



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 37 OF 2015

(Being an appeal arising from Judgment and Decree of Hon. P.W. Wasike, Resident Magistrate delivered on 17/7/2015 in Kitale Chief Magistrate's Court Civil Case No. 92 of 2013)

JENTRIX NATECHO WASWA.....APPELLANT

VERSUS

KENYA POWER & LIGHTING.....1ST RESPONDENT

JOHN MASENGELI.....2ND RESPONDENT

JUSTINE MURIUKI.....3RD RESPONDENT

J U D G M E N T

1. The appellant was a fare paying passenger in Motor vehicle Registration No. KAU 386L Toyota Hiace Matatu when it got involved in an accident along Kamukuywa – Kitale road with Motor vehicle Registration No. KBK 680T, though in the plaint the latter is described as Motor vehicle Registration No. KBK 386T Toyota Fielder.

2. As a consequence of the said accident the appellant sustained bodily injuries namely, Bruises on both knees and both legs which were tender and severe pains incurred during and after the accident.

3. She proceeded to file suit against both owner and drivers of the said motor vehicles claiming general and special damages.

The suit proceeded to full trial where the trial court dismissed the same stating inter alia that;

“ There was no proof of the vehicles involved in the accident due to the inconsistency with the pleadings in the plaint as well as inconsistency between the pleadings and the oral testimony of the plaintiff as to which vehicles were involved in the accused.”

4. The appellant aggrieved by the said decision has appealed against the same. The substance of the grounds of appeal can be summarised into one. Whether the aforementioned inconsistency in the pleadings on the question of the registration numbers of the vehicle can be a cause of the dismissal of the suit.

5. The rest of evidence is uncontested generally. Parties have filed rival written submissions to oppose and support the appeal; which I have taken time to peruse together with the attendant authorities.

6. The occurrence of the accident is not in dispute. The time and place is not disputed. The only discrepancy is the description of the registration numbers of the second vehicle namely the Toyota fielder which according to the plaint (paragraph 7) is stated as KBK 386T instead of KBK 680T. Apparently the appellant was in the Matatu KAU 386L Toyota Hiace.

7. **PW3, P.C. Kenneth Chebii** from the Kitale Traffic office stated that according to their records the motor vehicles involved were KAU 386L and KBK 680 T. He referred to the sketch maps in his evidence.

8. **PW4**, the Appellant referred to KBK 780 T in her oral evidence but she stated that the same was a Private vehicle.

9. **DW1 John Masengeli** the owner of motor vehicle Registration No. KBT 680 T testified and blamed the owner or driver of the Matatu KAU 386L Nissan. He said in his evidence in chief that;

“ I have not seen Inspection report. I wish that the case be terminated. He is the one who caused the accident. I pray for dismissal of this case .”

10. **DW2 James Mbaya Kiiru** the driver of KAU 380 L equally referred to KBK 680 T vehicle which he blamed for the accident.

11. The police abstract produced as evidence showed the vehicles that were involved in the accident as KBK 680T Toyota Fielder and KAU 386L Toyota Hiace Matatu.

12. Taking the totality of the evidence as presented by the appellant as well as the Respondents I find that the occurrence of the accident was not in dispute. Nothing in the proceedings during trial showed that they were in doubt that motor vehicles KBK 680T was Registration No. KBK 386L.

The type of the vehicles were not disputed.

13. For the trial court to find that the case was not proved on a balance of probability because of misdescription of the registration number of the private car by mixing the digits 386T instead of 680 T was clearly unjust and too harsh in the circumstances. It appears to me that it was a typing error not noticed by both parties all the way during trial.

14. The primary evidence namely the police abstract showed the registration number for the vehicles which was not disputed. Although the plaint was not amended to reflect the changes, the defence on the other hand was a mere denial and general.

15. Although there was a mistake in the final digits of the registration numbers of the Toyota fielder car the parties clearly knew what type of vehicles they were litigating upon. This did not go into the root of the case. As a matter of fact, to allow the trial court's position would be dwelling on technicalities rather than substance.

16. It must also be emphasised that rarely do litigants especially fare paying passengers take time to master the registration numbers of the motor vehicles they board. Infact it is only after the accident and when the police take over that they became keen to know the registration numbers. In the instant case both drivers of the two vehicles testified and nothing suggest in their evidences in chief or even during cross-examination that they meant different vehicles. Infact the demand notices before the filing of suit is clear on the vehicle they are referring to.

17. On this grounds I shall allow the appeal.

18. The issue of liability is worth considering also. From the evidence of both drivers It is clear that they each blamed each other. The evidence of PW3, the police officer seemed to suggest even from the sketch plans that the accident occurred almost in the middle of the road.

19. In the premises I do find that both motor vehicles should shoulder equal blame. I shall apportion each 50:50 percentage liability. The general damages reached by the trial court was reasonable in the circumstances taking into consideration the nature of the injuries sustained by the appellant.

Conclusion

1) The appeal is hereby allowed.

2) The Liability is apportioned equally between the appellant and the Respondents namely on a 50:50 basis.

c) General and Special damages arrived to by the trial court is shared on the above equal basis.

d) Costs of this appeal and the lower court to the appellant but subject to 50:50 basis above.

Orders accordingly.

Delivered, signed and dated at Kitale this 2nd day of April, 2019.

H.K. CHEMITEI

JUDGE

2/4/19

In the presence of:

Mr Okile holding brief for Omwenga for the 1st and 2nd Respondents

No appearance for the Applicant

Court Assistant – Kirong

Judgment read in open court.