REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 41 OF 2016

AGGREY ODUOR ABOM...APPELLANT

VERSUS

DOMINIC MUKUNDI &

TERESIA WANJIKU MUKUNDI (*suing as the Legal Representative of the*

***Estate of MARY MUMBI (DECEASED)*.........................1ST RESPONDENT**

JOHN MBUGUA…………………….............................2ND RESPONDENT

FRONTIER HAULAGE LIMITED..............................3RD RESPONDENT

(Being an appeal from the judgment and decree of the Principal Magistrate's Court at Kikuyu (Hon. D. Musyoka) Delivered on 25/08/2016 in Thika CM Civil Case No. 27 of 2014)

JUDGMENT

1. The Joint 1st Respondents in this case instituted suit in the Lower Court vide a Plaint claiming general and special damages as well as interests and costs for the wrongful death of Mary Mumbi (Deceased). The death arose as a result of a road traffic accident involving three Motor Vehicles: Motor Vehicle Registration Number KAV 238X, a Toyota Town Ace (the "Toyota *Matatu*"); Motor Vehicle Registration Number KBN 757F ZD 5098, a Mercedes Benz Actros ("Actros Lorry"); and Motor Vehicle Registration Number KAZ 004V ("Mitsubishi Canter").

2. The Deceased was a fare-paying passenger in the Toyota Matatu having boarded it in Nairobi heading to Nakuru. The Plaint alleged that on reaching the Muguga area, the Toyota Matatu was involved in road traffic accident. The 1st Respondents claimed that the accident was caused by the negligence of the driver of the Actros Lorry; that he drove it so recklessly that it lost control and violently hit the Mitsubishi Canter. As a result of the collision, the Plaint claimed, the Mitsubishi Canter was hurtled across the road where it hit the Toyota Matatu head-on thereby instantly killing the Deceased. Both the Actros Lorry and the Mitsubishi Canter were heading towards Nairobi at the time of the accident.

3. The Actros Lorry was driven by the 2nd Respondent and owned by the 3rd Respondent. Upon being served with the Plaint, the 2nd and 3rd Respondents filed a Statement of Defence. Then, on 25/08/2014, they took out a Chamber Summons under Order 1 Rule 15 of the Civil Procedure Rules seeking for orders that they be granted leave to issue a Third Party Notice against Aggrey Oduor Abom (the "Appellant"). The ground upon which the application was based was stated as follows:

> "*That the Defendants intend to claim contribution and/or indemnity against the intended Third Party on the basis his authorized driver's negligence solely caused and/or substantially contributed to the occurrence of the subject accident*."

4. It was on the basis of this Application that the Appellant was enjoined to the suit as a Third Party. Later on, after a number of procedural detours – which included a judgment entered in default which was later set aside -- an Application by the 1st Respondents dated 05/11/2015 was, by consent of all the parties granted by the Court on 01/12/2015.

5. The third prayer which was granted read as follows:

> *That the issue of liability and quantum between the plaintiff and the first and second defendants be tried together with the issue of liability and quantum between the first and second defendants and the third party and the Court be at liberty to apportion liability and quantum between the first and second defendants and the third party as if they were co-defendants*.

6. The ground upon which this prayer was sought was the following:

> *That the third party is already joined to this suit and has entered appearance and it would be expedient and time saving if the third party was treated as a co-defendant and all the issues tried at the same time.*

7. It was on the basis of these directions that the Trial in the Lower Court started afresh. The 1st Respondents called two witnesses and closed their case. The 2nd and 3rd Respondent called a single witness and so did the Appellant. The parties then made their submissions and the Learned Trial Magistrate delivered his judgment which is the subject of this appeal. The Learned Trial Magistrate apportioned liability as between the 2nd and 3rd Respondents on the one hand and the Appellant on the other at 70% to 30% respectively. He also awarded a total of Kshs. 2,844,742.40 as damages under different headings.

