



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 40 OF 2015

PATRICK KILONZO.....APPELLANT

VERSUS

EUNICE KALUNDA.....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 20/04/11)

J U D G M E N T

1. **Eunice Kalunda**, the Respondent, sued the Appellant and Another claiming special damages in the sum of **Kshs. 3,200/=**, General Damages, costs and interest. The claim arose out of a road traffic accident that occurred along **Thika-Garissa Road** involving motor-vehicle registration number **KAS 090B** in which the Respondent was travelling as a fare-paying passenger. It was pleaded that the Appellant was in actual possession and control of the motor-vehicle whereas the Co-Defendant was the registered owner of the said motor-vehicle. The Respondent blamed the person who was in control of the motor-vehicle for negligence.
2. The Defendants denied occurrence of the accident and the allegations of negligence on their part. In the alternative, they averred that the accident was caused and/or substantially contributed to by the negligence of the Respondent.
3. Only the Respondent testified. She stated that the motor-vehicle was being driven fast, it veered off the road and overturned. She blamed the owner of the motor-vehicle (Appellant) for the occurrence of the accident. On cross examination she stated that there was another motor-vehicle which suddenly moved to their lane and the motor-vehicle she was travelling in was unable to stop as it was on high speed. That if their driver was not over speeding he could not have hit the other motor-vehicle.
4. The Appellant did not call evidence.
5. The learned trial Magistrate considered evidence adduced and reached a finding that the defence did not adduce evidence in support of their case and third party proceedings were not instituted to enjoin the owner of the mystery vehicle. Judgment was entered in favour of the Respondent in the sum of **Kshs. 50,000/=** in general damages and special damages in the sum of **Kshs. 3,200/=**.
6. Aggrieved by the decision of the Court the Appellant appealed on the grounds that: The Judgment was a nullity as the mandatory requirements of **Order 21 Rule (4) and (5)** of the **Civil Procedure Rules** were not complied with; written submissions of the defence were not given due consideration; ownership of the accident vehicle was not proved; finding for the Respondent after she blamed the driver of an unknown motor-vehicle was erroneous; failing to consider evidence of the Respondent that a third party unknown motor-vehicle suddenly swerved onto the lane forcing the Defendant to swerve to avoid the collision; finding that the Defendants ought to have enjoined the third party unknown motor-vehicle was shifting the burden of proof to the Defendants; finding that negligence on the part of the Defendant was erroneous; and finding that injuries sustained by the Respondent were as a result of the accident was erroneous.
7. Following directions taken the Appeal was to be canvassed by way of written submissions. 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.

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

10. At the outset, I must reiterate what the Court of Appeal 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 urged that the Respondent blamed another motor-vehicle for the accident. In her testimony the Respondent who was a lawful passenger in the Appellant’s motor-vehicle stated on cross examination that when the motor-vehicle swerved to avoid the other one it failed to stop because it was moving at a high speed. A prudent driver would be expected to drive a vehicle at a speed that would enable him control the vehicle in case of any eventuality. It is pleaded in particulars of negligence that the Appellant’s driver drove the motor-vehicle at a speed which was excessive in the circumstances such that he failed to control the motor-vehicle to avoid the accident.

12. 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.”

13. The Respondent adduced evidence that was not controverted which proved that even if there was an intrusion in the name of another motor-vehicle, the accident resulted due to Appellant’s driver who was speeding. On a balance of probabilities the accident resulted from the sole effect of the Appellant’s negligence.

14. 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.

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

16. **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.”

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

18. 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.

19. 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 ...”

20. The learned trial Magistrate awarded a sum lower than the proposal put forward by the Appellants.

21. The upshot of the above is that the Appeal lacks merit. Accordingly, it is dismissed. Since the Respondent did not file any submissions there will no orders as to costs.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 6th day of February, 2019.

L. N. MUTENDE

JUDGE