



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 91 OF 2019

JUMAA MWARUA KAPHUTSU.....APPELLANT

VERSUS

PALLET LOGISTICS LIMITED.....RESPONDENT

(Being an Appeal from the Judgment delivered by the Senior Resident Hon. Adalo, Senior Resident Magistrate, delivered on the 1st October 2019 in Mariakani Civil Suit No. 332 of 2018)

Coram: Hon. Justice R. Nyakundi

Wachenje Mariga Advocates for the appellant

Okello Kinyanjui Advocates for the respondent

JUDGMENT

This is an appeal by the unsuccessful plaintiff, herein the appellant in the appeal from the Judgment of the Senior Resident Magistrate Court (**Hon. Adalo**) in Mariakani delivered on 1.10.2019, whereby the Learned Magistrate dismissed the suit for non-proof of the elements of negligence.

The appellants dissatisfaction with the whole Judgment is contained in the following grounds of appeal.

- 1. That the Learned Magistrate erred in Law and in fact in finding that the appellant had not proved his case against the respondent on a balance of probability and in dismissing the suit.***
- 2. The Learned Magistrate erred in Law and in fact in failing to give due consideration of the merits of the appellant's evidence in the suit, including in specific regard to the point of impact, the relative distance and time each driver had been on the road before the accident, the relative tonnage of each of the trucks and the fact that the appellant was driving uphill.***
- 3. The Learned Magistrate erred in Law and in fact in simultaneously finding the point of impact had been on the appellant's left lane and still finding appellant had hit, the respondents motor-vehicle.***
- 4. The Learned Magistrate erred in Law and in fact in concluding that if the respondent's driver had lost control of the vehicle, he ought to have colluded head on with the appellant.***
- 5. The Learned Magistrate erred in Law and in fact in concluding that the police blamed the appellant for the accident, after the investigations.***

Background

The facts are that on the 27th day of April 2016, the plaintiff/appellant was lawfully travelling as a driver of motor-vehicle registration No. KCD 220Q 2F 0960 along Nairobi – Mombasa road at Kokotoni area whereby the defendant/respondent agent, servant or driver or employee negligently controlled the said motor vehicle registration number KBA 539G ZC 7824V, thereby allowing or permitting the vehicle to violently hit motor vehicle Registration No. KCD 220Q ZF – 0960 while the plaintiff was on board occasioning the plaintiff/appellant very serious injuries. Under the terms of paragraph 5 of the Plaintiff particulars of negligence of the defendant/respondent agent, servant or driver or employee.

It was the plaintiff's/appellant case that on account of negligence which invariably he did not contribute to, he suffered severe bodily injuries

that as a consequence demanded compensation in damages.

The evidence for the plaintiff

According to **PW1 No. 91772 PC (w) Ann Wambui** of Mariakani Police Station stated during the hearing that an accident occurred on 2.4.2016 involving the identified motor vehicles namely KBA 539G ZC 7824 and KCD 220Q along Mariakani – Nairobi Highway. Though (PW1) was not the investigating officer, she confirmed that the accident report was booked at the station.

As a result a police abstract was issued to the parties produced as exhibit 1 and the P3 to the claimant one **Mwarua** which she also produced as exhibit 2.

PW2 – Juma Mwarua, the claimant and driver of motor vehicle registration number KCB 220q told the Court that on material day referred as 2.4.2016 he got involved in a road traffic accident with the defendants motor vehicle while driving along Mariakani- Makindu section of the road. In his evidence the offending on coming motor vehicle left its lane, swerved to the opposite lane and suddenly a collision occurred. In that state of events he suffered personal injuries involving fractures of the right 1st and 5th fingers, dislocation of the right 3rd finger, crash injury to the right hand with multiple lacerations, multiple facial cuts and blunt object injury to the head and right lower limb.

Thereafter, it was the testimony of (PW2) that he was initially treated at Mariakani with a follow-up admission referral to Pandya Memorial Hospital. On cross-examination the statement told the Court that the aforesaid accident occurred on a clear section of the road without any other pending traffic except the defendant oncoming vehicle on the other side of the road. He saw the defendants motor vehicle ram into his right side and a collision occurred. He blamed the cause of the accident on the negligence driving of the defendants motor vehicle.

