REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 23 OF 2015

PETER MBURU.....APPELLANT

=VRS=

1. EVANS MASESE MARANGA.....1ST RESPONDENT

2. DAVY MISUSE OMAE.....2ND RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. J. Njoroge – CM dated and delivered on the 16th day of June 2014 in the original Nyamira Chief Magistrate's Court Civil Case No. 98 of 2011}

JUDGEMENT

The appellant was the 1st defendant in the lower court case where the 1st respondent sought compensation for personal injuries he sustained following a collision between motor vehicle KBH 182Q belonging to the appellant and motor vehicle KAW 915B belonging to the 2nd respondent. The 1st respondent alleged that he was a fare paying passenger in motor vehicle KAW 915B. By a judgement delivered on 16th June 2014 the trial magistrate dismissed the case as against the 2nd respondent but found the appellant wholly to blame for the accident and awarded the 1st respondent a total of Kshs. 423,600/=, costs of the suit and interest. The appellant being aggrieved preferred this appeal. The same is premised on grounds that: -

> **"1. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.**
>
> **2. The Learned Trial Magistrate misdirected himself in ignoring the written submissions presented and filed by the Appellant in their entirety.**
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> **3. The Learned Trial Magistrate erred in not taking into account the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.**
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> **4. The Learned Trial Magistrate erred in failing to hold that the 1st Respondent failed to prove negligence on the part of the Appellant while the onus of proof lay with the 1st Respondent.**
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> **5. The analysis of the evidence as per the judgement is extremely wanting in material respects.**
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> **6. The Learned Trial Magistrate misapprehended the evidence on record to a material degree resulting in his arriving at a wrong conclusion.**
>
> **7. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law."**

The appeal was vehemently opposed and by agreement of counsel for the parties it was canvassed by way of written submissions. For the appellant it was first noted that the appeal is against liability as well as the quantum of damages. Counsel for the appellant submitted that the 1st respondent had in paragraph 4 of the plaint attributed negligence to both defendants and the trial court should therefore have taken that into consideration when apportioning liability. Counsel pointed out that even at the trial the 1st respondent testified that the vehicle he was travelling in was being driven at a high speed and that both vehicles collided in the middle of the road. Counsel contended that the trial magistrate ignored this evidence when considering the issue of liability. Counsel also stated that the respondent and the trial magistrate were at cross purposes regarding the identity of the motor vehicle the respondent was a passenger hence negating the judgement delivered. Counsel urged that on this ground alone this appeal ought to be allowed. Counsel submitted that ***"knowing the position of one's case is an***

essential fundamental right enshrined in the constitution under Article 50 of the Constitution with regard to fair trial." He urged this court to follow the decision of the Court of Appeal in **Anderson Mole Munyaya & 3 others Vs. Morris Sulubu Hare [2017] eKLR.**

Counsel for the appellant further faulted the trial magistrate for what he called disregard of the evidence and pleadings by both the 1st respondent and the appellant. Counsel contended that had the trial court considered the evidence and pleadings then he would have apportioned liability in the ratio 50%:50%. Counsel submitted that the 1st respondent did not in any event prove his case on a balance of probabilities. Counsel urged that should this court be unable to determine who is to blame for the accident then it should be guided by the case of **Pan Africa Paper Mills (EA) Ltd Vs. Vincent Simiyu Festo [2014] eKLR** where the Court of Appeal stated: -

> **"It is now settled law that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision of probabilities to conclude that one or the other party was guilty or both parties were guilty of negligence."**

On the quantum of damages counsel submitted that this court should consider the appellants' submissions in the lower court.

On their part counsel for the 1st respondent submitted that whereas it was the respondents' case that both vehicles were to blame, the respondent confirmed that the collision occurred on the right lane of motor vehicle KAW 915B which was going uphill and so could not have been over speeding. Counsel contended that the respondent was very clear that the vehicle he was in was not at fault and that the appellant did not adduce evidence to prove that his vehicle was under the control of carjackers when the collision occurred. Counsel contended that in the absence of such proof the court was not expected to believe the allegation. Counsel submitted that the evidence adduced pointed to negligence on the part of the appellant and the court was right to find him wholly liable.

