



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.109 OF 2017

DERRICK KIBAARA MUGO.....APPELLANT

VERSUS

ROK (Minor suing thro' next friend and uncle

EO.....1ST RESPONDENT

ZACHARIA MAINA.....2ND RESPONDENT

JOHN WANYOIKE.....3RD RESPONDENT

DENNIS NYANGAU.....4TH RESPONDENT

(Being an appeal from the Judgment of the Resident Magistrate's Court at Nakuru by Hon. W. Kitur, Resident Magistrate delivered on 22nd August, 2017 in Nakuru CMCC No.287 of 2011)

JUDGMENT

INTRODUCTION

1. This appeal arise from a suit filed in the lower court in respect of an accident involving motor vehicle registration number KAX 546Y and KBJ 509X; the plaintiff claimed general and special damages from the 1st to 4th defendant; 1st defendant being the owner of motor vehicle registration number KAX 546Y, 2nd defendant, 1st defendant being beneficial owner and driven by the 3rd defendant while the 4th defendant's was the registered owner of motor vehicle registration number KBJ 509X.
2. The trial magistrate found the 2nd to 4th respondent's/1st to 3rd defendants 20% liable and the Appellant/4th defendant 80% liable. He awarded general damages of kshs.250,000 and special damages of kshs.5,000.
3. The appellant/4th defendant being aggrieved by the decision on liability by the trial court filed this appeal on the following grounds:-
 - i. That the honorable trial magistrate erred in law and fact in failing to properly evaluate the evidence tendered and came to conclusion and findings of fact or liability that is at variance with the evidence adduced by the various witnesses called by.
 - ii. That the honorable trial magistrate erred in law and facts in finding the 4th defendant (appellant) liable in negligence to the extent of 80% arbitrarily without jurisdiction and against the gradient of evidence adduced which exculpated the Appellant.
 - iii. That the Honorable trial magistrate erred in law and fact in failing to give credit to the Appellant in face of evidence by the Appellant and in the independent police investigation and evidence that the accident in question was caused by primarily the 2nd, 3rd and 4th respondents (1st, 2nd and 3rd defendants in the lower court.).
 - iv. That the Honorable trial magistrate erred in law and in fact in giving undue weight to contrived evidence of 1st, 2nd, 3rd and 4th respondents herein and therefore burdening the appellant with oppressive level of liability that is not founded on evidence at and/or law.
4. Parties herein agreed to proceed by way of written submissions

APPELLANT’S SUBMISSIONS

- 5. Appellant submitted that the 1st respondent/plaintiff in his testimony blamed the driver of motor vehicle registration number KAX 546Y for driving at high speed between 70 to 80 km/hr; and in cross examination, he maintained that their driver lost control while driving at a speed of 70 to 80km/hr and caused an accident.
- 6. Appellant submitted that the 3rd defendant/4th respondent admitted KAX 546Y at a speed of above 50km/hr and that he saw a vehicle overtaking outside the right lane and when he tried to avoid it, KAX 546Y hit the side mirror of vehicle ahead, lost control and stopped 50 meters away. Further, that the 2 vehicles were both moving towards Eldoret direction from Nakuru and that KBJ 509X had slowed down to join Kiamunyi road when it was hit on the driver’s door by KAX 546Y.
- 7. Appellant submitted that in apportioning liability the court did not take into account the fact that the 3rd defendant/4th respondent had admitted that he was driving beyond the speed limit of 50km/hr within the city.
- 8. The appellant submitted that even if the driver of KBJ 509X joined the junction without indicating, the driver of KAX 546 Y who was driving from behind had greater duty of ensuring that his vehicle did not collide with vehicle registration number KBJ 509X.
- 9. Appellant submitted that when the lorry turned, the matatu hit it from the driver’s side; it lost control, veered off the road and landed in a ditch; that the trial magistrate erred in apportioning a larger portion of blame on the appellant.
- 10. Appellant further submitted that reason given for apportioning blame on the appellant is that, he was inexperienced having driven for less than 12 months; that the finding was not based on evidence.

RESPONDENTS’ SUBMISSIONS

- 11. Respondent in submissions confirmed that the two vehicles were moving to the same direction and at Soilo junction, KBJ 509X that was ahead tried to turn to feeder road heading to Mustard Seed School, which is on the right side of the road facing Kericho direction.
- 12. Respondent submitted that the road has 3 lanes at the scene; two towards Kericho direction and one to Nakuru direction; that KBJ 509X was on climbing lane while KAX 546Y was in the middle lane. He submitted that driver of KBJ 509X ought to have been on the climbing lane when he intended to turn to the right and ought to have been vigilant while making use of the side mirror.
- 13. Respondent submitted that the appellant availed one witness who confirmed that he was trying to turn to join feeder road to Mustard Seed. Respondent blamed the appellant for not doing anything when he saw the matatu trying to overtake. Respondent argued that the apportionment of liability was fair and if it is to be disturbed, the appellant should shoulder 100% liability.

ANALYSIS AND DETERMINATION

- 14. In his testimony, the 3rd defendant/4th respondent (DW1) stated that, the driver of KBJ 509X was on the outer lane and it hit KAX 546Y on the left rear. He said the driver of KBJ 509X should have driven on the inner lane if he wanted to turn to Mustard Seed and that he caused the accident by turning suddenly. Further, that he was hit while trying to pass the Canter.
- 15. From evidence on record, both parties agree that the road at the scene had three lanes, two for vehicles heading to Kericho direction where both vehicles were facing. There is no doubt that a vehicle intending to overtake is required to move to the inner lane. KBJ 509X was intending to overtake while KAX 546Y was moving ahead. There is no mention that the driver of KBJ 509X indicated that he wanted to turn to the right neither is it indicate that he moved to the inner lane at a safe distance. If he had done so, the driver of KAX 546X would have remained on his lane to allow KBJ 509X to turn to the feeder road. The driver was required to be considerate of other road users by alerting the vehicles moving on the same directions and oncoming vehicles.
- 16. Similarly, the vehicle behind KBJ 509X was required to move in a speed that would enable him control the vehicle if required to do so. However, the road being highway, greater responsibility lay on the vehicle ahead to warn vehicles on the road of the intention to turn to a feeder road.
- 17. From evidence on record, I do not see reason to fault the trial magistrate on determination on liability. I therefore uphold determination on liability by the trial court.

18. FINAL ORDERS

- 1. Appeal is hereby dismissed
- 2. Cost of the appeal to the respondents

Judgment dated, signed and delivered at Nakuru this 18th day of July 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Mr. Kisila Counsel for Appellant

Mr. Gekonga holding brief Mboga for 1st Respondent

Mr. Musembi for 2nd and 3rd Respondent