PW3 – Dr. Ajoni Adede gave evidence to the effect that on 29.8.2018 he examined **Juma Mwarua** who came with a history of being involved in a road traffic accident on 2.4.2016.

On an examination carried out after two (2) years and four (4) months he diagnosed him as having suffered fracture injuries to proximal phalanges of the 1st and 5th, dislocation of the 1st right and 3rd right fingers, multiple fractures to the hand and face. According to **Dr. Adede**, the claimant (PW2) suffered a residual permanent disability of 10% which arises out of the fracture areas resulting in weak grip of the right hand.

In the circumstances, (PW3) produced the medical report as exhibit 5 (a) and the receipt for consultancy fee as exhibit 5 (b). Having closed his case it was now the turn of the defendant who called in **Gidraf Ndungu Mbugua** as a witness. The evidence adduced is such that on the material day he was in control and driving motor vehicle registration number KBA 539G ZC 7824. Further, he told the trial Court that the claimant's motor vehicle swerved from its side encroaching into the left lane and the alleged accident occurred. He denied any particulars of negligence as alluded to by the claimant. When pressed under cross-examination by Learned Counsel **Mr. Wachenje**, the witness denied that he was driving at high speed nor was he the one at fault. That was enough to dispose of the claim and in her consideration any form of negligence failed to be proved by the claimant. Indeed in her considered Judgment that was a case set for dismissal in terms of the principles and guidelines laid down in the Law. On appeal both parties approached this Court by way of written submissions summarized as follows:

The appellant submissions

Mr. Wachenje for the appellant adopted the following perspective to try and persuade this Court to allow the appeal. he first delved into the key points in the evidence as presented in Court by the appellant, his witnesses and the respondent version of the accident. Learned Counsel further adumbrated the settled principles as applicable to the facts of the case. In the arguments and submissions by **Mr. Wachenje**, the Learned Magistrate was with respect in error in failing to appraise the evidence to ascertain that the respondent driver was solely to blame for the accident. Learned Counsel contended that there was enough material as manifested in the evidence of PW2 and DW1 on which a finding of causation and breach of the duty of care could be properly made in the circumstances of the collision.

In review of the evidence, Learned Counsel submitted and identified three elements which were ignored by the Learned trial Magistrate.

(a). Swerving and hitting the appellant's motor vehicle by the respondent driver and agent.

(b). Driving at high speed.

(c). The respondent's driver leaving its proper left lane as one faces Mombasa from Nairobi and hitting the appellant's vehicle on the left lane from Nairobi to Mombasa. That there was a breach of duty on the part of the respondent's driver.

Learned Counsel inter alia cited the case of **Kennedy Nyangoya v Bash Hauliers {Civil Appeal No. 8 of 2015}** on the relevance and materiality of police abstract in proof of causation and blameworthiness in road traffic accident claims with that Learned Counsel urged this Court to allow the appeal.

Submissions on behalf of the respondent

Ms. Chege in her submissions took the position that the appeal lacks merit both on the factual circumstances and the applicable Law. In Learned Counsel Submissions the evidence by PW2 lacked credibility on the collision. It was also noted that the police evidence from **(PW1) PC (W) Ann Wambui** did not add any probative value surrounding the collision on 2.4.2016.

Further, Learned Counsel argued and submitted that the failure by the appellant stating in Court that he did not see the respondent's vehicle

affected the accuracy of the testimony. In evaluating (PW1) evidence Learned Counsel was of the view that the investigations came up with a proper recommendations on the accident that it was due to the negligence on the part of the appellant- **Jumaa Mwarua**.

According, to Learned Counsel when the Court came to the point of deciding on the issue of liability after all the evidence that there was on record appellant failed to discharge the burden and standard of proof on a balance of probabilities.

In buttressing her arguments on the burden of proof as an import of Section 107 (1) and 108 of the Evidence Act, Learned Counsel placed reliance on the following authorities: **Treadsetters Tyres Ltd v John Wekesa Wepukulu {2010} eKLR, Kurshed Begum Mirza v Jackson Kaibunga {2017} eKLR, Halsbury's Laws of England, 4th Edition, Volume 17 at Para 13 and 14. Phipson on the Law of Evidence, Philomena Mutheu Nzyoka (Suing as a legal representative of the Estate of the Late TKM v Transpares Kenya Limited {2016} eKLR.**

In Learned Counsel insights she submitted that in this instant appeal there is not any remarkable evidence that the respondent's motor vehicle negligently caused the accident in which the appellant suffered loss and damage.