On the quantum of damages counsel for the 1st respondent submitted that the trial court's award of general damages of Kshs. 400,000/= was very reasonable. He relied on the cases of **Josephine Malel Kimaiyo Vs. Simon Njora Karichu & 3 others (Nakuru HCCC 499 of 2000)** where Kshs. 500,000/= was awarded and **Clement Gitau Vs. GKK [2016] eKLR** where the court awarded Kshs. 600,000/=. Counsel urged this court to come to the conclusion that this appeal had no merit and dismiss it.

The 1st respondent's evidence was that on 24th December 2009 he was travelling in motor vehicle KAW 915B when at a place called Nyaramba along the Kisii – Kericho Road the vehicle collided with a Mitsubishi lorry KBH 182Q. he was also clear that both vehicles were being driven at a high speed and that the collision occurred in the middle of the road. He reiterated this position during cross examination and when asked questions by counsel for the 2nd respondent described the collision as a head-on collision. He was categorical that he was seated at the front and saw what happened clearly. In his judgement the Learned Trial Magistrate observed that the issue of liability had been determined in **CMCC 58 of 2010 – Joseph Ondora Makima Vs. Peter Mburu and Davynisius Omae (now Nyamira HCCA No. 22 of 2015)** where the appellant was found 100% liable. I have perused the pleadings in that case and found that the averments in the plaint and the particulars of negligence against the defendants are identical to those in this case save for the injuries sustained by the respondents. There as in this case the plaintiff (now respondent in **HCCA No. 22 of 2015**) blamed both drivers for the collision and stated: -

> **"*I blame both* drivers because the vehicle I was travelling in was moving at a high speed and the lorry was moving zigzag on the road. Both vehicles failed to adhere the traffic rules which require that you do not over speed Traffic rules forbid that the lorry was coming from Kisii to Nakuru did not drive on its side." (sic)**

In cross examination the plaintiff in that case reiterated that though the other vehicle was driving in a zig zag fashion and in the path of their vehicle their driver did nothing to avoid colliding with the appellant's vehicle. He contended that had the driver of the matatu been driving at a moderate speed he could have stopped thereby avoiding the collision. It is therefore surprising that the trial magistrate found the appellant's driver wholly to blame for the accident when all evidence pointed to negligence on the part of both drivers. It is however my finding that this case is distinguishable from that of **Pan Africa Paper Mills (EA) Ltd Vs. Vincent Simiyu Festo [2014] eKLR** because in this case it is possible to apportion blame between the two drivers. According to the 1st respondent the driver of the appellant's vehicle was driving in zigzag fashion and towards the path of the vehicle in which the 1st respondent was a passenger and must therefore shoulder more blame. The driver of the matatu also contributed to the collision by failing to take any action to avoid the appellant's vehicle. This because he was driving too fast in the circumstances. The trial magistrate misdirected himself by ignoring the particulars of negligence in the plaint and the evidence in this case as well as in **CMCC 58 of 2010** which he treated as a test suit on liability. There is therefore good reason to disturb his finding on liability and it is my finding that liability be and is hereby apportioned in the ratio 70%:30% - for the appellant 70% and 30% for the 2nd respondent.

On the quantum of damages this court finds that it is neither inordinately high nor too low as to represent an entirely erroneous award and neither has it been shown that in arriving at the award the trial magistrate acted on the wrong principle or misapprehended the evidence in some material respect. This court will not therefore disturb the award save that both the general damages of Kshs. 400,000/= and the specials of Kshs. 23,600/= shall now be apportioned in the ratio 70%:30% between the appellant and the 2nd respondent. Likewise, the costs of the case in the lower court and as the appellant's appeal has succeeded only partially he shall get half the costs of this appeal and the same shall be borne by the respondents equally. It is so ordered.

Signed, dated and delivered in Nyamira this 14th day of February 2019.

E. N. MAINA

JUDGE