REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Appeal No. 717 Of 2016

(Being an appeal from part of the judgment delivered by L.W. Kabaria (Ms.) (Resident Magistrate) on 31st October, 2016 in CMCC NO. 3305 OF 2012)

(CORAM: F. GIKONYO J.)

NJUGUNA NJOROGE.....APPELLANT

-VERSUS-

PETER KIHIU MUCHERU.....RESPONDENT

CHOI SEO DONG.....1ST THIRD PARTY

PATRICK OJIAMBO OLUGO...2ND THIRD PARTY

JUDGMENT

1. The respondent who was the plaintiff in CMCC NO. 3305 OF 2012 sued the appellant vide the plaint dated 20th June, 2012. Therein, the respondent pleaded that on or about the 30th of May, 2010 while walking along Thika Road towards motor vehicle registration number KAX 569T (the subject motor vehicle) belonging to the appellant at about 1.00am, he was hit by the subject motor vehicle, the same having been knocked by another motor vehicle registration number KAA 153V, causing him to sustain serious injuries. Negligence was attributed to the appellant and the particulars of negligence as well as the injuries sustained were set out in the plaint. The respondent consequently sought for both general and special damages.

2. The appellant entered appearance on 25th July, 2012 and filed his statement of defence on 7th August, 2012 and which defence was later amended on 17th October, 2012. Therein, he essentially denied the particulars of negligence, the injuries and special damages pleaded in the plaint. In place, he pleaded that in the event that the accident occurred as alleged, then the respondent was inevitably to blame for the same; the particulars of negligence were similarly set out in the amended statement of defence.

3. Subsequently, the appellant took out third party proceedings against Choi Seo Dong and Patrick Ojiambo Olugo respectively, seeking indemnity and/or contribution in relation to the accident and with respect to the motor vehicle registration number KAA 153V. Interlocutory judgment was entered against the 2nd third party (Patrick Ojiambo Olugo) on 15th August, 2014 for failure to enter appearance and/or file a statement of defence.

4. At the hearing, the respondent relied on the testimony of two (2) witnesses for the plaintiff's case whereas the appellant testified as the sole defence witness.

5. In his oral evidence as PW1, the respondent adopted his filed witness statement, the contents of which were that on the material date, he was at his work place in Kamukunji area together with his employer, Mr. Titus Kinyua Mwangi, when they received a call from the appellant requesting for towing services. The respondent indicated that they then proceeded to Safari Park area where they found the subject motor vehicle parked in the middle of the road and as they approached it, the motor vehicle registration number KAA 153V knocked the subject vehicle from behind, causing it to hit the respondent and his employer, causing them to sustain the injuries pleaded.

6. PW1 further indicated in his adopted statement that while approaching the subject vehicle, he and his employer noticed that the appellant had neither put on the hazard lights nor placed any warning signs on the road. The witness further stated that he sustained a fracture to his right leg/femur and that he was taken to hospital where he received treatment. The medical documents were produced in court. In addition, he indicated that he reported the matter to Kasarani Police Station and was issued with a police abstract which he equally produced as evidence.

7. During cross examination, PW1 reiterated inter alia that the subject motor vehicle was stationary and that the appellant was inside, adding that the subject motor vehicle was parked in the middle of the road when they arrived at the scene. The witness clarified that the road was not lit at the time of the accident and that it was under construction.

8. PW2 was the doctor who attended to the respondent, being Dr. Jacplet Amuganda. This witness confirmed the injuries sustained and produced the medical report dated 29th April, 2011 to that effect. Subsequently, the respondent closed the plaintiff's case.

9. In his oral testimony, the appellant who was DW1 equally adopted his filed witness statement, going further to assert that upon hitting the stone block, his car stalled and he requested for towing services to assist in moving his motor vehicle. He further stated that both his hazard light and headlights were on at all material times. The appellant also stated that following the accident, the subject motor vehicle was pushed to the left lane of the road. He admitted that his vehicle was knocked from behind by the motor vehicle registration number KAA 153V thereby causing his vehicle to hit the respondent and his employer, adding that the driver of the latter vehicle was drunk at the time and driving at a high speed.

10. Upon being cross examined, DW1 though reiterating that his headlights were on at the time of the accident, indicated that he could not blame the respondent for the accident. He also asserted that he had not contacted the respondent directly, neither had he given the respondent and his employer directions on how to find him.

11. On re-examination, it was the appellant's evidence that he was assisted in moving his vehicle by good Samaritans following the initial accident and that he blames the driver of motor vehicle registration number KAA 153V for the accident involving the respondent. He then closed the defence case.

