REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

HCCA NO. 35 OF 2011

DAVID NJUE NYAGA.....APPELLANT

VERSUS

DUNCAN NJERU MBINDANI.....1ST RESPONDENT

KINYUA THIERI.....2ND RESPONDENT

ASHFORD KINYUA NJOKA.....3RD RESPONDENT

CONSOLIDATED WITH

HCCA NO. 32 OF 2011

ASHFORD KINYUA NJOKA.....APPELLANT

VERSUS

DAVID NJUE NYAGA.....1ST RESPONDENT

DUNCAN NJERU MBINDANI.....2ND RESPONDENT

KINYUA THIERI.....3RD RESPONDENT

(Being an appeal against the decree emanating from the Judgment of the Hon. Mrs Wachira (Chief Magistrate) delivered on the 15th February, 2011 Embu C.M. CC No. 67 of 2006)

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J U D G M E N T

1. Before this court are two appeals namely Embu High Court Civil Appeal No. 35 of 2011 and No. 32 of 2011 which were consolidated vide a consent of parties recorded in court on 1st December, 2014. The two appeals arose from the decision of Hon. Mrs Wachira- Chief Magistrate in ***Embu Chief Magistrate's Court Civil Case No. 67 of 2006*** wherein **DAVID NJUE NYAGA** (now the Appellant in Civil Appeal No. 35 of 2011) (hereinafter to be referred to as 1st Appellant) had sued **DUNCAN NJERU MBINDANI & KINYUA THIERI** (1st and 2nd Respondents-herein) for negligence in a road traffic accident involving Motor vehicle Registration No. KAT 598A associated with 1st and 2nd Respondents and motor vehicle Registration No. KAS 464L associated with the appellant in Civil Appeal No.32 of 2011 (hereinafter to be referred to as 2nd appellant for ease of reference) who was brought into the proceedings as the 3rd party by 1st and 2nd Respondents herein. The 1st and 2nd Respondents blamed the 2nd appellant for the accident that occasioned the 1st appellant herein injuries.

2. The pleadings filed in the lower court reveal that the first appellant was travelling as a fare paying passenger in motor vehicle Registration No.KAT 598A driven by the 2nd Respondent and owned by the 1st Respondent. The first appellant blamed the 1st and 2nd Respondent for the accident which took place along Embu- Runyenjes Road on 27th May 2005. The 1st and 2nd Respondent on their part defended themselves and laid blame squarely on the 2nd Appellant whom they brought in as a party through 3rd party proceedings. On his part, the 2nd Appellant blamed the 1st and 2nd Respondent pleading that the 2nd Respondent caused the accident owing to his negligence.

3. The matter went for full trial upon which the trial court found that the 2nd Appellant (3rd party) was 100% to blame for the accident and absorbed the 1st and 2nd Respondents herein from blame. The 1st Appellant was awarded total **Kshs.426,967** inclusive of both general damages and special damages.

4. Both the 1st and 2nd Appellants herein felt aggrieved on the finding of the trial Court and preferred the appeals cited above which as I said were consolidated and now subject of this judgment. The gist of the two appeals is the question of liability. The 1st Appellant contended that in his view he proved his case against the 1st and 2nd Respondent and faulted the learned trial magistrate for holding that the 1st and 2nd Respondent were not to blame , which finding in the first Appellant's view was against the weight of evidence.

5. The 2nd Appellant (3rd party in the lower court) on his part faulted the trial court in its finding submitting that after finding that the 1st and 2nd Respondents were free from blame, the trial court could not find that the 2nd Appellant was to blame and should indemnify a party against whom blame did not lie. In the 2nd Appellant's view, there was no evidence to support the finding of the trial court that he was 100% liable for the accident.

6. This is a first appeal and being the first appeal this court is mandated under **Section 78** of the **Civil Procedure Act** (Cap 21 Laws of Kenya) to re-look at the evidence tendered at the trial and re-evaluate the same with a view to coming up with its own conclusions and findings. Looking at the evidence tendered before the trial court it is apparent that the 2nd Respondent was driving motor vehicle KAT 598A, a Toyota Hiace Matatu along Embu Runyenjes and at place known as Kiangima, he stopped to either drop or pick passenger and while at it, after dropping the passenger, he entered onto the road suddenly catching the 2nd Appellant who was driving motor vehicle No. KAS 464M from behind unawares as a result of which the 2nd Appellant's motor vehicle Registration No.KAS 464M hit the matatu Registration No. KAT 598A from the rear forcing it into a ditch. The 1st Appellant suffered injuries as a result and the injuries are not disputed in this appeal.

