



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 80 OF 2010

AIC HEALTH MINISTRIES..... APPELLANT

VERSUS

SOLOMON NDEGWA NG'ANG'A.....1ST RESPONDENT

KANINI HARAKA ENTERPRISES.....2ND RESPONDENT

(An appeal from the Judgment and Decree of Hon. Njagi, Principal Dated and delivered on the 30th day of March 2010)

JUDGMENT

1. Judgment by the trial court was delivered on the 30th March 2010. Contributory negligence was apportioned between the 2nd Respondent Kanini Haraka Enterprises Ltd at 50% and the 3rd party Africa Inland Church Health(AIC) Ministries, now the appellant at 50%.

The Respondents support the said apportionment and have urged that the appeal is without merit and ought to be dismissed.

2. A brief background leading to the appeal will suffice.

An accident occurred on the 25th May 2005 involving the 2nd Respondents Motor vehicle Registration Number KAT 068Q and the appellants vehicle Registration No. KAA 560G. The 1st Respondent was a lawful passenger in the motor vehicle that collided with the 2nd Respondents vehicle.

3. The 2nd Respondent took out 3rd party proceedings against the 1st Respondents by a 3rd party notice dated the 29th April 2008 for contribution and indemnity against the said 3rd party/appellant alleging that the said vehicle Registration No. KAA 560G caused the accident and/or contributed to the same. In its defence the 3rd party denied liability and 3rd party directions were taken that the issue of liability as between all the parties be tried at the trial of the suit.

4. There is no dispute that an accident occurred between the two vehicles nor that the 1st respondent was a passenger and was injured in the 2nd respondents vehicle.

5. The issues as raised by the appellant in its grounds of appeal, (twelve in number) all on liability may be summarised as hereunder.

1. The apportionment of liability as being against the weight of evidence adduced as the 2nd respondent failed to call any evidence thus leaving the 1st Respondents evidence uncontroverted and unchallenged.

2. The import, the law and 3rd party in relation to 3rd party proceedings on liability.

6. As mandated and being the first appellate court, I am obligated to reconsider and re-evaluate the evidence before the trial court taking into account that I did not hear or see the parties testify and come up with my own findings and conclusions.

See **Selle -vs- Associated Motor Boat Co. Ltd (1968) EA 123** and **Williamson Diamonds Ltd -vs- Brown (1970) EA 1** among many other decisions thereafter.

7. The 1st Respondents evidence was brief.

That on the material date he was a passenger in motor vehicle Registration Number KAA 560G seated behind the driver, that he saw motor vehicle KAT 068Q a lorry coming to the lane of his vehicle and a collision occurred and that he was injured and taken to hospital. That he was the only survivor in the vehicle, a Nissan caravan owned by the 1st Respondent.

Upon cross examination by both counsel, it was his evidence that the driver of motor vehicle registration No. KAA 560G died in the accident and was to blame for driving the vehicle without an insurance cover but denied that the driver was overtaking a *matatu* and further that he did not know if motor vehicle KAT 068Q took any evasive action before it landed into a ditch. He stated that the lorry KAT 068Q hit their vehicle while on its correct side.

That was the evidence of PW1, the 1st Respondent.

8. The 3rd party and the Appellant did not call any evidence but their Advocates participated in the suit by cross examination.

Upon the above uncontroverted evidence the trial Magistrate made findings

“-----that both drivers were to blame for the accident. It was clear that the driver of motor vehicle Registration No. KAA 560G was blamed for driving on the wrong lane and not having an insurance cover contrary to the law and the 3rd party blamed for driving in a zigzag manner on the road.”

9. It was his further findings that:

“Both drivers were to blame as both contributed towards it that in the absence of any evidence from the defendant and the 3rd party I am persuaded to find that the plaintiff who was the only survivor has established his case on a balance of probability against the defendant and therefore judgment on liability shall be entered in favour of the plaintiff against the defendant and the 3rd party.”

10. The appellant submits that the evidence on record does not support the trial courts findings that are plainly wrong in that the vehicles blamed by 1st Respondent was the lorry the 2nd respondents vehicle for being driven on the wrong side of the road, and not the appellants vehicle.