12. At the close of the hearing, the parties filed their respective written submissions. Subsequently, the trial court rendered its decision in favour of the respondent in the following terms:

> *a) Liability-80%:20% to be apportioned between the appellant and driver of KAA, though the respondent could only claim 80% against the appellant, having filed the suit solely against the said appellant.*
>
> *b) Quantum:*
>
> *(i) General damages Kshs.500,000/=*
>
> *(ii) Special damages Kshs.2,000/=*
>
> *TOTAL Kshs.502,000/= (to the extent of 80%)*

13. Being aggrieved by the aforesaid decision, the appellant has seen it fit to lodge an appeal against the same. His memorandum of appeal dated 28th November, 2012 constitutes four (4) grounds namely:

> *(i) THAT the learned trial magistrate erred in fact and in law in holding that the respondent was liable for the accident.*
>
> *(ii) THAT the learned trial magistrate erred in law and in fact and misdirected herself by apportioning liability between the appellant and the 2nd third party in the ratio of 80%:20%.*
>
> *(iii) THAT the learned trial magistrate erred in law and in fact by failing to evaluate the evidence on record on its own merit.*
>
> *(iv) THAT the learned trial magistrate erred in failing to dismiss the suit against the respondent.*

14. The appeal was canvassed through written submissions as per the directions given by this court on 23rd July, 2019. Vide his submissions filed on 14th August, 2019 the appellant submits that he has proved his case on a balance of probabilities, citing the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR.* The appellant further contends that going by the evidence presented before the trial court in respect to liability, the respondent's suit against it ought to have either been dismissed or the 2nd third party held 80% liable or at the very least, the blame ought to have been shared in equal proportions between the appellant and 2nd third party.

15. It is also the appellant's submission that the 2nd third party was at all material times driving at a high speed contrary to Section 42(3) of the Traffic Act. Put another way, the appellant has taken the position that the 2nd third party caused the accident and is therefore solely to blame for the same and urges this court to set aside the trial court's decision and dismiss the claim against him with costs.

16. On his part, the respondent through his brief written submissions contends that the learned trial magistrate aptly applied her mind to the issues discussed before her and arrived at a correct decision on liability. In the end, it is the respondent's submission that the appeal be dismissed with costs.

ANALYSIS AND DETERMINATION

Duty of court

17. The duty of first appellate court is to evaluate the evidence and come to own conclusions except it should give allowance to the fact that it neither saw nor heard the witnesses when they testified. See**: SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. I am aware that, in this exercise, the court is not beholden or compelled to adopt any particular style. Except, it must avoid merely rehashing of evidence as was recorded or trying to look for a point or two which support or does not support the finding of the trial court. Of greater concern is to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed.

Of third party liability

18. I note one matter of concern; the trial magistrate after apportioning liability stated that:

Liability-80%:20% to be apportioned between the appellant and driver of KAA, though the respondent could only claim 80% against the appellant, having filed the suit solely against the said appellant. [Underlining mine]

Ordinarily, where a third party served with third party notice fails to enter an appearance in the suit, and the suit is tried and results in favour of the plaintiff, the court may either at or after the trial enter such judgment as the nature of the suit may require for the defendant giving notice against the third party: Except, however, execution thereof shall not be issued without leave of the court, until after satisfaction by such defendant of the decree against him. See order 1 rule 21(1) of the CPR. I do not therefore understand the prohibition the trial court placed upon the respondent not to recover full compensation on the basis that the suit was filed only against the appellant. In my decision I will make appropriate orders thereto.

Main issues

19. Back to the main issues. I have carefully considered the grounds of appeal as well as the rival submissions and authorities cited by the appellant. I have also studied the impugned judgment.

20. Notably, this appeal is solely on liability. I will therefore address the four (4) grounds of appeal contemporaneously.

