



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 178 OF 2010

PETER MUANDIKO MUENDOAPPELLANT

VERSUS

JUSTUS KYENGO NDILO1ST RESPONDENT

STEPHEN MWANGI2ND RESPONDENT

(An appeal from the judgment of Senior Principal Magistrate Hon. S. Mungai at Machakos Law Courts in CMCC No. 488 of 2010

delivered on 7th December, 2010)

JUDGMENT OF THE COURT

The Appeal

1. The appellant filed this appeal on the 7th June, 2013 and advanced four (4) grounds of appeal on the face of the Memorandum of Appeal as follows;

- a. The learned magistrate erred in law and fact in making a finding that the Appellant herein had not proved liability as against the respondents herein.
- b. The learned magistrate erred in law and in fact in disregarding the appellant's testimony and wholly believing the respondents, testimony.
- c. The learned magistrate erred in law and in fact in failing to consider the appellant's submissions placed before it.
- d. The learned magistrate erred in law and in fact in failing to consider the fact that the appellant was not blamed and/or charged by the police after the said accident.

2. The appeal is an appeal from the decision of Hon. Mungai SPM in Machakos CMCC No. 488 of 2010 which was filed in court on the 23rd April, 2009. The plaintiff in the aforesaid suit claimed special damages for the sum of Kshs. 23,398/=, General damages for pain and suffering and costs and interests of the suit, arising from injuries occasioned to her after she was hit by motor vehicle registration number

KAP 502H.

3. During trial, the plaintiff testified that he was on the 4th June, 2008 riding his bicycle from heading to Wamunyu following Kitui- Machakos Road when motor vehicle registration number KAP 502H was so negligently and/or recklessly driven and/or managed that the same veered off its lane and knocked him as he was riding way off the road. The plaintiff testified that he sustained the following injuries:

- a. Fracture of an ankle joint.
- b. Inure on right wrist
- c. Injury right shoulder
- d. Injury left ankle joint.

4. He further testified that he was taken to Machakos Level 5 Hospital where he was admitted for two months.

5. The defendant testified and confirmed that indeed an accident occurred on the 4th June, 2008 involving the plaintiff. He was the driver of motor vehicle registration number KAP 502H. He also confirmed that the plaintiff was injured as a result of the said accident. He testified that the plaintiff was hit by a cyclist who was riding behind him and not the defendant. He did not call any witness and hence his evidence remains uncorroborated.

6. The appellant prays for the following;

- i. That the appeal herein be allowed and the said judgment be set aside.
- ii. That this court does proceed to make a judgment on liability and quantum.
- iii. That costs be to the appellant.
- iv. Any other relief the court might deem fit to grant.

7. The appeal is opposed by the respondent. The respondent's case is that PW1 in his statement admitted that there were two cyclists cycling ahead of the respondent's vehicle towards Wamunyu on the left side of the road. He heard a motor vehicle behind him and they both left the road since there was an oncoming lorry on the right lane. DW1 in his evidence told the trial court, that two cyclists were cycling side by side and when he hooted at the two cyclists that other cyclist not before court who was cycling on the plaintiff's right side moved behind him and the impact was between the plaintiff and the 2nd cyclist not before court due to confusion or instability of the second cyclist when DW1 hooted. The Respondent's case is that there exists no nexus between the plaintiff and the defendant. Further, the respondents told the trial court that he was driving at speed of 15-20KPH since the road was under construction and to avoid causing knocking down the cyclists, DW1 applied brakes which he could easily achieve since he was not at a high speed. He also hooted as he could not swerve to his right since there was an oncoming lorry and Road Traffic rules do not encourage dangerous overtaking on the right lane where the right lane had oncoming traffic. It would have been a tragic accident had he swerved to the right lane.

Duty of Appellant Court on first appeal

8. This duty was established in the Kenya Case of *Abok James Odera t/a A. J. Odera and Associates Vs. John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR*

“On first appeal... The court should reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the

witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

9. I have accordingly analyzed the evidence placed before the trial court to enable this court make its own findings on the matter.

Determination

10. Parties filed submissions which I have considered. The only issue I raise for determination is whether or not there was enough evidence placed before the trial court to enable it allow the suit. From the trial, the following issues arose;

i. That there was an accident which was primarily caused by the defendant who admitted to hitting the first cyclist, and then alleges that the first cyclist then hit the second cyclist. However, the defendant did not call the said first cyclist to give evidence. The defendant was the sole witness in his case and his evidence was not corroborated.

ii. The defendant admitted in his evidence of paragraph 7 of the Records of Appeal that he was driving at a slow speed of 15-20Km/h. However he does not explain why he did not stop. It is the finding of this court that the defendant had ample opportunity to stop his vehicle and to avoid the said accident.

iii. There is no dispute that the plaintiff was injured in the accident. Even if this court were to accept the defence of the defendant that it was the first cyclist who hit the plaintiff still the issue for the court to consider is the causation of the events. In this case, there is a close nexus between the defendants hitting the first cyclist who then hits the plaintiff. Therefore, this court finds that the proximate cause of the plaintiff’s injuries was the defendant who must assume liability for the same.

11. For these reasons, the appeal succeeds on liability. Since the parties did not raise any objection to the finding of the court on general damages, the sum of Shs. 350,000, which the trial court stated it would have granted had the suit succeeded, will remain, together with special damages of Shs. 23,398.

That is the judgment of the court.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 8TH DAY OF FEBRUARY, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Muumbi - for Nthiwa for Appellant