Analysis and Determination

The appeal at bar is governed by the principles in the cases of **Abok James Odera T/a A. J. Odera & Associates v John Patrick Machira T/a Machira & Co. Advocates {2013} eKLR, Kenya Ports Authority v Kuston (Kenya) Limited {2009} 2 EA 212.**

“The Law in relation to the jurisdiction of the first appeal from the subordinate Court to the High Court should be to reconsider the evidence, evaluate it 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 that respect.

Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not deceit with by the parites in the evidence.”

On the basis of this appeal at the heart of it all is whether the Learned trial Magistrate was right in arriving at a conclusion that neither the appellant nor the respondent was materially responsible for negligence to such a collision that occurred on 2.4.2016.

Pursuant to this issue in assessing the weight and all the relevant circumstances, its worthy to speak to the applicable Law in order to reach a logical conclusion. Generally a statute like the Traffic Act and the Highway Code imposes a duty of care to every person who drives and is in control of a motor vehicle on a road to do so with due care and attention. Its therefore inferred that any person injured as the result of breach of the duty shall have remedy in damages, even in the absence of an indictment on careless driving.

The basic proposition of applying the criterion that a breach of the duty of care is sufficient to manifest remedy in damages has been expounded in various precedent setting decisions. In **Cecil Brown v Judith Green & Ideal Car Rental Claim No. 2006 HCV 2566** thus:

“It is clear there is, indeed a common Law duty as well as statutory duty for motorists to exercise reasonable care while operating their motor vehicle on a road and to take all necessary steps to avoid an accident.”

The other true gist of the matter is as expressed in the case of **Devon Higgiris & Shanice Brown v Umah Campbell & Winston Campbell & Orville Senior HCV 04716** in which the Court stated:

“A driver of a vehicle on the road owes a duty of care to take proper care and not to cause damage to other road users whom he reasonably foresees is likely to be affected by his driving. In order to satisfy this duty he should keep a proper look out, avoids excessive speed and observes traffic rules and regulations.”

By his pleadings, the appellant contended that the accident occurred on account of negligence and contravention of the traffic act on the part of the defendant/respondent to this appeal. similarly, the defendant on the other hand raised a challenge to the assertions by the appellant on the mode of the collision and subsequent loss and damage.

As part of this evaluative process to determine whether there is a breach of that duty, the Court in **Bennet v Chemical Instruction Ltd {1971} 3 ALL ER 822** where **David L. J.** said:

“In my view, it is not necessary for that doctrine to be pleaded. If the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the defendant, than it is for the defendant, to explain and show how the accident could have happened without negligence.”

In **Hammerstone v Leary {1921} 2 KB 664** where it was held:

“That a collision between two vehicles raises an inference of negligence and the onus is on the defendant.”

It therefore appears to the Court that ordinarily a plea based on negligence must satisfy the requirements of a duty of care owed by the defendant to the plaintiff. That there was that breach of duty by the defendant calling for compensation in damages for the harm and damage caused. With critical facts of this case at play it is important to emphasize that the appellant bears the burden of proof against the respondent

to bring the claim within the rubric of negligence.

The Court in **Blyth v Bingham Waterworks Co. Ltd 1856 {11EX Ch 781}** observed:

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or something which a prudent and reasonable man would not do.”

One thing, however is important to note, in this connection. Although, the accident is not disputed, the admission on breach of duty of care and negligence kept on shifting between the appellant and the respondent. In other words the appellant blamed the defendant, driver for losing control from the left side lane towards the right side in such situation a collision occurred. Whereas, the defendant witness (**DW1**) maintained that the evidence constituting the accident clearly placed the appellant at the scene of the breach of the duty care. The underlying rationale here is that the appellant was the author of his own misfortune therefore not liable to be compensated by the defendant.

How does the Court go about exercising discretion for that matter. In the **Learned Authors in Bingham & Berryman’s motor claim cases 10th Edition** it was held:

“Regard must be had not only to the causative potency of the acts or omissions of each of the parties but to their relative blameworthiness.”

I appreciate the positions taken by both the appellant and defendant who incidentally happen to be eye-witnesses to the collision. Therefore, bringing their conduct within the principle in **Hay v Bourhill v James Young {1941} S.C. 395, 429**. In the case the **House of Lords** stated interalia that:

“No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in the premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care proper care connotes avoidance of excessive speed, keeping a good look out, observing traffic rules and signals and so on. Then to whom is the duty owed? Again I quote and accept the words of Lord Jameson. “To persons so placed that they may reasonably be expected to be injured by the omission to take such care.”

In the instant appeal, a review of the evidence as scrutinized by the Learned trial Magistrate reveals that the appellant lost the claim for lack of cogent and credible evidence on causation.

In her further appraisal of the evidence, the Learned trial Magistrate gave weighty to a sketch apparently presented by the appellant which supposedly contradicted his original version. There was therefore an issue of recollection of the events leading to the collision of two vehicles. It is instructive to observe that the much touted evidence of (PW1) came from a police officer who never visited the scene nor investigated the accident.

It is a fundamental rule of evidence under Section 63 of the Evidence Act that hearsay evidence is inadmissible. The police abstract was not filled by witness (PW1) nor can she allude to the contents contained therein for purposes of proving the truth as to the accuracy of statements made on occurrence of the accident. Therefore, the most important question on the point of impact and presence of the debris could not be answered by (PW1), whether the scene was interfered with before the arrival of the traffic police are certainly matters of significance not addressed by the trial Court.

I fully agree with the Learned trial Magistrate observations that parties are bound by their pleadings. However, the evidence on record shows that both vehicles were being driven on different directions. The appellant’s vehicle was headed to Nairobi whilst the respondent’s was being driven along Mariakani – Mombasa Highway.

In my view to assess what type and degree of care is reasonable in this particular circumstances it was incumbent upon the Learned trial Magistrate to turn to the standard of a reasonable prudent person and ask; the question how such an accident would have taken place in that part of the road without negligence by either of the drivers.

In pursuing the answer to this question to define the standard of proper behavior in terms of the test of a prudent person the Law relies on the objective standard against which to measure the defendant’s conduct. A very thorough examination of this tort is to determine whether the defendant choices and conduct led to the accident and injury was due to negligence or non-negligence act or was in a way contributed to by the plaintiff (appellant).

According to the evidence presented by the appellant and respondent witnesses the collision prima facie illustrates one of the two drivers may at least be partially to blame for the accident. While the burden of proof on causation rests with the plaintiff in certain special situations that evidential burden may shift to the defendant. Here the true gist of the action is usually the proximate cause of the accident.

Even where there is evidence suggesting that the accident may have occurred without fault of the drivers at the scene in so far as this case is concerned the question involved and which remained unanswered is that of nearness and closeness to the collision.

In **Jaensch v Coffey {1984} 155 CLR 549** the Court held as follows:

“on the threshold of proximity to be determined in explaining the cause of the accident (a). Physical proximity in the sense of space and time of the two vehicles at the scene (b) circumstantial proximity, such as an overriding proximity and finally causal proximity.”

The dictum in **Yorkshire Dale S. S. Co. Ltd v Minister of War Transport {1942} A. C. 691 H. L.** makes it clear in the following passage:

“The choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards causation is to be understood as a man in the street and not as either the scientist or metaphysician, would understand it.”

The Court on reflecting the sort of decision arrived at by the Learned trial Magistrate gets the impression at the logical end of the spectrum causation was without breach of duty from any of the drivers on the Mombasa – Nairobi Highway at the time. It is open to doubt however whether the whole episode on liability can be conclusively stated to be without negligent acts of the defendant or the manouvres by the plaintiff.

In the first place, negligence is a common Law cause of action. This was a case where the Learned trial Magistrate had the judicial discretion to make use of the cannons of interpretation and appraisal of the evidence by invoking the concept of presumption under Section 119 of the Evidence Act. The Section provides:

“The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of a particular case.”

The same point was made by **Ringera J in Raphael Mwaniki Kiboi v Joseph Njogu Kinyua HCCC No. 3974 of 1988** whereby incrementally by analogy with established categories observed as follows on the collision of two vehicles:

“I am entitled under Section 119 of the Kenya Evidence Act to presume as a likely fact that when two motor vehicles collide on a highway they do so in consequence of the negligence of either one or both of the drivers thereof”

I make that presumption here? Why, there is no dispute that the appellants was driving his motor vehicle ascending the highway whereas the respondent was descending towards Mombasa. A collision occurred at Kokotoni area. Such is the context that each drivers conduct could have been assessed as to the definition and meaning of proximate cause of the accident.

