



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 221 OF 2013

PETER KIMANI NJEHIA.....1ST APPELLANT

MAGDALINE WANGUI NJIHIA.....2ND APPELLANT

- V E R S U S -

PEER MURIITHI MBOTHUA.....RESPONDENT

DIRECTIONS

1. Peter Muriithi Mbothua, the respondent herein, filed a compensatory suit before the Kikuyu Senior Resident Magistrate's Court against Peter Kimani Njehia, and Magdaline Wangui Njihia, the 1st and 2nd appellants respectively and one John Kaharu Njau for the injuries the respondent sustained when he was lawfully standing off Kikuyu-Wangige road at a bus stage when motor vehicle registration KAB 142L owned by John Kaharu Njau lost control and hit motor vehicle registration no. KAP 145V from the rear causing the same to lose control and hit the respondent. The suit was heard by Hon. Doreen Mulekyo, learned Senior Resident Magistrate, who in the end apportioned liability at 40% as against the appellants while John Kaharu Njau would shoulder 60% liability. The respondent was awarded ksh.150,000/= for pain and suffering.

2. The appellants were dissatisfied with the decision hence they preferred this appeal. On appeal the appellants put forward the following grounds in their memorandum:

1. THAT the learned trial magistrate erred in law and in fact in failing to find that the 2nd defendant was wholly to blame for the subject road traffic accident.

2. THAT the learned trial magistrate erred in law and in fact in finding that the 1st and 3rd defendants were 40% jointly liable for the subject accident without any supporting evidence.

3. THAT the learned trial magistrate erred in law and in fact in assessing general damages in the sum of ksh.150,000/= which was excessive in the circumstances.

4. THAT the learned trial magistrate erred in law and in fact in failing to find that the driver of motor vehicle registration number KAB 142L was wholly to blame for the subject accident.

5. THAT the learned trial magistrate erred in law and in fact in failing to take into account the fact that the driver of motor vehicle registration number KAB 142L was charged and convicted for careless driving in respect of the subject accident in traffic Case no. 1156 of 2002 – Kikuyu, when apportioning liability between the defendants.

6. THAT the learned trial magistrate erred in law and in fact in failing to dismiss the suit against the 1st and 3rd defendants due to lack of sufficient evidence against them.

3. When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the submissions filed by the appellants. At the time of writing this judgment the respondent had not filed his submissions. Though the appellants put forward a total of 6 grounds of appeal, those grounds revolve around the questions touching on liability and quantum.

4. On liability, the appellants are of the submission that the trial Senior Resident Magistrate erred when she made the order apportioning

liability in the ratio of 40% against the appellants and 60% against John Kaharu Njau. The appellants argued that the respondent testified before the trial court to the effect that he was standing at the bus stage when he saw lorry registration no. KAB 142L owned by John Kagharu Njau hit motor vehicle registration no. KAP 245V from behind causing it to lose control and hit him. The appellants urged this court to set aside the order apportioning liability and substitute it with an order finding John Kaharu Njau wholly liable.

5. I have already stated that the respondent did not file any written submissions. Let me point out that the order apportioning liability affected both the appellants and John Kaharu Njau. This court has been beseeched to interfere with the order apportioning liability on appeal. It is unfortunate that the appellants did not deem it fit to enjoin John Kaharu Njau to this appeal as a respondent. In his absence, this court cannot make a decision that will affect him without giving him an opportunity to be heard first. For this reason alone, I decline to determine the appeal on its merits and instead make the following directions.

- i. The appellants are given 14 days to amend the memorandum of appeal to enjoin John Kaharu Njau as the 2nd respondent.**
- ii. The appellants to thereafter have the Amended Record of Appeal served upon the respondents.**
- iii. The appeal is fixed for further orders and directions on 31.5.2018.**
- iv. Mention notice to be served upon the respondents for 31.5.2017.**

Dated, Signed and Delivered in open court this 11th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents