



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO.68 OF 2016

PETER MWANGALE.....APPELLANT

VERSUS.

JOHNSTONE WAFULA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

[An appeal from the judgment and decree in original Webuye PMCC No. 25 /2015

delivered on 3/11/2016 by Hon C.N Oruo - PM]

JUDGMENT

By plaint dated 28th February 1995, the appellant in this appeal sued the respondent for general damages for pain, and suffering, special damages and cost of the suit plus interest at court rate as a result of a road traffic accident that occurred on or about 3rd March 1994 involving motor vehicle registration number GK 130(KYU 138). Owned by Government of Kenya and driven by 1st defendant as its driver an/or agent. Particulars of negligence were tabulated under paragraph 4 of the plaint as;

- a) *Driving too fast in the circumstances.*
- b) *Failing to apply the brakes sufficiently or in time or at all.*
- c) *Failing to have any or any proper control of the said motor vehicle registration number GK 130(KYU 318).*

The defendants herein filed their statement of defence dated 8th June 1995 through D.O. Omwenga state counsel-Eldoret and in paragraph two of the defence the Defendants averred as follows;

“Save that the accident occurred on the date and place named in the plaint which accident involved in the named motor vehicle registration number GK 130(KYU 318),the defendants deny that the said accident was caused by negligence of the defendants and the plaintiff is put on strict proof thereof”.

In Paragraph 3 of the defence without prejudice the defendant averred that the plaintiff was careless and negligent if at all he was injured in the said accident stating particulars of negligence on part of the plaintiff that the plaintiff was running to the rugged part without due care, pushing his bicycle on the road without due care and regard to his safety and that of other road users contributing to the accident.

The matter was set for hearing on the 26th February 2014 and the evidence before the trial court was that, PW1 the plaintiff Peter Mwangale Wekesa testified he comes from Webuye and he was involved in an accident on 3.3.1996 in Webuye town.

While going home at T-junction Kitale Road while walking with his brother Samuel a motor vehicle make Land rover overtook a matatu and came to their side off the road and he was injured on the leg and people came and took him to Webuye District Hospital.

He stated that he was also treated at Misikhu mission hospital and leg was plastered and produced outpatient card PMFI.2 and treated at Lugulu mission hospital and produced receipts of Kshs.12,130/= as exhibit 3 and he reported matter to Webuye Police Station and was given police abstract as exhibit 4 and he was issued with P3 form that was filled and produced it as PMFI-5.

He testified that he went to see Doctor Gadhaya who confirmed he suffered 20% incapacity and paid Kshs.2,000/=. He produced medical report as exhibit. He testified that at Misikhu he paid Kshs.855/= receipt as exhibit 8 and bundles of bus fare as P-exhibit 9.

On the 24.11.2015 by consent of both parties documents marked as PMFICO treatment notes-P exhibit1. Treatment notes 3.03.1994 Misikhu Hospital PMFIC.2)-P exhibit 2 police abstract PMFICA)19.04.94-P exhibit P3 form PMFIC.5) 24.03.1994 P exhibit 5 medical report Dr. Jambi PMFI(7)(a) 18.08.1994 P exhibit 7(a) receipt exhibit 7(b).

The plaintiff then closed his case. The defendant did not call any evidence. Parties filed written submissions on liability and quantum.

By judgement dated 3rd November 2016 Hon. Oruo, entered was entered judgement in favour of the Defendants against the Plaintiff dismissing appellant suit. The Appellant was aggrieved by the judgement and appealed on the following grounds:

- i. That the learned trial Magistrate erred in law by dismissing appellant's suit despite plaintiff having proved his case on balance of probability;***
- ii. That the learned trial Magistrate exercised his discretion wrongly wrongfully in dismissing the appellant's suit without taking into consideration plaintiff's submissions;***
- iii. That the learned magistrate exercised his discretion wrongfully by failing to enter judgement on liability and quantum;***
- iv. That the learned magistrate erred and misdirected himself in law and fact by not applying the correct law, test and fact by not applying the correct law, tests and principles relating to delivery of judgements and exercise of judicial discretion.***

By consent of the parties, this appeal was canvassed by way of written submissions. Mr. Kamau for the appellant submitted that the plaintiff/appellant herein was involved in accident and has proved his case on balance of probabilities and urged the court to hold the defendant 100% liable for the accident for failing to call a witness to testify on its case relying on the case in *Trust Bank Limited Vs. Paramount Universal Bank Limited & 2 Others and Douglas Mwanagangi Ngutu Vs Charles Maingi Njeri & Joseph Mundia Kuria[2001]Eklr*

He submitted that the appeal is meritorious and it ought to be allowed and this court ought to make an award of damages in favour of appellant. The respondent herein did not file any submissions to this appeal

I am mindful that this being a first appeal this court is obligated and duty bound to reappraise the evidence tendered before the lower court in order to determine whether the findings and the decision of the trial magistrate was justifiable having regard to the evidence. The court however will not interfere with the findings of fact of the trial magistrate unless it is manifestly clear and evident that the trial magistrate misdirected himself on a point of law and/or it is clear he failed to take account of any particular circumstances and/or evidence such that a miscarriage of justice could result unless the court interfered to remedy the situation. Thus, this court as an appellate court of first instance has mandate to reappraise the evidence tendered in the lower court and draw its own inferences of fact. This mandate has been enunciated in many decided cases and the courts have been guided by the principles as set out by the then East African Court of Appeal in the case of *Selle -vs- Associated Motor Limited Company [1968] E. A 123* where the court stated thus:

“This court must reconsider the evidence, evaluate it itself and draw it own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that 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.

