



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 41 OF 2012

PAUL NJOROGI MUTORU.....APPELLANT

VERSUS

JACINTA MUTHONI GITU.....1ST RESPONDENT

ALEX NDUNGU WAINAINA.....2ND RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Nakuru Chief Magistrate's Court Civil Case No. 272 of 2009 by Hon. C.OBARA S.P.M.Nyahururu delivered on 25th day of January 2012)

J U D G M E N T

INTRODUCTION

1. This appeal arise from claim for general and special damages by the 1st respondent against the appellants as a result of injuries she sustained when he was travelling as a fare paying passenger in Appellant's motor vehicle registration number KAX 426D. The 2nd respondent was enjoined as a third party in this suit. The trial magistrate found the third party (the 2nd respondent herein) 100% liable for the injuries sustained by the 1st respondent. She however entered judgment against the appellant/defendant.

2. Reason recorded in the judgment is that she believed the third party had taken out third party cover. She awarded kshs.300,000 as general damages and kshs.3,500 special damages. She entered judgment for the 1st respondent against the appellant for a total of kshs.303,500.

3. The appellants being dissatisfied with the said judgment filed this appeal on the following grounds:-

- i. That the Learned Trial Magistrate erred in law and fact in failing to give a concise statement and points of determination in her judgment.
- ii. That the Learned Trial Magistrate erred in law and in fact in holding the Appellant liable on quantum and failing to find that the 3rd party was wholly liable to compensate the Respondent.
- iii. That the Learned Trial Magistrate erred in law and in fact in misapprehending Order 1 Rule 19 of the Civil Procedure Rules.
- iv. That the Learned Trial Magistrate erred in law and in fact in failing to wholly dismiss the suit against the Appellant with costs.

APPELLANTS SUBMISSIONS

4. The appellant restated grounds of appeal. Counsel for appellant argued that the trial magistrate misapprehended Order 1 Rule 19. He submitted that the third party was evidently to blame and was entitled to bear the whole burden and compensate the plaintiff.

5. Counsel further submitted that, directions were taken that liability would be determined between defendant and 3rd party. He argued that evidence adduced demonstrated that the accident was caused by motor vehicle registration number KBB 008B owned by the third party who was enjoined in this suit.

He submitted that there was confirmation that the third party's driver was charged, convicted and fined kshs.5000 and the trial magistrate confirmed that the third party's driver was 100% because he should have stopped to ensure that the road was clear before joining the highway.

6. Counsel submitted that there must be a judgment against the defendant but in this case, the third party was found 100% liable. There was no apportionment.

RESPONDENTS SUBMISSIONS

7. Counsel for the respondents submitted that the court gave reason why the defendant should shoulder liability third party has a leeway to claim from the third party after causing satisfaction of the decree. He submitted that the judgment delivered was regular.

ANALYSIS AND DETERMINATION

8. It is not disputed that the court found the third party 100% liable for the accident herein. Judgment was however entered for the plaintiff against the defendant. **Order 1 rule 19 of the civil procedure rules** defendant is entitled to judgment against the third party after satisfying decree for judgment entered against itself. Alternatively, the court may on application by the defendant pass such judgment against the third party before such defendant has satisfied the decree passed against him.

However, 24. (1) Provide as follows:-

“Where a defendant desires to claim against another person who is already a party to the suit— (a) that he is entitled to contribution or indemnity; or defendant...

or (c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.”

In Nairobi Civil Case No.4589 of 1991 Solomon Mwarimbo Vs Kenya Bus Services Ltd the court held as follows:-

“It is not to be forgotten that the purpose of a third-party notice is to avoid multiplicity of suits and at the hearing of the application for directions, the Court is entitled to determine whether the defendant’s claim against the third party should be heard at or after the trial of the plaintiff’s claim against the defendant.”

9. In this suit, the third party was made party to the proceedings in the trial court. The magistrate arrived at determination on liability as between the three parties herein. He determined that the third party was 100% liable. Liability having been determined between the parties, the party found liable should have been made to satisfy responsible for damages. It would not be proper to enter judgment against the defendant yet the third party was already a party to the proceedings and found liable 100%. Whether the defendant had taken out third party insurance was immaterial.

10. My view is that the requirement to satisfy the decree and seek indemnity should only apply where the third party has not been involved in proceedings to determine who is liable. From the foregoing, I find merit in the appeal. Entry of judgment against the defendant is hereby set aside

FINAL ORDERS

1. A in the trial court to be paid by the third party to the defendant
appeal is hereby allowed
2. Judgment for plaintiff against the defendant is set aside
3. Judgment is hereby entered for plaintiff against third party for kshs.303,500.
4. Costs. Each party to bear own costs of the appeal.

Judgment Dated, signed and delivered at Nakuru this 2nd day of May 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jared Court Assistant

Njuguna holding brief for Juma Counsel for Appellant

Onkoba Counsel for Respondent