REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 183 OF 2013

ISAAC KINGANGI M'ITHAI...APPELLANT

VERSUS

NGARI THITU..1ST RESPONDENT

KENNETH MANYANGI WAITHANJI...............................2ND RESPONDENT

JUDGMENT

1. The appellant **Isaac Kingangi M'thai** filed this appeal from the Judgment and decree on liability of the Hon. Cheruiyot, Senior Resident Magistrate at Kerugoya in SPMCC No. 405 of 2010 delivered on 17th April, 2012. The appellant raised the following grounds:

(i) The Learned Magistrate erred in law and fact in finding the Defendant/Appellant 100% to blame for the accident when the Plaintiff/Respondent had not demonstrated (as by law required).

(ii) The Learned Magistrate erred in law and fact in ruling against the weight of the evidence presented.

(iii)The Learned Magistrate erred in law and fact by not finding that the Defendant/Appellant was not liable for the accident given the circumstances of the accident.

(iv) The Learned Magistrate erred in law and fact by ignoring the evidence of the Plaintiff that the Defendant was not vicariously liable for the accident.

(v) The Learned Magistrate erred in law and fact by not taking into account the traffic case No. 367 of 2009 Kerugoya in which the party to blame for the accident was accused.

(vi) The Learned Magistrate erred in law and fact by ignoring that the Police blamed motor vehicle KAL 422Q for the accident.

(vii) The Learned Magistrate erred in law and fact by finding liability on Defendant/Appellant against the weight of the evidence.

(viii) The Learned Magistrate erred in law and fact by not holding that the Defendant/Appellant had taken all reasonable steps in law to ensure that the accident did not occur.

(ix) The Learned Magistrate erred in law and fact in holding the Defendant/Appellant liable in negligence against the weight of the evidence.

(x) The Learned Magistrate erred in law and fact in not finding that the Defendant/Appellant was wrongfully dragged to court by the plaintiff.

2. The appellant prays that the judgment of the trial magistrate in favour of the Plaintiff and the resultant decree be vacated and be replaced with an order dismissing the plaintiff's claim. The respondent to pay the costs of this appeal and costs of the suit in the sub-ordinate Court.

3. The parties agreed to dispose off the appeal by way of written submissions. The 1st respondent filed written submissions and submits that he proved his case in the lower Court on a balance of probabilities.

4. I have considered the submissions. The issue which arises is liability. The evidence which was adduced by the 1st respondent Ngari Thitu

and his witness P.W. 3 Dominic Kabia Gatiki was that the 1st respondent was waiting to board a vehicle on his way to Kutus. He was on the left side of the road. He then saw an on-coming pick-up heading towards Mwea and a Canter registration number KAL 422Q which was heading towards Embu. The said Canter made a U-turn towards Ndifatha shopping Centre. The pick-up went towards the extreme left hand side of the road and knocked the Canter at the front. The pick-up then proceeded and knocked 1st respondent. The pick-up was registration number KBH 143C. The pick-up veered off into the bush. The 1st respondent was rushed to Embu Hospital by a Good Samaritan. The driver of the Canter Kenneth Manyagi Waithanji, who was the driver of the Canter was charged with a traffic case No. 367 of 2009 with careless driving. He was acquitted since the driver of the pick-up and the driver of the lorry were both to blame. The 1st respondent blamed the driver of the pick-up KBH 143C as he is the one who knocked him. The driver of the pick-up was not charged.

5. The driver of the pick-up Isaiah Kaberia testified that at Difathas as he was heading to Mwea, he met a lorry which was on his lane. The Canter turned towards Difathas when he was ten metres from him. He tried to swerve but the Canter hit the pick-up on the driver's door and pushed the vehicle off the road. In the process the 1st respondent who was standing at the stage was hit by the pick-up. He blamed the driver of the Canter for the accident as he is the one who hit him and pushed him off the road.

6. The judgment of the trial Magistrate was that the vehicle KBH 143C veered off the road onto the bush and it rolled, that it was being driven at a high speed. That the driver's failure to control the vehicle is sufficient evidence that he was driving carelessly and was negligent. I am therefore satisfied that the Plaintiff proved negligence on the part of the driver (D.W. 1) on a balance of probabilities. I find the defendant vicariously liable for the negligence of his driver (D.W.1). I therefore hold the defendant 100% liable for the accident. Page 93 of the record.