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant. In my view, the issues for determination in this appeal is:

- i. Whether the appellant suit was properly dismissed by trial court*
- ii. Whether the appellant is entitled to prayers sought*

On issue one it is appellant contention that on or about 3rd March 1994 he was involved when he was lawfully walking on the pedestrian path along Kitale-Webuye Road he was hit by motor vehicle registration number GK 130(KYU 138)Land Rover and it had two people in it and he got injured and was taken to Webuye District hospital by people. He produced treatment notes and medical reports in support of his claim.

On the other hand, the defendant denied liability of the accident and stated that the appellant evidence is riddle and hearsay without corroboration.

By judgement dated 3rd November 2016 the learned trial magistrate stated and I quote;

“From the evidence on record I find that the driver of the Land Rover motor Vehicle registration number G.K. 130(KYU 318) was negligent and was to blame for the accident. He overtook the matatu, lost control and went to hit the plaintiff.

Counsel for the Plaintiff submitted that the plaintiff proved his case on a balance of probability and that the defendants should be held 100% liable for the accident.

He relied on the case of Douglas Mwangangi Ngutu -Vs- Charles Maingi Njeri & Joseph Mundia Kuria(2001)E Klr where the defendant was held 100% liable for failing to give evidence in court.

*The defendant on the hand of liability submitted that the evidence of the Plaintiff's case is riddle with inconsistent hearsay and not corroborated. He relied on several authorities **Mbilo Munyasa & Another V Malde Transporters Ltd & Another(2015)e KLR** where neither an eye witness nor an investigating officer was called to testify on the accident. The court dismissed the suit on the ground that there was no evidence to prove how the accident occurred.*

I will agree with the Defendant's counsel in his submission that the evidence of the plaintiff was never corroborated by the independent and competent eye witness. The plaintiff ought to have called his brother who has accompanied him from work on the day of accident as a witness.

Further the investigating officer/police officer was never called as a witness to testify how the accident occurred and who the police after completing their investigations blamed for the accident.

“In the upshot I will dismiss the plaintiff's suit with costs to the Defendant for lack of sufficient evidence to prove how the accident occurred.”

I have perused the court records and trial court judgment it was found that the defendant was liable in one paragraph and in the same judgement it was held that the plaintiff had not proved his case against the defendant.

Being in the same Judgement I find that it is an error for the trial court in one paragraph of the Judgment and the defendant liable and yet again find that the plaintiff has not established its case. The trial court correctly in my view state;

“From the evidence on record I find that the driver of the Land Rover motor Vehicle registration number G.K. 130(KYU 318) was negligent and was to blame for the accident. He overtook the matatu, lost control and went to hit the plaintiff.

Having done so it was not available for the learned magistrate to again conclude; ***“In the upshot I will dismiss the plaintiff's suit with costs to the Defendant for lack of sufficient evidence to prove how the accident occurred.”***

I have considered the evidence before the trial court. Plaintiff having been involved in accident involving motor vehicle Reg. No. GK. 130 (KYU318) along Webuye Kitale Road. He tabulated the particulars of negligence. The defendant in Paragraph 2 of their defence admit ownership of the motor vehicle and occurrence of the accident on same date and place. The plaintiff gave evidence and stated that the accident was caused by the careless overtaking of a matatu at a corner. He considered this aspect of driving an act of negligence.

The accident was reported to police and police abstract issued when documents were admitted as exhibits by consent of plaintiff and defendant's advocates. This evidence was not challenged by the defendant either in Cross-examination or by evidence by the defence. In my view the plaintiff properly discharged his burden of probability and as the learned magistrate found in one paragraph he was liable. There was no need in my view for any corroboration of the facts which had been proved in the result I find the appeal is with merit, I set above the Judgment of the trial magistrate dismissing the plaintiff's case and substitute thereof that the Appellant/Plaintiff had proved his case on a balance of probability and that the Respondent/Defendant is 100% liable in damages.

I note that the learned trial magistrate had not stated in her Judgment what she would have awarded had the Defendant/Respondent been found liable. I therefore remertit this case to the trial magistrate to assess the appropriate quantum of damages. Mention before Principal Magistrate Webuye on 30.10.2019 if Hon. Oruo has been transferred.

Dated and Delivered at BUNGOMA this 16th day of October 2019.

S.N. RIECHI

JUDGE.