8. The Appellant is aggrieved by the decision of the Learned Trial Magistrate and has filed the present appeal. Through his lawyer, he has listed ten grounds of appeal. However, they are truly only two grounds:

> a) The first grievance is that the Appellant argues that there was no direct claim by the 1st Respondent against the Appellant (as the Third Party in the Lower Court) and that it was, therefore, a fundamental misdirection for the Learned Trial Magistrate to have made any finding in liability against him.
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> b) Second, the Appellant complains that it was an error for the Learned Trial Magistrate to have held him to be 30% liable for the subject accident in the face of the evidence adduced.

9. The 2nd and 3rd Respondents opposed the appeal. It is probably fair to say that the 1st Respondent was indifferent. That is probably because none of the parties has contested the damages awarded by the Learned Trial Magistrate.

10. The Appeal was argued through written submissions.

11. I have read and considered the respective arguments in the parties' written submissions.

12. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

> *I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 conclusions though it should always bear in mind that it has 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 demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

13. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

> *It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.*
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> *"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."*

14. The appropriate standard of review established in these cases can be stated in three complementary principles:

i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

15. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resourt v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

16. I will begin by dealing with the first "joint" ground of appeal raised by the Appellant since it would be dispositive if successful.

17. The argument is that the suit in the lower Court was between the 1st Respondent on the one hand and the 2nd and 3rd Respondents on the other. The Appellant was only brought in as a Third Party. The Appellant argues that the 1st Respondent had never made any claim against the Appellant in the Plaint and that, therefore, it was improper for the Learned Trial Magistrate to make any adverse findings on liability against him in the case. This is because, the Appellant argues, the Appellant was never sued in his own right and has only been brought by the 1st Respondent.

18. The Appellant placed reliance on ***Sammy Ngigi Mwaura v John Mbugua Kagai & Another [2006] eKLR*** – a Court of Appeal decision which, in its *ratio* held as follows:

> *In our view, it should be noted that the three sub paragraphs (a), (b) and (c) of* ***Order I Rule 14 (1)*** *are each in the alternative and that the only alternative chosen to be relied upon by the defendant/respondent in his Third Party Notice was a claim for "* ***indemnity or contribution to any judgment that may be entered in favour of the plaintiff in respect of the plaintiff's claims as is set out in the plaint."***
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> *If, as was the position in this case, there was no judgment entered in favour of the plaintiff against the defendant for the very good reason that there was no evidence of any negligence by the defendant or his employee, there could not be any amount in respect of which the defendant could be indemnified by the Third Party or to which the Third Party could contribute however negligent the Third Party or its employee, driver of the lorry may have been.*

19. The ***Sammy Ngigi Mwaura Case*** is, of course, binding upon me as it is a decision of the Court of Appeal. But it is only binding on its facts. The facts here are completely different. I began this judgment by giving a short history of the litigation so that the factual distinction between the situation in ***Sammy Ngigi Mwaura Case*** and the present case is clear. In the ***Sammy Ngigi Mwaura Case***, the Defendants in the case sought to enjoin the Third Party in the suit for a claim for "*indemnity or contribution to any judgment that may be entered in favour of the plaintiff against the defendant in respect of the plaintiff's claims as is set out in the plaint*."

20. Based on the specific prayer by the Defendant in that case, the Court concluded that no claim could be found against the Third Party.

21. However, the situation is radically distinguishable here. The Third Party Notice by the 2nd and 3rd Respondents was to the effect that: *"That the Defendants intend to claim contribution and/or indemnity against the intended Third Party on the basis his authorized driver's negligence solely caused and/or substantially contributed to the occurrence of the subject accident."*

22. That claim is not couched as limited only to any judgment that may be entered against the 2nd and 3rd Respondent as was the case in the ***Sammy Ngigi Mwaura Case***. Instead, it is wider: it seeks contribution against the Third Party for any liability resulting from the subject accident.

23. In addition, in this matter, directions were given. They were quite specific that all the parties had agreed that "*the issue of liability and quantum between the plaintiff and the first and second defendants be tried together with the issue of liability and quantum between the first and second defendants and the third party and the Court be at liberty to apportion liability and quantum between the first and second defendants and the third party as if they were co-defendants*."

