



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 290 OF 2014

JACOB MOMANYI ORIOKI.....APPELLANT

VERSUS

KEVIAN KENYA LTD.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon M. Chesang (Mrs), Senior Resident Magistrate Ag (SPM) at the Chief Magistrate's Court at Milimani in Civil Case No 353 of 2012 delivered 9th July 2014)

JUDGMENT

INTRODUCTION

1. In her Judgment of 9th April 2014, the Learned Trial Magistrate, M. Chesang (Mrs), Senior Principal Magistrate (Ag. SPM) entered judgment in favour of the Respondent against the Appellant for the sum of Kshs 435,761/= made up as follows:-

Payment Voucher	Kshs 405,671/=
Rescor Services Report	Kshs 5,270/=
Assessment Report	Kshs 4,640/=
Re-inspection fees	Kshs 1,740/=
Tracing Report	<u>Kshs 18,400/=</u>
Total	Kshs 435,761/=

Plus costs and interest from date of judgment. The Appellant was found wholly to blame for the accident.

2. Being dissatisfied with the said judgment, on 16th July 2014, the Appellant filed his Memorandum of Appeal dated 14th July 2014 and filed on 15th July 2014. He relied on eleven (11) Grounds of Appeal.

3. The Appellant's Written Submissions were dated 12th June 2018 and filed on 13th June 2018 while those of the Respondent were dated and filed on 9th July 2018.

4. When the matter came up on 26th September 2018, the parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

5. According to the Appellant, on 17th February along Thika Road, the Respondent's Motor Vehicle Registration No KAW 519G rammed into a third party Motor Vehicle Registration No 74 CD 2K (hereinafter referred to as "Third Party Motor Vehicle") but that he safely braked his Motor Vehicle Registration No KAT 086V to avoid ramming into the Respondent's Motor Vehicle. He pointed out that George Njoroge Minisia (hereinafter referred to as "PW 3") testified that the Respondent's Motor Vehicle had no damage at its rear but that the damage was at its front. It was his contention that the Respondent opted to sue him due to what he assumed to be diplomatic impunity as against the driver

of the Third Party Motor Vehicle.

6. He stated that he had no cause of action against the owner of the Third Party Motor Vehicle and consequently, there was no need to have enjoined him in the proceedings in the lower court.

7. It was his averment that the Learned Trial Magistrate erred when he attributed negligence to him and that in any event, the Respondent's driver was under a duty to observe the Highway Code by driving at a reasonable speed which could have enabled him stop when faced by an obstacle.

8. He was emphatic that it was the Respondent's Motor Vehicle that obstructed him and consequently, the party who had committed an offence could not be absolved from liability. He therefore faulted the Learned Trial Magistrate for having found him wholly liable for the sum of Kshs 435,761/=.

9. He thus urged this court to allow his Appeal herein.

THE RESPONDENT'S CASE

10. The Respondent was categorical that the Appellant, just like any other driver was expected to keep a proper look out and have regard to other road users. It stated that instead, the Appellant took no evasive action to avoid the collision and hence he was wholly liable for the accident that occurred herein.

11. He therefore asked this court to dismiss his Appeal.

LEGAL ANALYSIS

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

13. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

14. Having considered the parties Written Submissions, it was evident that the only issue the Appellant had contested was that of liability. He did not submit on whether or not the Respondent had proven the Special damages it had sought in its suit.

15. On perusing the proceedings, the court noted that on 17th February 2009 an accident occurred along Thika Road. Both the Appellant and the Respondent were driving on the said date. The Appellant was following the Respondent's Motor Vehicle. In front of the Respondent's Motor Vehicle was the TP Motor Vehicle. Those were the undisputed facts of this case. However, both the Appellant's and Respondent's versions of how the accident occurred differed.

16. According to the Respondent's driver at the material time, Daniel Gichuru (hereinafter referred to as “PW 1”), the Third Party Motor Vehicle stopped abruptly. He stopped. As he was stationary, the Appellant's Motor Vehicle hit him. Due to the impact, he in turn hit the TP Motor Vehicle. He stated that the police blamed the Appellant for having caused the ripple effect which was clearly indicated in the Police Abstract Report.

