



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 129 OF 2017

FORMERLY MACHAKOS HCCA.NO. 32 OF 2016

JOSEPH KIOKO MBELE.....APPELLANT

-VERSUS-

TIPPER HAULIERS LIMITED.....1ST RESPONDENT

ANASTACIA N. WAMUTUNGA.....2ND RESPONDENT

JUDGMENT

1. The Appellant was the Plaintiff in the trial court. He filed a suit claiming for general and special damages for injuries he suffered when the 2nd Respondent's motor vehicle registration no. KAQ 933X Toyota station wagon he was travelling in was involved in an accident with the 1st Respondent's vehicle registration no. KBG 103E/ZC8606. This was on 29th November, 2013. He blamed drivers of both vehicles for the accident.

2. The 1st Respondent entered no appearance and interlocutory judgment was entered against it. The 2nd Respondent filed a defence denying the claim. The case proceeded to full hearing after which the trial court found that the Appellant had failed to prove its case, dismissed his case against the 2nd Respondent and set aside the interlocutory judgment against the 1st Respondent. The Respondents were awarded costs.

3. The Appellant was dissatisfied with the judgment and filed this appeal raising the following grounds: -

- 1) ***That the learned magistrate erred in both in law and fact when he found that the Appellant had failed to prove negligence against the Respondents.***
- 2) ***That the learned magistrate erred both in law and fact when he made a finding that the Appellant had not proved any negligence against the 1st Respondent.***
- 3) ***That the learned magistrate erred in both law and fact when he dismissed the Appellant's suit.***
- 4) ***That the learned magistrate erred in both law and fact when he found that the Respondents were not liable to the Appellant.***
- 5) ***That the learned trial magistrate erred in law and fact when he applied the wrong parameters to dismiss the Appellant's suit.***
- 6) ***That the learned magistrate erred both in law and fact when he assessed damages at Kshs.150,000/=.***
- 7) ***That the learned magistrate erred both in law and in fact when he relied on extraneous matters to reach his decision.***

4. A summary of the case before the court is that the Appellant was a passenger in the 2nd Respondent's motor vehicle registration No. KAQ 933X a Toyota salon. It was driven by the 2nd Respondent. They were driving behind a bus along Mombasa road headed to Nairobi. As they moved, they came across a stationary lorry. A lorry from Nairobi direction hit them after hitting the bus ahead.

5. He explained that the stationary lorry was in the middle of the lane. They had to use the descending lane to climb. The lorry that knocked them was registration No. KBG 103E ZE 8606 belonging to the 1st Respondent. Both drivers were speeding. As a result of the accident he was injured on the ribs, left hand and hips and was attended to at Baptist dispensary and Machakos level 5 hospital. A report was made to the police and he was issued with a P3 form (PEXB1) police abstract (PEXB2) treatment notes (PEXB4) for Kshs.530/=, medical report each at Kshs.3,000/= (PEXB 5), copy of records KRA-3 at Kshs.1,500/=(PEXB6), demand letter PEXB7. Though not sick he said he can't do

casual work because of pain.

6. In cross examination, he said they were on the climbing lane and had not finished overtaking the stalled lorry. The lorry first knocked the bus then the vehicle he was in. He agreed that had they kept a safe distance they may not have been hit.

7. **Pw2 FNO 23114 Inspector Joseph Nyasili** a traffic officer at Salama received the accident report. He went to the scene and found the stationary vehicle, the bus, saloon car and trailer. The stationary vehicle was on the climbing lane. An identified tanker used the outer lane towards Mombasa and disappeared. It was raining and this caused the trailer to skid and knock the bus and then the saloon car. It was going downhill. He confirmed that the Appellant was a passenger in the saloon car. He stated that a charge of carelessness would not be proved against the trailer driver in the circumstances.

8. The 2nd Respondent testified as Dw1 and stated that as she drove, there was a lorry on the left with a bus ahead. A lorry came towards the bus, hit it and turned towards Nairobi. She swerved to the left and was hit by a trailer which swerved onto the road. That the lorry that hit the bus was coming downhill.

9. In cross examination, she said the bus was ahead of her, and the lorry had gone off its lane. When it tried to get back it hit the saloon car. She was hit by the trailer on the rear. She denied overtaking the stationary lorry.

10. Directions were taken for the appeal to be canvassed by way of written submissions. As at the time of writing this judgment it is only the Appellant's submissions which had been filed.

11. Mrs. Isika for the Appellant in her submissions contends that there is sufficient evidence on record proving the negligence by the Respondents through the overtaking when it was not safe to do so and failure by the 2nd Respondent to keep a safe distance. Secondly that the 1st Respondent's driver in avoiding to hit an oncoming tanker caused the accident. That there was no evidence to rebut that since the 1st Respondent never testified. She submits that the trial magistrate did not give any reason why he did not find the 1st Respondent negligent.

12. She argues that the 1st Respondent turn to the road after swerving contributed to the accident. Had he stopped where he had swerved to, the accident could have been avoided. That the only reason this was not done is because the driver was using excessive speed so that to swerve and apply brakes and to wait and first see the reasonability of coming back to the road was impossible in that situation.