7. Looking at the facts which were presented before the trial magistrate, it is clear that it is the driver of the Canter KAL 422Q who was to blame for the accident as he made a right turn when it was not safe to do so as there was an on-coming pick-up which was coming from the direction of Embu which was very close. The driver of the Canter KAL 422Q did not give way to the pick-up which was only ten metres away. The driver of the pick-up swerved to avoid the Canter but the Canter hit his vehicle which in turn hit the 1 st respondent. The driver of the Canter was charged with careless driving after the Police found that he was to blame for the accident. He was however, acquitted of the traffic charge.

8. It is submitted for the appellant that the 1st respondent did not prove a case against the appellant. He submits that the **Evidence Act Cap 80 Laws of Kenya** provides:

> ***"107 (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts.***
>
> ***(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.***
>
> ***108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***
>
> ***The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

9. He submits that the defendant enjoined a 3rd party who is the 2nd respondent who failed to enter appearance and subsequently interlocutory judgment was entered against him. It is submitted that the 1st respondent did not prove any negligence against the appellant. It is true that from the record of the lower Court, it was proved on a balance of probabilities that the major contributing factor to this accident was the fact of making of the unlawful U-turn by the driver of the Canter on a busy road and onto the path of the appellant's vehicle causing a collision between the two vehicles. As a result the Appellant's motor vehicle was pushed off the road where it hit the 1 st respondent. In this case the 1st respondent and the appellant are in agreement that it is the fact of the Canter making the U-turn without giving due consideration to other road users.

10. The trial Magistrate relied on the mere fact of the accident to find that the appellant was negligent. He found that "failure to control the vehicle is sufficient evidence he was driving carelessly and was negligent."……..There was no evidence adduced before the trial Magistrate that at any point the driver of the pick-up lost control. The trigger was the fact that he was hit when he was lawfully on his lane and what followed was beyond his control. There was no evidence that the appellant had left his lane or had done anything which could have possibly contributed to the accident.

11. The evidence which was adduced by the traffic Police before the Traffic Court, that is P.W. 4 Francis Macharia was that the driver of KAL 422Q made a U-turn before he had fully reached at the inter-section that allowed him to turn right, that is why he could not get a clear view of the road user and that is why the accident occurred. Traffic case No. 367 of 2009 (page 29-38 of the record). The driver was charged with careless driving. It should be noted that in Civil matters, proof is on a balance of probability. The evidence adduced by P.W. 4 in the Traffic case shows that it was the driver of the Canter who was negligent by making a sudden U-turn before reaching the junction without a clear view of on-coming vehicle. He thus created a situation of danger on the road, he was negligent and careless and caused the accident. The fact of acquittal does not absolve him of negligence in the manner he drove the vehicle at the material time. I am in agreement with the persuasive decision in **Andrew Kamau Waweru -V- Guchu Muruguri** where it was stated:

> ***"Section 40 (a) of the Evidence Act Cap 80 deals with the evidence in criminal cases the standard of proof of which is beyond reasonable doubt. I am not convinced this section applies to civil cases like ours per se. That someone was or not convicted of a criminal case does not necessarily mean he did or not commit the wrong complained of in a subsequent civil case. Many a times civil cases have successfully been prosecuted against wrong doers who had not been charged with criminal offences arising from their acts."***

The outcome in a traffic case does not necessarily determine the outcome of a civil case on the issue of negligence apart from where there is a conviction and no appeal as provided under Section 47A of the Evidence Act. This is because as I have stated the standard of proof in civil cases is on a balance of probabilities and traffic cases it is beyond any reasonable doubts.

12. The 1st respondent had the burden to prove the case against the appellant. The fact of the accident per se is not sufficient to prove negligence. There must be proof that the appellant committed an act of omission and failed in his duty of care owed to the 1st respondent. The 1st respondent did not tender any evidence pointing to the appellant's negligence. The facts are clear that it is not the appellant who caused the accident. Liability of the appellant can stem from acts of negligence which must be proved. There must be facts to support the allegation of negligence which can be attributed to the appellant. I agree with the submission by the counsel for the appellant that the 3rd party's driver is a *'condition sine qua non'* without which the accident could not have occurred. He broke the chain of causation between the appellant's driving and the knocking down of the 1st respondent by his intervening act of colliding into the said vehicle, hence the 2nd respondent is fully to blame for the occurrence of the accident. In **Peter Shirau Amakobe -V- Republic (2017) eKLR** it was stated:

