REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 605 OF 2016

SAMUEL KAGEMA MWANGI.....APPELLANT

VESUS

ERUKANA MUTEBI .....1ST RESPONDENT

TRI-CONTINENTAL

DISTRIBUTION LIMITED.....2ND RESPONDENT

Being an Appeal against the judgment of the Hon. I. Gichobi (RM) delivered on 23rd September, 2016 in CMCC No. 7546 of 2013 at Milimani)

JUDGMENT

This is an appeal arising from the judgment of the lower court delivered on 23rd September, 2016 whereby the appellant's suit was dismissed with costs. The lower court case was as a result of an accident that took place on 1st November, 2013 along Ngong road whereby the appellant's motor vehicle registration No. KAU 559T collided with motor vehicle registration No. KBK 353X owned by the 2nd respondent and driven by the 1st respondent at the time of the accident.

The appellant blamed the accident on the negligence of the driver of motor vehicle registration KBK 353 X. He suffered injuries as a result and claimed damages resulting therefrom. The respondents denied the appellants claim and blamed him for the accident particulars of which are set out in the defence. After a full trial the trial court found that the appellant was wholly to blame for the accident and held him 100% liable.

Aggrieved by the said judgment, the appellant filed this appeal faulting the trial court for failing to consider the evidence against the respondents on liability, leading to the dismissal of the appellant's claim against them. The trial court was also faulted for failing to consider the submissions of the parties on liability and also failing to assess general damages payable. Both parties have filed submissions and cited some authorities.

As the first appellate court, I have gone through the evidence adduced by the parties in the lower court with the view to arriving at independent conclusions. The collision between the two vehicles is not denied. In terms of liability, only the appellant and the 1st respondent gave evidence. The police officer called to testify as P.W. 1 was not of any help to the court because he was not the investigating officer in this matter.

There was no sketch map produced in evidence and so the point of impact cannot be determined from the evidence of the appellant and the 1st respondent. It is clear that these two parties blamed each other for the accident.

The trial magistrate indeed observed in her judgment as follows,

> **"At trial both parties blamed each other for encroaching into each other's lane and causing the accident.**
>
> **Both parties stated that the accident occurred on their lane. However, no sketch plan/map was produced to confirm point of impact."**

The trial court then went on to address probabilities which with respect, could not be supported by any tangible evidence as to occurrence. I say this because she said as follows,

"I have carefully read through both counsels' submissions on liability but, my opinion and the most probable thing that happened is that the plaintiff seeing the opposite lane was clear and his lane had traffic tried to overtake and thus encroached unto the 1st defendant's and that is why the 1st defendant lit his head lights fully to alert and/ or warn the plaintiff he was on the way and had encroached unto to the 1st defendants lane but then the distance was too short and the accident occurred."

With profound respect, that was misdirection. In the first place counsel's submissions may not take the place of evidence. Secondly, the court's opinion should not be used to influence a decision that is reached. Caution should always be exercised to avoid the court appearing to take the position of a witness.
Taking the evidence adduced in totality, and considering the rival or divergent positions of the appellant and the 1st respondent, I find that both drivers were equally to blame. That is, each shall bear 50% liability. The first respondent must have been driving with the authority of the 2nd respondent and therefore vicarious liability attaches upon his principal.

The appellant sustained injuries to his chest described in the pleadings as trauma to the chest. He was subsequently examined by Dr. A. O. Wandugu who prepared the medical report dated 21st November, 2013. It will be noted that this was 3 weeks after the accident.

Upon examination, the appellant complained of chest pains leading to breathing difficulties and inability to perform strenuous tasks. There was also tenderness to the chest. According to the doctor, the injuries were consistent with a blunt force and the complaints were consistent with the injury sustained. The appellant may need medication on and off and may be vulnerable to recurrent respiratory tract infections.

When the appellant gave evidence in May 2016 he had fully recovered and in fact said, "**I have fully recovered. I thank God."** The injuries sustained by the appellant may at most be described as soft tissue injuries. Whereas the trial court assessed general damages at Kshs. 80,000/= had the appellant succeeded. I believe the correct award should be Kshs. 100,000/=. This figure shall be discounted by 50% leaving a balance of Kshs. 50,000/=.

Accordingly, this appeal is allowed by setting aside the judgment of the lower court in its entirety and in place thereof, there shall be judgment for the appellant in the sum of Kshs. 50,000/= general damages plus Kshs. 2,500/= special damages. The appellant shall have the costs of the suit, both in the lower court and in this appeal subject to 50% contributory negligence.

Dated, signed and delivered at Nairobi this 6th day of November, 2018.

A. MBOGHOLI MSAGHA

JUDGE