17. In his Cross-examination, PW 1 admitted that the issue of the TP Motor Vehicle was not pleaded in the Respondent's Plea and that if the driver of the said TP Motor Vehicle had been enjoined as a party in the pleadings, then it could have assisted in apportioning blame.

18. Jackson Mbuthia Kisei (hereinafter referred to as “PW 2”) testified that he was the Legal Officer of ICEA Insurance Co Ltd that had insured the Respondent's Motor Vehicle. His testimony was that the said insurance company repaired the Respondent's Motor Vehicle at a sum of Kshs 435,751/=.

19. PW 3 was the Assessor. His evidence in the typed proceedings was incomprehensible. The court therefore turned to the hand written notes of the Learned Trial Magistrate to ascertain exactly what his evidence of where he had stated that the Respondent's Motor Vehicle had sustained damages. He had indicated that the Respondent's Motor Vehicle had damages in the front. The rest of his proceedings were difficult to decipher as the notes were torn on the side.

20. On his part, the Appellant testified that the Respondent's Motor Vehicle stopped abruptly and he applied emergency brakes but it was not possible for him to stop. He was emphatic that the said Motor Vehicle was not damaged but he had a small cost on the grill. He admitted to having hit the Respondent's Motor Vehicle but he denied having caused the accident. He also stated that he had invoice.

21. A perusal of the Police Abstract Report showed that the Appellant was blamed for having caused the accident herein. The Learned Trial also concluded that because the Appellant did not demonstrate what evasive action he took to avoid the collision, then he was a hundred (100%) per cent liable for the accident herein.

22. This court wholly concurred with the conclusion that was arrived at by the Learned Trial Magistrate. This was because the fact that the Appellant admitted having hit the Respondent's Motor Vehicle was sufficient proof that he was not keeping a safe distance between him and the Respondent's Motor Vehicle. If he had done so, he would have had enough space to have taken such evasive action so as not to have hit the Respondent's Motor Vehicle.

23. Notably, the Appellant's arguments that PW 3 had testified that the Respondent's Motor Vehicle also had been damaged at the front did little to assist his case. Of concern to this court was, whether the Respondent's Motor Vehicle was hit at the rear. The Appellant admitted that he hit the Respondent's Motor Vehicle. He could not therefore have hit the Respondent's Motor Vehicle at the front. Since he was following him, the only logical place for him to have hit the Respondent's Motor Vehicle was at the rear.

24. Going further, the Police Abstract Report was clear that the Appellant was blamed for having caused the accident. Although the police were not called to tender in evidence the said Police Abstract Report, the Appellant did not object to the same being produced in court by the Respondent. In the absence of any documentary evidence to the contrary, this court came to the conclusion that the Respondent's case had remained unrebutted and/or uncontroverted.

25. In view of the fact that the Respondent's Motor Vehicle was hit at the rear, its driver could not have taken any other action to have avoided the accident. As a result, the Appellant had to be found to have been wholly liable. It was immaterial that there was another vehicle in front of the Respondent's Motor Vehicle or that the Respondent's driver stopped abruptly. The bottom line was that the Appellant ought to have maintained adequate distance between his Motor Vehicle and that of the Respondent's so as to have been able to manouver and avoid a collision with the Respondent's Motor Vehicle.

26. This court therefore found that the cases of Multiple Hauliers [EA] Ltd vs Justus Mutua Malundu & 2 Others [2017] eKLR and Norman Graham vs Jermaine Bailey & Another [2016] JMSC Civ 259 Jamaica that the Appellant relied upon did not assist his case. In fact, in the case of Multiple Hauliers [EA] Ltd vs Justus Mutua Malundu & 2 Others (Supra), P.J. Otieno J associated himself with the holding of Majanja J in the case of Samuel Stephen Were vs Sukari Industries Ltd [2008] eKLR where he held that:-

“Since the motor bike was hit from behind, it would have been very difficult, if not impossible, for the deceased to avoid the accident”.

DISPOSITION

27. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged in court on 9th July 2014 was not merited and the same is hereby dismissed. The effect of this decision is the Learned Trial Magistrate's decision is hereby upheld. The Appellant will bear the Respondent's costs of this Appeal.

28. It is so ordered.

DATED and DELIVERED at NAIROBI this 6th day of December 2018

J. KAMAU

JUDGE