On the part of the Learned Magistrate without excluding the rule of hearsay evidence seemed to have given weight to (PW1) testimony from the police station who neither visited the scene or drew the sketch plan soon after the incident.

I am of the firm believe, that from the incident it was plausible for the Learned trial Magistrate to have formed the view that negligence of the appellants driver and that of the respondent equally caused the collision. The appellants negligent acts of swerving to the east side of the road and on the respondents seeing appellants’ vehicle swerved to the wrong side of the road in the direction of the oncoming vehicle. The novel aspect of the Learned trial Magistrate Judgment as thus formulated, is that it does appear to be a test of misdirection that the accident occurred without cause and blameworthiness on the part of the drivers.

I am alive to the general legal principle that the Law recognizes unavoidable accidents. An unavoidable accident is one which occurs in such manner that it cannot justly be said to have been proximately caused by negligence as known and defined in Law. The essence of this being the fact in the event a claimant suffers damage in an unavoidable accident he or she has no right to recover damages for harm suffered.

A feature of the case at bar was not deficient of pleading and evidence for it to be brought within the doctrine of unavoidable accident. In accordance with the doctrine the **Supreme Court in Carlborg v Wesley Hospital & Nurse Training School (Kansas) {323}** stated as follows:

“Generally speaking when an accident is caused by negligence, there is no room for application of the doctrine of unavoidable accident even though the accident may have been inevitable or unavoidable at the time of its occurrence and one is not entitled to the protection of the doctrine if his negligence has created, brought about or failed to remedy a dangerous condition resulting in a situation where the accident is thus inevitable or unavoidable at the time of the occurrence. In other words a person is liable for the combined consequences of an inevitable accident and his own negligence.”

It is therefore surprising that the Learned trial Magistrate turning into the facts and evidence of the case invoked the burden and standard of proof pursuant to Section 107 as read with Section 108 of the Evidence Act to rule that the appellants had failed to discharge the burden of proof in that respect.

In accordance with the notion on general presumption, the evidence discloses no other contributing factor to the accident but for the conduct of the drivers which could reasonably have been found sufficient to equally apportion liability.

In this case, the prima facie evidence was sufficient to show that the negligent acts by the drivers of the vehicles should have anticipated or foreseen a likelihood result of their own negligence. To that extent, confronted by the two versions as to how the accident had occurred save for some minor inconsistencies and contradictions of the witnesses the sense of it can be inferred on proof of the existence or non-existence of the facts in issue on occurrence of the accident. From the evidence available before the Learned trial Magistrate at the time of the accident each of them though set out to exonerate himself from blame, what emerged both of them were at fault.

In the instant case, matters or facts on causation were of a peculiar nature and only within the knowledge of both drivers to the accident. The qualified principle for the Learned trial Magistrate at the time of evaluating the appellants evidence dependent upon what the Court stated in **Wyong Shire Council v Shirt {1980} HCA 12** as follows:

“In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendants position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. It the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man’s response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have it is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard response to be ascribed to the reasonable man placed in the defendant’s position.”

It must be appreciated by this Court that from the record particulars of negligence were clearly stated in the Plaint and subsequent evidence adduced by the appellant. The evidence which the Learned trial Magistrate declined to accept demonstrated the various aspects of negligent acts on the part of both drivers on the fateful day of the accident.

In the present case, I find the Learned trial Magistrate to be wrong when on the merits of the claim went ahead to rule that the accident could have happened without negligence.

Having considered the authorities and the proven facts at the trial, it is my Judgment on liability issue that both drivers were equally to blame for the collision.

There is therefore a fault principle exhibited by the Learned trial Magistrate which calls upon the Court to exercise discretion pursuant to the principles in **Mbogo v Shah {1968} EA 93** to interfere with the impugned Judgment on liability. For these reasons, I would allow the appeal, set aside the dismissal order and remit the file back to the trial Court for assessment of damages. The costs of the appeal to the appellant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Mulwa holding brief for Wachenje Mariga Advocates for the appellant