21. Just as the learned trial magistrate observed after considering the evidence adduced, it all boils down to the appellant's word against the respondent's, for there was no independent witness such as the investigating police officer who testified. That aside, where a vehicle breaks down on the road, the driver of the vehicle is under an obligation to place sufficient warnings or signs on the road to warn other road users of the stationary vehicle so as to avoid accidents such as this one. The evidence by DW1 was that he was helped by good Samaritans to push the vehicle to the left lane of the road; he did not say he pushed it off the road. Therefore, the overall impression of the entire evidence is that the appellant's vehicle was still on the road and the driver ought to have ensured there were sufficient warnings and signs on the road to sufficiently warn other motorists of his stationery vehicle. At this point ***Section 53*** of the ***Traffic Act, Cap. 403*** is pointedly relevant**. *Sub-section 1*** thereof stipulates that any stationary motor vehicle should be placed as close to the side of the road as possible, whereas ***sub-section 2*** expresses that in the event that a motor vehicle has broken down, it should be removed from the road as soon as possible ***and prior to its removal, its position should be clearly indicated by way of lights that make it possible for other road users to identify it from either direction***. Of particular interest to me is ***Sub-section 3*** of the aforesaid Act which provides thus:

> ***"If any part of the vehicle remains on or near the road in a position so as to obstruct or to be likely to obstruct or to cause or to be likely to cause inconvenience or danger to other traffic using the road, the driver shall place on the road not less than fifty metres from the vehicle two red reflecting triangles of such construction and dimensions as may be prescribed, one ahead of the vehicle and one behind it so that each is clearly visible to drivers of vehicles approaching from ahead or behind, as the case may be."***

22. The foregoing are statutory obligations. Did DW1 comply? PW1 stated that when they arrived the driver of the subject vehicle neither had its hazard lights on nor was there any warning sign on the road. Evidence show that the appellant did not place any signs on the road to warn other road users. The learned trial magistrate appreciated the evidence adduced and even observed that the subject of the warning sign was not discussed by the appellant in the course of his oral testimony, thus leading her to conclude that no such sign was placed on the road as it ought to have been, otherwise, the driver of motor vehicle registration number KAA 153V would have come across it and been sufficiently warned.

23. DW1 claimed that the headlights and hazard of his vehicle were on at all material times. It bears repeating that whether or not the appellant's vehicle headlights or hazard lights were on at all material times was disputed and varied positions were taken by the parties. Perhaps the investigations officer would have provided details on this matter. But, in the absence of such targeted evidence, the court should determine the case on the basis of the evidence available. Lack of clarity on this matter was also acknowledged by the learned trial magistrate in her analysis. In any event, these measures are not sufficient or in full compliance with the law.

24. The evidence show that it was at night and the road where the accident took place was not lit at the time; and was under construction. Therefore, if the claim by DW1 that both his hazard light and headlights were on at all material times was true, the vehicle could have been visible from far distance. Circumstances of this case and evidence by the respondent show quite the opposite of his claims.

25. Recapitulations above bring me to one conclusion; that the appellant did not take such precautionary measures necessary to sufficiently warn other road users. Even placing of leaves or twigs on the road would have helped. Use of warning signs in whatever form is necessary. See ***Nyeri Municipal Council & 2 Others v Charles Kinyua Mworia [2009] eKLR*** where the High Court on appeal reasoned that the laying of tree branches near a stalled vehicle amounts to sufficient warning to other motorists.

26. DW1 also claimed that the driver of KAA 153V was drunk at the time and driving at a high speed. There was no evidence adduced to support these claims. Ultimately, I find the appellant to be negligent for failing to sufficiently warn other road users of the state, presence and position of his motor vehicle on the road.

Third party liability

27. However, the driver of the motor vehicle registration number KAA 153V was also under duty to drive at reasonably safe speed especially on a road not well lit and under construction. Given the condition of the road, the said driver ought to have driven at a speed that would enable him observe or see a stationery vehicle in good time and perhaps swerve or undertake such other action as to avoid hitting the appellant's stationery vehicle. In addition, with proper and functional headlights and at reasonable speed he would have seen the stationery vehicle in good time and avoid hitting it. Therefore, I find him to be guilty of contributory negligence. The learned trial magistrate also considered these facts and possibilities and accordingly apportioned liability at 20% against the said driver.

28. Going by the evidence tendered before the learned trial magistrate, the appellant was substantially to blame for the accident and so he shall bear 80% of liability. In light thereof, the Learned Trial Magistrate did not err in apportioning liability at 80% against the appellant and 20% against the third party driver.

29. Suffice it to say that looking at the circumstances of this case, the respondent proved his case on a balance of probabilities on the part of both the appellant and the 2nd third party. I uphold the decision by the trial magistrate except I order that the respondent shall recover 80% from the Appellant and 20% from the 2nd third party.

30. The upshot is that apart from the clarification above, the appeal lacks merit and is dismissed with costs to the respondent.

Dated and signed at Nairobi this 15th day of October 2019

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F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 22nd day of October, 2019

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L. NJUGUNA

JUDGE