



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 39 OF 2015

PATRICK KILONZO.....APPELLANT

VERSUS

NGWAU KUKU.....RESPONDENT

(Being an Appeal from the Judgment in Mwingi Senior Resident Magistrate's Court Civil Case No. 91 of 2009 by Hon. V. A. Otieno DM II Prof. on 28/04/11)

J U D G M E N T

1. **Ngwau Kuku**, the Respondent, sued the Appellant and Another claiming special damages in the sum of **Kshs. 3,200/=**, General Damages, costs of the suit and interest. The claim arose out of a road traffic accident that occurred on the 7th day of **June, 2008** in which the Respondent was involved. It was pleaded that the Respondent was travelling as a fare paying passenger aboard motor-vehicle registration number **KAS 090B** when the driver drove it in a negligent manner such that it lost control, veered off the road and rolled whereby the Plaintiff was injured.
2. The Defendants denied the occurrence of the accident and the allegation alluded to of negligence on his part. In the alternative they averred that the accident was caused and/or substantially contributed to by the negligence of the Respondent.
3. At the hearing only the Respondent testified. She stated that the motor-vehicle veered off the road and overturned. On cross examination she stated that the driver of the subject motor-vehicle turned to avoid another motor-vehicle when the accident occurred. But, she clarified on re-examination that their driver was driving at a high speed.
4. The Appellant never adduced evidence to controvert what was stated by the Respondent.
5. The learned trial Magistrate analyzed evidence adduced and reached a finding that the motor-vehicle was being driven at a high speed and having not instituted third party proceedings the Respondent a fare paying passenger who was not involved in control of the motor-vehicle could not be blamed for the accident. Judgment was entered for the Respondent in the sum of **Kshs. 50,000/=** in general damages and special damages of **Kshs. 3,200/=** together with costs of the suit.
6. Aggrieved by the decision of the Court the Appellant appealed on grounds that: mandatory requirements of **Order 21 Rule (4)** and **(5)** of the **Criminal Procedure Rules** were not met therefore the Judgment was a nullity; submissions by the Appellant were not taken into account; ownership of the accident motor-vehicle was not proved; finding for the Respondent after she blamed another motor-vehicle for the accident was erroneous; finding that the Defendant ought to have enjoined a third party was shifting the burden of proof to the Appellant; finding that negligence was proven against the Appellant and another was erroneous; finding that injuries sustained by the Respondent were as a result of the accident was erroneous and the submission of the Appellant was not considered.
7. Following directions given the Appeal was to be disposed off by way of written submissions but only the Appellant filed submissions.
8. This being a first Appellate Court, it is my duty to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility (**See Selle vs. Associated Motor Boat Company Limited (1968) EA 123**).
9. Issues to be determined as submitted by the Appellant are:
 - (i) Liability.
 - (ii) Ownership of the motor-vehicle.

(iii) Whether the Judgment of the trial Court met the mandatory requirements of **Order 21 Rule (4) and (5) of the Civil Procedure Rules**.

10. It is important to take into consideration what was stated in the case of **Makube vs. Nyamuno (1983) KLR 403**, that:

“A court on Appeal will not normally interfere with the finding of fact by a trial Court unless it is based on evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

11. It is submitted that the Respondent having blamed another motor-vehicle for the accident it could not be explained why she sued the Appellant and the co-defendant. In this regard they cited the case of **Livingstone Otundo vs. Naima Mohamoud** (a minor who had sued through her next friend **Mohamoud Ali**) **(1980) eKLR** where the Court stated that:

“the appellant’s duty of care should have been judged by what he ought reasonably to have anticipated in this regard and then consider what course of action he would have taken to ensure that no accident occurred. In other words, the degree of his obligation in connection therewith was that of a reasonable man. That was the standard of which his negligence ought to have been adjudged. An obligation greater than this would mean imposing and impossible burden on him.”

It was urged that the Appellant having swerved to avoid the accident his duty should have been adjudged by what ought reasonably to have been anticipated. That the degree of his obligation should have been that of a reasonable man.

12. Although another motor-vehicle was blamed for the accident which was acknowledged by the Respondent, it was her evidence that she was travelling as a passenger therefore was not to blame for the accident. She blamed the accident vehicle for moving at a high speed an act that deterred the driver from controlling the motor-vehicle when he swerved to avoid the other motor-vehicle. A prudent driver would be expected to drive the motor-vehicle at a speed that would enable him to control the vehicle in case anything comes up. This would not be insinuated to be burdensome to him. If indeed the other party was solely to blame the Appellant should have sought to claim against him. This was not done and similarly the Appellant rendered no evidence in an endeavour to explain what happened.

13. In the case of **Kiema Mutuku vs. Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258** it was stated that:

“there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

14. Evidence adduced by the Respondent proved on a balance of probabilities the inability of the Appellant to exercise the duty that he owed the Respondent as a lawful fare paying passenger on the motor-vehicle. Had he been moving at a reasonable speed he would have controlled the vehicle even after swerving to give way to another vehicle.

15. The allegation that the Appellant was in the actual possession of the motor-vehicle and was in control of the same was not controverted. The Respondent adduced in evidence a Police Abstract with the name of Appellant as the owner of the motor-vehicle. A copy of Records adduced in evidence had the 2nd Defendant as the registered owner of the motor-vehicle. In the case of **Nancy Ayemba Ngaira vs. Abdi Ali (2010) eKLR** it was held that a person who enjoyed actual ownership, beneficial ownership, possessory ownership or any other categories of ownership may for practical purposes, be much more relevant than the person whose name appeared in the Certificate of Registration of Motor-vehicle.

16. Evidence adduced of the Police Abstract which was not controverted was proof of the fact of possessory/beneficial ownership of the motor-vehicle.

17. **Order 21 Rule (4)(5) of the Civil Procedure Rules** provides thus:

“4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefore, upon each separate decision on each issue.”

18. It is a requirement for a Judgment to contain the statement of the issues for determination and a reasoned decision.

19. The learned trial Magistrate captured the claim as pleaded and the response filed by the defence. Issues for determination were not specifically set out but reasons for the decision reached are included. Therefore failure to strictly comply with the provision of the law was not prejudicial to the Appellant as no injustice was occasioned in the circumstances.

20. On quantum of damages, in the submissions filed by the Appellant, it was stated thus:

“In the event that the Court finds the Defendant liable, which is unlikely, we humbly submit that an award of Kshs. 70,000/= would be sufficient. In so saying we have considered the inflation and the nature of the injuries being excessive in the below cited authorities, which we are guided by ...”

21. The sum awarded in general damages is lower than what was proposed by the Appellant. This was after a consideration of cases that were cited therefore the Appellant's submissions were not disregarded.

22. In the premises I find the Appeal lacking merit. Accordingly it is dismissed with no orders as to costs.

23. It is so ordered.

Dated, Signed and Delivered at Kitui this 7th day of February, 2019.

L. N. MUTENDE

JUDGE