11. I have analysed PWI evidence and submissions by the appellant. There is no recorded evidence where PWI the 1st Respondent blamed both vehicles for negligence save that he blamed motor vehicle KAA 560G for not being insured. He was not shaken on cross examination and reiterated that he blamed the driver of motor vehicle Registration No. KAT the lorry for driving on the wrong side. There is also

no evidence that the 3rd party vehicle was being driven in a zig-zag manner or on the wrong lane. The evidence on record does not support the trial courts findings above. This court is bound by the evidence as recorded before the trial court, and reference to none recorded evidence as is the case of the trial magistrate is against the law as the court is a court of record.

12. I agree with submissions by the appellant that the findings by the trial Magistrate were upon fabricated evidence. To demonstrate the above PW1 stated as hereinunder:

“---The lorry motor vehicle Registration No. KAT hit us on our side. I saw the lorry come to our side---

The motor vehicle that hit us belonged to Kanini Haraka.”

PW1 blamed the vehicle he was travelling KAA 560G because it was being driven without an insurance cover.

Further, the trial magistrate made a finding that:

“PW1 had established his case on a balance of probability against the Defendant and therefore judgment on liability shall be entered against the defendant and the 3rd party.”

Once again, the above conclusion is not based on the evidence on record. It is clear that the trial Magistrate erred in stating that:

“-----Judgment on liability shall be entered against the defendant and the 3rd party when he found liability having been established against the defendant, and not against the 3rd party, now the appellant.”

13. It is true that the appellant (3rd party) failed to adduce evidence to rebut the pleadings of the 2nd Respondent in its defence as was its case as it did not call evidence to prove its allegations of contributory negligence in its own defence. See **Section 107 Evidence Act**.

Both the 2nd Respondent and the appellant having failed to prove their allegations against each other, the only evidence that the court must be bound by is the 1st respondents evidence that the 2nd Respondents vehicle KAT 068Q was to blame for the accident.

14. I do not agree with submissions by the 1st respondent that failure to insure a motor vehicle and having it being driven on a road would contribute to an accident. In my considered view, that is an offence under the Traffic Act but cannot in itself be considered as having been a factor in causing or contributing to the causation of the accident. The evidence of PW1 was that he blamed motor vehicle KAA 560G for not having an insurance cover but not for being driven negligently.

15. In the case **Mwania -vs- KBS C.A No.302 of 2002**, the respondent did not testify but made a feeble attempt in its defence by raising the issue of 3rd party proceedings as it tried to blame another car as the main cause of the accident.

The court of appeal held that:

“--the issue of 3rd party proceedings was not taken any further and hence it remained as mere allegation in the respondents defence.”

Under **Section 107 and 108 of the Evidence Act**, it is upon the person who asserts to prove. To that extent the 1st respondent did not blame or prove any negligence against the appellant driver though his evidence was not contraverted. He blamed the 2nd Respondents driver only.

16. A 3rd party once served with the 3rd party notice and proceedings, it becomes a party to the proceedings with same rights and obligations under its defence and ought to be treated as a defendant sued by the party issuing the 3rd party notice being treated as a plaintiff in the suit. A separate action independent of the original action is thus created by a 3rd party notice, and proceedings.

- See **Halsbury's Laws of England 2nd Edition, Vol. 37 at Paragraph 257.**

I agree with the Appellants submission that there are two actions being tried as one, the plaintiffs cause of action against the defendant and the Defendants action for contribution and indemnity against the 3rd party. The defendant is thus treated as plaintiff in 3rd party proceedings.

That being the case, and as in an ordinary suit by a plaintiff against a defendant failure to prove its case automatically leads to a dismissal of the suit To that extent then, the defendant/2nd Respondent hereof having failed to prove its case against the appellant (3rd party) the suit ought to have been dismissed against it. The claim by the 2nd Respondent against the Appellant for contribution and indemnity therefore is dismissed.

That leaves the 2nd respondent wholly to blame for the accident, a fact supported by the evidence on record.

17. On the above findings, it is my conclusion that the judgment of the trial court on apportionment of liability was erroneous as it was not supported by the evidence. I am persuaded to set aside the said Judgment and substitute it with a judgment that the 2nd Respondents motor vehicle registration No.KAT 068Q was the sole cause of the accident. The appeal thereof succeeds wholly and is allowed with costs.

18. The trial court had ordered costs split equally between the 2nd Respondent and the appellant. I set aside that order on costs and direct that as the appeal has been wholly successful, the costs of the appeal be borne by the 2nd respondent and payable to both the appellant and the 1st Respondent.

It is so ordered.

Dated, Signed and Delivered this 2nd Day of February 2017.

J.N. MULWA

JUDGE