13. On damages, she submits that a sum of Kshs.250,000/= is reasonable. She cited the cases of **Patrick Mwiti, M'Imanene & Anor –vs- Kevin Mugambi Ngunja Civil Appeal No. 9 of 2011(2013) eKLR & Paul Kipsang Koech & Anor –vs- Titus Osule Osore Civil Appeal No. 6 of 2012(2013) eKLR.**

Analysis and Determination

14. This is a first appeal and this court has a duty to consider the evidence on record afresh and arrive at its own conclusion. The court has to bear in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This was the position in the case of **Selle & Anor –vs- Associated Motor Boat Co. Ltd & others (1968) E.A 123** when it stated as follows:

“An appeal to this court from a trial by the High court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

15. I have considered the evidence on record, the grounds of appeal and the Appellant's submissions. I find the issues falling for determination are: -

i. Whether the Appellant proved liability against the Respondents.

ii. If the answer to issue no. (i) is in the affirmative whether an award of Kshs.150,000/= is sufficient compensation.

Issue (i) Whether the Appellant proved liability against the Respondents.

16. There is no dispute that an accident occurred on 29th November, 2013 along Mombasa. It involved the 1st and 2nd Respondents vehicles (KBG 103E ZE 8606 and QAQ 933X) respectively. There was a stationary vehicle on the road, which the 2nd Respondent had overtaken as she followed a bus. The stationary lorry, bus and 2nd Defendant's vehicle were all headed to Nairobi, while the lorry belonging to the 1st Respondent was from Nairobi heading to Mombasa. This lorry first hit the bus and then the 2nd Respondent's vehicle. The 2nd Respondent was on a climbing lane and had not completed it at the time of the accident. The Appellant was a passenger in the 2nd Respondent's vehicle QAQ 933X.

17. Pw2 a traffic police officer who went to the scene and found the four (4) vehicles involved in the accident at the scene stated that he investigated the case. He was however unable to prosecute any of the drivers as there wasn't sufficient evidence to prove careless driving.

18. Whatever it is, there is evidence to prove there was an accident. Secondly that the trailer or lorry KBG 103E/ZC8606 hit the 2nd

Respondent's vehicle plus a bus KBG 100C which were overtaking a stationary lorry. Thirdly, the driver of the trailer/lorry had first swerved to avoid the vehicles but returned to the road and caused the accident.

19. Fourthly, if the 2nd Respondent had kept a safe distance between herself and the bus, her motor vehicle would not have been hit by the trailer/lorry. Fifthly, the Appellant was a mere passenger and had no control of any of the vehicles. Lastly, the weather was not very friendly as it was raining. Ownership of the vehicles was never an issue before the trial court.

20. Pw2 the investigating officer made mention of some unveiled tanker which was overtaking the bus using the outer lane. That it was this unveiled tanker that caused the trailer/lorry to swerve and return to the road. It is this evidence by Pw2 that convinced the learned trial magistrate that the 1st Respondent's driver had good reason to swerve to avoid hitting the tanker.

21. I have gone through the evidence of Pw1 and Dw1 who were both at the scene. None of them makes mention of the said tanker. Pw2 himself was not at the scene. If the said tanker which was overtaking was using the outer lane, and the 2nd Respondent's trailer/lorry was headed to Mombasa, then at what point did they meet? This is not clear from the evidence. Furthermore, Pw2 states that the unveiled tanker was overtaking the bus. It would clearly mean; it overtook the 2nd Respondent's vehicle first as it moved to overtake the bus which was ahead of it. If that was the case, then the Appellant and Pw1 ought to have seen it. Their evidence is to the contrary.

22. More so, the 1st Respondent ought to have availed the alleged driver to explain why he swerved from his lane just to return and cause an accident. The learned trial magistrate could not through the judgment give an explanation of what happened when no eye witness testified.

23. I do find that the main reason why Pw2 was not able to prosecute any of the drivers for careless driving was because each of them played a role in the causation of this accident so the required standard for proof of such an offence could not be achieved. Secondly, he did not gather sufficient evidence to build his case. On liability, I find that the Appellant proved that there was negligence on the part of the two drivers. No *iota* of evidence was placed before the court to prove the involvement of a mysterious, unveiled tanker.

24. I therefore set aside the trial court's finding on liability and apportion liability as follows:

1st Respondent – 85%

2nd Respondent – 15%

Issue No. (ii) If the answer to issue no. (i) is in the affirmative whether an award of Kshs.150,000/= is sufficient compensation.

25. The medical documents produced including the P3 form (*PEXB1*), treatment notes (*PEXB3*) and medical report (*PEXB5b*) confirm that the Appellant suffered soft tissue injuries on the ribs, elbows with minor bruises on the right hip. At the time of examination on 10th February, 2014, (*PEXB 5b*) he had fully recovered and there was no possibility of any permanent functional disability.

26. After considering the nature and degree of the injuries suffered and decided cases, I cannot fault the learned trial magistrate for the assessment he made of Kshs.150,000/=. Proved special damages amount to Kshs.4,500/=.

27. I therefore set aside the judgment of the trial court and enter judgment for the Appellant in the sum of:-

- General damages Kshs.150,000/=

- Special damages Kshs.4,500/=

- Total Kshs.154,500/=. The award will be apportioned at 85% as against the 1st Respondent and 15% as against the 2nd Respondent plus interest from the date of judgment.

- The Appellant will get costs of the suit.

DELIVERED, SIGNED AND DATED THIS 9TH DAY OF OCTOBER, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE