



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 22 OF 2017

(Being an appeal arising from Judgment and Decree in Kitale CMCC

No. 343 of 2013 delivered by Hon. G.N. Sitati – Resident Magistrate on 6/6/2017)

KISAKA JOHN GIDEON.....1ST APPELLANT

JOHN BARASA.....2ND APPELLANT

VERSES

JOHN ENDEKU ONZERE.....1ST RESPONDENT

BERNARD LIDANYA MADEGWA.....2ND RESPONDENT

OBIRI VUHUNJI.....3RD RESPONDENT

JUDGEMENT

1. The facts leading to this appeal are clear and straight forward. The 1st Respondent was a fare paying passenger in Motor Vehicle Registration No. KAZ 023G Isuzu Mini bus owned and driven by the Appellants respectively. The same was involved in a road traffic accident on the 11th day of August, 2013 along Kitale Webuye road where he sustained serious bodily injuries.

2. The said accident involved Motor Vehicle Registration No. KAT 642V Toyota Saloon owned and driven by the 3rd Respondent. The 1st Appellant then filed suit at the lower court seeking general and special damages as a result of the said accident. The matter proceeded to full trial where the trial court apportioned liability between the Appellant and the 2nd and 3rd Appellants equally, that is 50:50 basis.

3. The Appellant being dissatisfied with the said judgment has appealed and from the grounds thereof in the memorandum it is basically on liability and not on quantum. All the parties have filed written submissions which the court has perused as well as the attached set of authorities.

4. It is now trite law that the appellate court shall interfere with the findings of the trial court if it considered extraneous issues in arriving at the decision. **See (KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES & OTHERS (1982-1988) KAR.**

5. What then was the evidence in regard to this specific area of liability that was presented to the trial court? The 1st Respondent told the court that he sat on the middle of the vehicle and he did not witness how the accident occurred. On cross examination he blamed the bus he was in but he admitted that he did not see how the accident occurred.

6. The 2nd Respondent when he took the witness box said that he was driving the salon vehicle and on the way there was another vehicle which braked suddenly and he hit it from behind. This caused him to veer to the other side of the road and in the process hit the mini bus which left its lane and rolled outside the road. Before the bus veered off it hit his vehicle, meaning that he had already moved to its lane.

7. On cross examination the 2nd Respondent said that it had rained a little and the tarmac road was wet and he could not therefore manage and control the vehicle and that is why he hit the vehicle which was ahead of him.

8. The 2nd Appellant who was driving the bus said that he saw the saloon car ahead of him as he drove moderately at a speed of about 50 Km/Hr. The one behind knocked the one which was ahead at it veered to his side and the bus hit it from behind. The said incident occurred so suddenly.

9. That was the summary of how the accident occurred. The police officer from the traffic department produced the file and he said that as per the file he blamed the driver of the salon vehicle and he was issued with a notice of prosecution although as at that time he was not prosecuted.

10. Who then caused the said accident which was not disputed by any of the parties? From the oral evidence on record it was not denied by the 2nd Respondent that he was unable to brake and or control his car once the vehicle ahead of him stopped suddenly. The owner and or the driver of the said Harrier vehicle were not brought on board by the Respondents despite being mentioned prominently as the one who caused the accident. It would have been prudent if indeed the said vehicle caused the accident to have been enjoined. It appears that it did not stop after the accident or if it stopped its details and contribution to the accident was never captured.

11. If the 1st Respondent did not see the accident occurring though he was injured then the court shall rely on what the rest of the witnesses said. The 2nd Respondent on cross examination states that:

“ The road was slippery, maybe it had problems with brakes. The car ahead caused the accident. I rammed into the harrier car ahead of me. I tried braking but the brakes were not sufficiently good....”

12. Clearly the 2nd Respondent knew what happened. He admitted that he did not enjoin the owner of the Harrier vehicle.

13. Was the Appellant’s vehicle at high speed? The 2nd Appellant said that the same had speed governor and he was driving at a moderate speed. The saloon vehicle veered off its lane after hitting the Harrier car, came to the bus lane which caused it to hit it from behind and forced the bus to land into the ditch and overturned.

14. Taking into consideration the above position, then it is not farfetched to conclude that the 2nd Respondent may have been on a high speed. This conclusion is based on the fact that it forced it onto the bus lane and turn around towards Kitale direction where it came from.

15. In my considered view therefore, I find that the 2nd Respondent carries liability for the accident and by extension the owner of the harrier vehicle who was not made a party to the case. I do not see how the bus which was on its proper lane could be accused of negligence yet it was on its right position and driven at a moderate speed caused the accident. The 2nd Respondent clearly did not explain how the bus contributed to the accident yet it was on its proper lane.

16. In the premises, the appeal is hereby allowed. The trial court judgment on liability is hereby set aside to the extent that the Appellants are jointly and severally absolved from any liability. Liability at 100% is hereby apportioned against the Respondents.

The Appellants shall have the costs of this appeal and at the trial court.

Dated signed and delivered in open court at Kitale this 23rd day of July, 2019.

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H K CHEMITEI

JUDGE

23/7/19

In the presence of:-

Khaoya holding brief for Omwenga for Respodnent

Khisa holding brief for Nyambane for Applicant

Court Assistant – Kirong

Judgment read in open court.