24. In the face of these directions, it is un-availing for the Appellant to turn at this point and argue that no direct claim was made against him by the 1st Respondent and that, therefore, based on that technicality any judgment assigning liability on him should be dismissed merely for that reason. The answer to that argument is that the parties took directions and by consent agreed that both the question of liability and quantum among the three parties to the suit will be determined in the present suit.

25. In Grounds 5, 6 and 7 in the Memorandum of Appeal, the Appellant claims that the Learned Trial Magistrate erred in holding the Appellant 30% liable for the subject accident. The Appellant argues that the evidence adduced in the trial pointed to the subject accident being caused by the sole negligence of the 2nd Respondent and that, therefore, the Learned Trial Magistrate should have found him to be 100% liable for the accident. The Appellant places heavy reliance on the evidence of PW1 (the Traffic Policeman who investigated the accidence) and that of his own witness who was the driver of the Mitsubishi Canter. The Appellant argues that the Police categorically stated that the 2nd Respondent was wholly to blame for the subject accident and that charges had even been preferred against him. According to the Appellant, the evidence adduced at the trial was clear that the Appellant did not contribute to the occurrence of the accident and that, therefore, should not have been saddled with 30% liability.

26. The Learned Trial Magistrate noted in his judgment that though the 2nd Respondent was acquitted of the charges of dangerous driving, the acquittal was based mainly on the fact that the Investigating Officer in the case did not appear in Court to testify. As such, there was no clear link between the accident and the 2nd Respondent who was the Accused in the case. The situation was different in the trial at hand, the Learned Trial Magistrate felt, for two reasons: First, that the standard of proof in the criminal trial is much higher than the one in the civil trial he was presiding. Second, the Investigating Officer was able to testify in the civil trial the Learned Magistrate was presiding over and offered his version of events. From that version, the Learned Trial Magistrate was persuaded that the correct apportionment of liability was 70% to 30%.

27. The Appellants insist that the evidence showed that the 2nd Respondent was wholly to blame for the accident.

28. I have carefully perused the trial Court record as well as all the exhibits produced in the trial. It is true that the Learned Trail Magistrate did not specify why he reached the conclusion that the Appellant shared part of the responsibility for the accident albeit less attribution. After my own analysis, I am persuaded that the conclusion the Learned Trial Magistrate he came to was correct. I say so for at least two reasons.

29. First, though the PW1 was categorical in his examination-in-chief that the 2nd Respondent was wholly to blame for the accident, he appeared less so on cross-examination. In any event, the OB extract produced in Court presented a quite different scenario than the one presented by PW1: it states that the accident occurred when the Appellant's driver was in the process of overtaking the Actros Lorry while "negotiating a corner" and, in the process, lost control of the Mitsubishi Canter causing it to cross the road and collide with the Toyota Matatu.

30. Second, I have noted that the information entered into the OB book on the day of the accident was entered there by a Police Officer who visited the scene of the accident – as opposed to PW1 who did not. This was information entered based on interviews from the immediate aftermath of the accident – and, likely, was not product of self-interested pre-meditation.

31. Third, no plausible reason is given why the Police Officer who entered the OB report would fill in inaccurate information.

32. Lastly, none of the witnesses controverted the claim by the 2nd Respondent that the Appellant's driver was trying to overtake in a corner – which would indicate a measure of negligence.

33. Given all these factors, it appears to me that it was eminently reasonable for the Learned Trial Magistrate to reach the conclusion that liability should be apportioned at 70%:30%. I will, therefore, based on my independent analysis of the evidence, not disturb that finding.

34. There was not appeal against the assessment of damages. I do not find them to be patently erroneous. I will therefore leave them undisturbed.

35. The result is that the appeal herein is without merit and is dismissed with costs.

36. Orders accordingly.

Dated and delivered at Kiambu this 4th day of June, 2018.

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JOEL NGUGI

JUDGE