> ***"I need to consider the issue of 'causation' given that the appellant action did not directly cause the injury to the complainant. Causation provides means of connecting conduct with a resulting effect. This is a consideration of whether the defendant's conduct or omission cause the harm or damage. In doing so, 'but for' test should be invoked. The question here is, 'but for' the actions of the defendant would the result have occurred? If yes, the result would have occurred in any event, the defendant is not liable. If the answer is no, the defendant is liable as it can be said that his action was a factual cause of the result."***

13. The facts in this case show that it is the action of the driver of the Canter which caused the accident. He hit the appellant and the appellant hit the 1st respondent. The chain of causation was not broken. This is confirmed in the submissions by the 1st respondent. It is clear from the evidence that the appellant's vehicle was on its correct lane driving normally and would not have gone to the side of the road where 1st respondent was if it was not blocked by the Canter which made a sudden U-turn without a clear view of the on-coming pick-up and before the junction. The person who was to blame for the accident is clear, his acquittal of the traffic charge notwithstanding.

14. The Court of Appeal while dealing with the issue of standard of proof in **Michael Hubert Koss & another -V- David Seroney & 5 Others** stated:

> ***"The acquittal of Kloss in the traffic case would, of course not be binding on a civil court subsequently considering the issue of negligence on a standard of proof which is lower than "proof beyond reasonable doubt." As this Court stated in Robinson V Oluoch [1971] EA 376:***
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> > ***"It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."***

The converse is also true where there is an acquittal.

On the issue of determination of liability in road traffic accident, the Court of Appeal proceeded to state:

> ***"The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley V Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:***
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> > ***"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it…………………………..***
>
> ***"The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."***

The Civil Court is still under a duty to determine the issue of liability. In this case it is not difficult to determine who was at fault and who was solely to blame for the accident. The driver of the Canter was pin pointed as the person who was at fault. He drover carelessly and bears the blame for this accident. In the case of **Republic -V- Dilesh Sonchand Bid (2014) eKLR H.C**. the Court held:

> ***"This is because in traffic cases, it can never be said that the accused person set out to commit the offence. The offence is committed due to the carelessness or recklessness of an accused person. The degree of blameworthiness is what results in an accused person being charged with the offence of dangerous driving."***

Fault involves failure by the driver to drive with due care and attention expected of a person competent to drive depending on the circumstances of the case. It has been demonstrated that the driver of the Canter was at fault as he failed to drive with due care and attention to other road users.

15. The trial magistrate based his finding on the fact that it is the pick-up which hit the 1st respondent and disregarded the evidence presented before him showing that it was the Canter which caused the accident due to careless driving. The driver of the Canter was served with a 3rd party notice pursuant to an order of the Court issued on 26th July, 2011. The 3rd party was duly served with a 3rd party notice but he failed to enter appearance. Judgment in default was entered against the 3rd party on 29th November, 2011. The appellant prayed that judgment be entered against the 3rd party on the final award made in favour of the plaintiff, page 91 of the record. The 3rd party who is the 2nd respondent called no evidence to disapprove the allegations of facts made against him. The learned trial Magistrate was clearly in error in finding that the Appellant was 100% to blame when the 3rd party called no evidence at all and when in fact there was already interlocutory judgment against him. I am of the view that in the light of these undisputed facts the 3rd party was wholly to blame for the accident. The interlocutory judgment against the 3rd party still stands to the extent of liability and the quantum damages assessed by the trial Magistrate. The trial magistrate erred by ignoring the evidence tendered before him and more particularly the fact that the Police blamed motor vehicle KAL 422Q which was owned by the 3rd party and the appellant had taken all the necessary steps to avoid the accident. The Judgment of the trial Magistrate was against the weight of the evidence. There is no shred of doubt that the appellant knocked the 1st respondent as a consequence of the careless manner of driving by the drive of KAL 422Q. The finding by the trial Magistrate that the appellant was 100% liable was made by error and not supported by evidence. In view of the reasons stated I find that the appeal has merits.

16. (1) I allow the appeal.

(2) I order that the judgment of the trial magistrate be set aside and substituted with an order dismissing the suit against the Appellant .

(3) I award the costs of the appeal and the costs before the trial Court to the appellant.

Dated and delivered at Kerugoya this 1st day of March, 2018.

L. W. GITARI

JUDGE

Read out in open Court, Mr. Ndana holding brief for Ngigi Karomo for Appellant. Mr. Ngigi Gichoya for 1st Respondent, court assistant Naomi Murage this 1st day of March, 2018.

L. W. GITARI

JUDGE

01.03.2018