



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 268 OF 2010

MUNIU KIMANI.....1ST APPELLANT

SAMWEL WACHIURI MWANGI.....2ND APPELLANT

VERSUS

FRANCIS MBUGUA NGARE.....1ST RESPONDENT

ANN NYAWERA MWANGI.....2ND RESPONDENT

JOHN NDUNGU MUKURIA.....3RD RESPONDENT

(Being an appeal from the Judgment delivered by the Resident Magistrate Hon. A. O. Aminga on 11th June, 2010 in Limuru CMCC No. 88 of 2009)

JUDGEMENT

This appeal arises from the judgment of the lower court delivered on 11th June, 2010 in a suit filed by the 1st respondent against the appellants and the 2nd and the 3rd respondents. The 1st respondent was a passenger in motor vehicle registration No. KAY 654Z which collided with motor vehicle registration NO. KAR 932 P on 14th February, 2009 along Naivasha Nairobi road at Kimende. This was a test case among others that had been filed relating to the same accident.

After hearing the parties, the trial court apportioned liability against the appellants at 60% while the 2nd and 3rd respondents were held to blame at 40%. The court proceeded to award the 1st respondent a sum of Kshs. 380,000/= general damages plus Kshs. 2,700/= special damages, costs and interest. The appellants were aggrieved by that judgment and lodged this appeal.

The 2nd and 3rd respondents did not call any evidence during the trial. The trial court however made a ruling on liability by holding that the appellants were largely to blame hence the apportionment of liability as stated above.

I have gone through the record before me. There was corroborative evidence that motor vehicle registration No. NO. KAR 932 P was being driven in a zig zag manner before the collision with motor vehicle registration No. KAY 464 Z in which the 1st respondent was travelling as a fare paying passenger. It strayed into the path of the other vehicle, and the driver of motor vehicle registration No. KAY 464Z told the court he could not swerve to avoid the collision because there was a ditch on the left hand side.

The police accident abstract produced by P.W. 2 Cpl Erod Dunson as exhibit 4 indicated the driver of motor vehicle registration No. KAR 932P was to blame for the accident. That notwithstanding, this is the party and his employer who were held less to blame for the accident. With respect, the finding of the trial court was contrary to the evidence adduced.

My assessment of the evidence is that the 2nd and 3rd respondents were to blame for the accident because, other than the police finding the driver to blame, it was clear his motor vehicle strayed onto the path of the other vehicle leading to the collision.

However, the driver of motor vehicle registration No. KAY 464Z cannot be absolved wholly of the accident. He saw motor vehicle registration No. KAR 932 P approach in a zig zag manner. There was a distance of about 50 metres and his speed was 60 km per hour. He did not take any remedial action. He did not flash his lights when he saw the other vehicle veering onto his side and says as much. From his evidence he did not swerve. It is common knowledge that most of our highways have road shoulders. He did not say that this road did not have that provision. In my view, he could have at least taken steps to reduce the impact or avoid it completely. That notwithstanding, he was less to blame.

An appellate court may interfere with the finding of the trial court in light of the evidence that does not justify the conclusion made. This is one such case. In my judgment, the appellants should have been held 20% to blame while the 2nd and 3rd respondents should bear 80% liability.

On quantum the trial court said it had perused and considered the submissions made and the extent of injuries sustained by the 1st respondent. I have also looked at the submissions presented in this appeal and the authorities cited. The award in general damages is not that high to attract the intervention of this court. I find no reason to disturb the award made by the lower court both on general damages and special damages.

The end result is that the appeal on liability is allowed as set out above, while that on quantum is dismissed. The appellants shall be entitled to costs of the appeal payable by the 2nd and 3rd respondents to the extent of 80%.

Dated, signed and delivered at Nairobi this 11th day of December, 2018.

A. MBOGHOLI MSAGHA

JUDGE