7. This court has gone through the evidence of the 1st Appellant in this appeal. He was the victim in the accident as evidence shows that he was a fare paying passenger in the 1st Respondent's motor vehicle. He told the trial court that the road where the accident occurred was a straight stretch and despite the fact that there was ***"no designated stage",*** the 2nd Respondent, "***stopped suddenly, pulled off the road and suddenly joined the road."*** The 2nd Respondent appears to have abruptly turned into the main road and thereby caught the 2nd Appellant unawares who told the trial court that he had began the process of overtaking the matatu when he suddenly turned onto the road. The 2nd Appellant in his evidence stated that the collision occurred on the middle of the road and his assumption was that the 2nd Respondent had attempted to make a U-turn to pick another passenger on the right side of the road. According to the 2nd Respondent, he had overtaken the 2nd Appellant's motor vehicle Registration No. KAS 464M driving to Embu. He told the trial court;

> **"I overtook it and the next thing I heard is a bang."**

8. I have carefully re-evaluated the evident tendered by both drivers (2nd Respondent and the 2nd Appellant herein) and though both claim that they were at the time driving at moderate speeds between 55 Km/h and 60 Km/h, it is obvious that the speed at which the 2nd Appellant in particular was being driven was well above 60 Kilometre per hour. This is because at 60 Kilometre per hour, he should have been able to stop even if the matatu (driven by 2nd Respondent) suddenly turned onto the main road after stopping to drop a passenger. This court finds that the 2nd Respondent had suddenly stopped to drop a passenger and again abruptly and suddenly joined the main road without due care and attention to other road users. To that extent he equally contributed to the occurrence of the accident. The trial magistrate faulted the 2nd Appellant herein for claiming that the 2nd Respondent herein was making a U-turn when he had not pleaded so in his defence. This court finds that this fault was a misdirection because it was based on the 2nd Appellant's wrong assumption that the 2nd Respondent herein intended to make a U-turn. In his evidence under cross- examination he stated as follows:-

> **"The U-turn was not complete. He had turned on the right side. I hit him while at the middle of the road..... I hit the motor vehicle on the rear right side. I stopped on the middle of the road. The other motor vehicle rolled on the ditch."**

It is quite apparent therefore that there was no U-turn as we know it. The matatu just turned onto the road suddenly and due to the proximity of the 2nd Appellant's motor vehicle probably driven at a higher speed simply banged onto the matatu and hence the accident.

9. From the above analysis it is apparent that the learned trial magistrate fell into error when she concluded that the 2nd Appellant herein was 100% liable for the accident. From the evidence tendered he contributed to the accident but the 2nd Respondent caused the accident by stopping to drop a passenger in undesignated area and abruptly turning to join the main road without due care and attention to other road users. The evidence of the first Appellant at the trial on what really took place was corroborated by the evidence of Irene Wanja Kabugu DW3. That evidence was credible and the trial court erred to make a contrary finding. The evidence tendered did not show that the 2nd Appellant was solely responsible and liable for the accident. The 2nd Respondent and by extension the 1st Respondent on account of vicarious liability were responsible too and contributed to a larger extent to the occurrence of the accident. This court finds that on the basis of the evidence tendered at the trial, the 1st and 2nd Respondents were 60% liable. The 2nd Appellant ought to have been on proper lookout and drive at reasonable speed and maintain safe distance and because there was that omission on his part, I find that he should shoulder 40% blame. The fact that he hit the matatu on the rear side shows that he was to blame to that extent.

10. In the end, I allow this appeal for the aforesaid reasons. The Judgment of the learned trial magistrate on liability is set aside. In its place I enter judgment for the 1st Appellant **DAVID NJUE NYAGA** against the 1st and 2nd Respondent herein at 60% liability while the 2nd Appellant shall shoulder contribution of 40% for his contributory negligence. The award on quontum is upheld. The costs of this appeal and costs at the trial is awarded to the 1st appellant to be paid by both the 1st and 2nd Respondent and the 2nd Appellant at the same rate of

60 % by 1st and 2nd Respondents and 40% by the 2nd Appellant (Ashford Kinyua Njoka).

Dated, signed and delivered at Embu this 18th day of September, 2018.

R. K. LIMO

JUDGE