



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 23 OF 2016

(Being an appeal arising from Judgment and Decree of Hon. P.W. Wasike Resident Magistrate delivered on 5/8/2016 in Kitale CMCC No. 164/2014)

GESUKA JOE.....APPELLANT

VERSUS

RUTH NYANDUKO MCHIRA.....1ST RESPONDENT

MBUGUA TABITHA.....2ND RESPONDENT

J U D G M E N T

1. The 1st Respondent filed suit against the appellant as well as the 2nd Respondent pursuant to the injuries she sustained in a road traffic accident that occurred on 18/7/2012 along Kitale – Eldoret road at Kapkoi area. She was fare paying passenger aboard motor vehicle Registration No. KBL 197B Matatu which collided with canter lorry Registration No. KBH 082Q. The matatu was owned by the 2nd Respondent, whereas the Canter Lorry was owned by the appellant.
2. The 1st Respondent sustained degloring injury on the left hand. She was treated at Kitale District Hospital and later at Mt. Elgon hospital. At the time of testifying in court she had generally healed.
3. The matter proceeded to full trial where the 1st Respondent called 4 witnesses including herself. She described how the accident occurred and where she was sitted in the Matatu. She attributed negligence to the driver of the Matatu who apparently died as a result of the said accident.
4. **PW2 Doctor Samuel Njenga** examined the 1st Respondent and prepared the medical legal report which he produced . He opined that he sustained 40% incapacity but had healed with no permanent disability.
5. **PW3 Corporal Jentric Naliaka Wangwe** from the traffic department Kitale police station did produce the police investigation file as well as the police abstract. The same laid blame on the driver of the Matatu who lost control and went to the side of the Canter. She said that had he been alive he would have been charged with committing traffic offence.
6. PW4 Kirwa Labatt from Kitale District hospital produced the hospital summary as well as the P3 form in respect to the 1st Respondent.
7. Both the appellant and the 2nd Respondent closed their cases without offering any defence.
8. The trial court proceeded and awarded the 1st respondent a sum of kshs 120,000 and attributed negligence on both the appellant as well as the 2nd Respondent. Essentially, he attributed equal negligence to both of them.
9. The court has perused the grounds of Appeal raised by the appellant and essentially the contention is on the question of liability. According to him the trial court failed to appreciate that the appellant was not blameworthy. The evidence on record, he submitted clearly demonstrated that it was the 1st respondent's driver who caused the accident.
10. Both parties have filed written submissions which I have perused together with the authorities. The 2nd Respondent apparently did not file any submissions.
11. The burden of proof as is the case is on the person alleging. The fact and the occurrence of the accident is not disputed. The involvement and the injuries sustained by the 1st respondent is not disputed. The only issue is who was to blame for the accident.

12. Going through the evidence on record, the 1st respondent ideally blamed the driver of the Matatu. She only insisted that at least he could have avoided the same. She was however unable to tell whether he was speeding or not. All that she knows was that she heard an impact and she had seen the Lorry ahead.

13. In the absence of any eye witness as the matatu driver died and the appellant did not call the driver of the lorry, the only credible independent evidence is that of the traffic police, which essentially was documentary.

14. PW3 testified in her evidence in chief that:

“ ----- While at the scene, driver of KBL 197B lost control going zigzag and knocked the Canter head on. The passengers were injured and driver died.”

15. She went on to state:

“----- According to this file and initial investigation officer the driver of Toyota townace was to be blamed. He lost control and went to side of the Canter as per this sketch plan which I have here.”

16. On Cross-examination she said she went on to state that:

“----- The driver could not control the vehicle. The distance can be confirmed on the sketch plan as to how far the vehicle moved in zigzag mode. It moved 15 metres i.e from where skid marks are . I cannot tell this distance exactly. The driver of the Canter maintained his lane. It maintained but moved to the rear side on his lane. Why he swerved or not can be answered by the driver.”

17. The Matatu infact after the impact turned to the direction (opposite) it came from suggesting that the impact was really violent.

18. From the evidence as presented by the traffic police officer, I find that the Matatu driver was wholly to blame. It is unfortunate that he died during the accident.

19. The only issue I have with the appellant is the fact that it was not enough to suggest that the accident was caused by the Matatu. At least the accident was not self involving. Two vehicles collided. They were driven by human beings. At least, the Canter driver should have had an explanation.

20. Nonetheless I find that the largest percentage to blame was the driver of the Matatu contrary to the findings by the trial court. It cannot be said that the liability was equal based on the evidence on record.

21. I do find therefore that the 2nd respondent should shoulder 85% liability and the appellant 15% liability. The issue of general damages in my view was reasonable in the circumstances considering the nature of the injuries sustained by the 1st respondent.

22. In the final analysis the appeal succeeds partially. Liability is apportioned at 85% and 15% as stated above. The damages shall be apportioned on that basis. Each party shall bear their own costs in this appeal. However at the lower court the cost shall go to the 1st respondent and apportioned on the same percentage of 85% and 15% respectively.

Orders accordingly.

Delivered, signed and dated at Kitale on this 10th day of December, 2018.

H.K. CHEMITEI

JUDGE

10/12/18

In the presence of:

Wanyonyi for Onyinkwa for the Appellant

No appearance for Okile for Respondents

Court Assistant – Kirong

Judgment read in open court.