



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 761 OF 2016

WILBERFORCE OGUSINI.....APPELLANT

-VERSUS-

1. BENSON KIRAGU.....1ST RESPONDENT

2. DAVID W. K. KARIUKI.....2ND RESPONDENT

3. ALEX KARIUKI.....3RD RESPONDENT

J U D G M E N T

The Appellant who was the Plaintiff in CMCC number 6227/2011 filed a plaint dated the 19th day of October, 2011 in which he claimed special damages of Kshs. 2,500/-, general damages and costs of the suit against the respondents who were the defendants in the lower court.

The cause of action was an accident that is said to have occurred on or about the 21st November, 2010 involving motor vehicles registration numbers KAU 240H and KAC 131H, when the two vehicles collided along Likoni Road, in Nairobi as a consequence of which, the appellant who was travelling as a lawful fare paying passenger in motor vehicle KAU 240H was injured.

The Appellant averred that the accident was caused by negligence on the part of the first Respondent who was driving the aforesaid motor vehicle as an authorized driver and/or agent of the 2nd and 3rd Respondents who were jointly registered as the owners of the said motor vehicle.

The particulars of negligence, injuries and those of special damages are set out in paragraph 6 of the plaint. The appellant prayed for judgment against the respondents jointly and severally.

In a joint defence filed on 27th February, 2012, the Respondents denied the appellant's claim and more specifically the occurrence of the accident and that the Appellant was a lawful passenger in motor vehicle registration number KAU 240H at the material time. Further, they denied the particulars of negligence attributed to the first Respondent but in the alternative and without prejudice, they averred that, if there was such an accident as alleged, the same was caused solely and/or substantially contributed to, by the appellant's own negligence.

They set out the particulars of negligence at paragraph 6 of the defence.

The Respondents also attributed negligence to the driver of motor vehicle KAC 131H and have set out the particulars of such negligence at paragraph 6 of the defence. Further, they averred that the appellant's claim is based on fraud on his part and misrepresentation that he had been involved in an accident and had been injured. The particulars of fraud and his misrepresentation are set out at paragraph 8 of the defence. The alleged injuries, loss and damage were denied and the appellant was put to strict proof.

In his evidence, the Appellant who adopted his witness statement dated the 12th day of October, 2011, testified that on the material day, he was a passenger in motor vehicle KAU 240H, when the vehicle was abruptly involved in an accident. He sustained injuries and was rushed to Kenyatta National Hospital where he was treated and discharged. He blamed the driver of motor vehicle KAU 240H for the accident.

Dr. Cyprrianus Okoth testified as PW1. He examined the Appellant on 26/05/2015 and according to him, he sustained the following injuries:-

- i. Blunt injury on the head

ii. Blunt injury on the left shoulder

iii. Blunt injury to both lower legs.

He stated that at the time of examination, the head, shoulder and both legs were normal.

PC Anthony Omondi gave evidence in support of the Respondent's case. He is a police officer who was attached at Makongeni Police Station performing traffic duties. He stated that on 21/11/2010, a report was made of a serious road traffic accident involving motor vehicles KAU 240H and KAC 131H, along Likoni Road, in Nairobi, in which, several passengers were injured. He confirmed the involvement of the appellant in the accident. He produced the extract of the Occurrence Book and the Police Abstract as exhibits in the case.

After hearing the parties, the learned Magistrate delivered a judgment on the 9th December, 2010 in which she apportioned liability between the Respondents and the owner of motor vehicle KAC 130H at 10%:90% and awarded the Appellant general damages in the sum of Kshs. 100,000/- subject to contribution. She also awarded special damages of Kshs. 2,000 plus costs of the suit.

The said judgment is the subject of this appeal by the Appellant (Plaintiff) who was dissatisfied with the same.

In his amended Memorandum of Appeal, amended on 6th day of September, 2017 he listed 12 grounds of appeal which can be summarized into two;

i. Quantum

ii. Liability.

The appeal was disposed of by way of written submissions which the court has duly considered. In his submissions, the appellant has urged the court to re-evaluate the evidence on record afresh and enhance the award on general damages in his favour.

He has also asked the court to consider the issue of liability on the non party in the suit before the trial court. He has argued that being a passenger in motor vehicle KAU 240H he did not contribute to the occurrence of the accident and had a right to arrive safely at his destination but due to the negligence of the Respondents and/or their driver, his journey was cut short.

