that the appellant failed to prove particulars of negligence against third party. He submitted that evidence of PW2 did not corroborate the evidence of the appellant.

He submitted that the appellant was not involved in the accident for reasons that the evidence was inconsistent with P3 form.

Having considered the Appellant's grounds of appeal and the parties' respective submissions, it is clear that the issue for consideration and determination in this appeal is; -

***i. Whether the appellant was involved in a road traffic accident on 28.1.2010 involving motor vehicle registration KAU 177 M matatu and motor vehicle registration number KBJ 435Y lorry and whether he sustained injuries out of the said accident?***

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of ***Selle V Associated Motor Boat Company Ltd [1968] EA 123*** where Sir Clement De le Stang stated that:

***“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .***

***However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).***

In *Ephantus Mwangi & another Vs Duncan Wambuga* 1983 2KCA 100.

1 The trial court in arriving at the finding tht appellant was not a passenger rendered itself thus: -

2 There is no dispute that there was an accident involving motor vehicle registration No. KAU 177 Lorry and KAM 177M matatu. The 3<sup>rd</sup> defendant/Respondent and his driver admit this. The single issue is whether appellant was a passenger in the matatu? Being a passenger in a PSV vehicle can be proved by tendering evidence to show that one boarded the motor vehicle by production of ticket; or by evidence of the driver or conductor of motor vehicle or even evidence of other passengers in the motor vehicle. Evidence can also be deduced form records of the accident police or medical personnel who attended to the accident. There can also be evidence of treatment as a result of the accident. Al these evidence must from a chain of flow for it to be credible and therefore, acceptable in court. Where there are inconsistencies, they must be explained minor inconsistencies can be ignored. However, grave inconsistencies which go to the substance of the claim cannot be ignored by court.

In this case the appellant did not have any document to show he was a fare-paying passenger in the matatu. He explained that the documents were lost during the accident. He stated he sustained injuries in the accident and went to Bungoma District Hospital for treatment. He produced the treatment book Exhibit 1 which shows that the name of original patient was Disho gorge of our patient no. 13261010 and that he was seen at the hospital at 10.40 a.m. on 28<sup>th</sup> January, 2010. It shows that the patient was knocked down by a vehicle and sustained lower limp pain. The patient was given treatment and cleaning and dressing of wound done. He was given a sick off for 2 days.

The police abstract produced exhibit 4 shows lists the appellant as a passenger and had sustained serious injuries. The statutory notice issued to the claims manager Amaro Insurance by the Appellant counsel Gacathe & Co. advocates stated: -

3 All these are inconsistencies and contradiction noted in the evidence. The effect of proof of contradictions. Is to discredit the witness as

being unreliable as his evidence in court is contrary to the documents produced. These contradictions were material particularly in establishing whether appellant was passenger in the matatu. In my view the finding that the appellant has not proved that he was a passenger in the matatu was premised on evidence on record.

In the result, I find no merit in this appeal which is hereby dismissed with costs.

**Dated and Delivered at BUNGOMA this 5<sup>th</sup> day of June, 2020.**

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**S N RIECHI**

**JUDGE**