On the part of the respondents, it was submitted that the magistrate's finding on liability was merited, justified, fair and reasonable in view of the evidence on record.

As stated earlier on, the court has carefully considered the submissions by both parties. On liability, the material evidence adduced before the trial court is that of PW2 and DW1. PW2 adopted his witness statement. On negligence, he stated that they had just joined Likoni Road and there was a motor vehicle KAC 131H coming from the opposite direction. That, all of a sudden they collided head on with the Nissan Matatu KAU 240H that he was travelling in. He was seated on the middle seat. He blamed the driver of KAU 240H as he was not careful while driving and that, he ought to have seen the oncoming Motor vehicle KAC 131H and swerved to avoid the accident. In cross examination, he stated that he could not tell what happened. He further stated that he could not see the oncoming vehicles from where he was seated. According to him, the only reason he blamed the driver of KAU 240H was because he was over speeding, was not careful and he could have swerved to avoid the accident.

On his part, Anthony Omondi Obwaga DW1, a police officer attached to Makongeni Police Station blamed the driver of Motor vehicle KAC 131H. He produced the OB extract which shows that the driver of KAC 131H who was driving from Lungalunga direction towards Muthurwa lost control and hit motor vehicle KAU 240H. The court has perused a copy of the OB extract marked as defence exhibit 1 and it can confirm that indeed, the evidence by DW1 is what was captured in the OB. I wish to note that the accident was a collision involving the two vehicles and the appellant himself stated as such. Looking at his evidence on record, he did not give the court a clear account of how the accident occurred. He only stated that the two vehicles collided but did not tell the court how or which side of the road it happened so as to assist the court in determining the party which was to blame. He only stated that the driver of motor vehicle KAU 240H was to blame but he did not say why he held that view.

Though PW2 stated that the driver of KAU 240H was speeding and that he could have swerved to avoid the accident, from his evidence, the court is unable to weigh that evidence. He could not even tell the court at what speed the driver was driving. Comparing his evidence in his statement and what he told the court in cross examination, this court is unable to find the driver of motor vehicle KAU 240H negligent and liable for the accident. In view of the evidence of DW1, though he was not the investigating officer, the police officer who investigated the accident filled the OB in the ordinary course of his/her duties and this court would have no reason to doubt the contents of the OB.

Though the accident involved two motor vehicles, the Appellant did not sue the owner of motor vehicle KAC 131H but the Respondents had initiated third party proceedings but by the time the matter was heard, the third party proceedings had not crystallized. In her judgment, the learned Magistrate attributed 90% liability to the owner of the said vehicle going by the evidence of DW1. The question that we need to ask here is whether a court can apportion liability on a party who is not a party to the proceedings. In my considered view, I think not.

It is trite law that the Appellant had the onus of proving his case against the Respondents. The degree is that on a balance of probability. Given his evidence on record, my humble view is that he failed to do so. See the case of *V. O. W Vs. Private Safari (EA)Limited (2010) eKLR* where the court held:-

..... it was not for the respondent to prove that he was not negligent but for the appellant to discharge the burden of proof. Indeed an accident can be caused by many factors.

In our case, it was for the Appellant to prove that the first Respondent was to blame for the accident. Though he pleaded the principle of Res Ipsa Loquitor, the same cannot come to his aid. The accident was a collusion and not self involving and there is evidence to negate that legal principle. In my view the learned Magistrate ought not to have apportioned liability to a non party to the suit. It was the Appellant's duty to sue the driver and/or owners of the two vehicles for the court to determine who between them was liable. He failed to do so. He insisted on suing the driver and owners of motor vehicle KAU 240H yet he did not proof any negligence against them.

I find that the learned Magistrate erred in apportioning liability as she did. She ought to have dismissed the case.

On the quantum of damages, I have perused the medical report of the Appellant and the authorities cited. I am of the view that the sum of kshs. 100,000/- awarded by the trial Magistrate would have been reasonable as general damages but in view of my finding on liability upon the re-evaluation of the evidence on record, the court has no option but to dismiss the appeal with costs.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 13TH Day of JUNE 2019.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Appellant

..... For the Respondent