



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NUMBER 70 OF 2014

KENYA SUGAR RESEARCH FOUNDATION. APPELLANT

VERSUS

SOSPETER WANYAMA NYONGESA. RESPONDENT

AND

KISUMU HIGH COURT OF CIVIL OF 71 OF 2014

KENYA SUGAR RESEARCH FOUNDATION. APPELLANT

VERSUS

VYONE A OKINYO (*Suing Through Next Friend Tobias Okinyi Ogwallo*).RESPONDENT

**(BEING AN APPEAL FROM THE JUDGMENT AND DECREE IN ORIGINAL WINAM SRMCC
20/2009 DELIVERED ON 5TH JUNE, 2014 BY C. N. MASALE – SENIOR RESIDENT
MAGISTRATE)**

J U D G M E N T

The two appeals Kisumu HCCA No. 70 of 2014 and Kisumu HCCA 71 of 2014 were by consent consolidated on 30th November, 2016. Sospeter Nyongesa the Respondent in HCCA 70 of 2014 was a motor cyclist riding the same along Bondo-Usenge road on the material day on 3rd December, 2008. Yvonne A. Okinya was a pedestrian along Usenge-Bondo Road when at Usigu area the Appellants motor vehicle Registration No. KAW 147Z Toyota Prado was so carelessly managed and/or riven that the same lost control and veered off the road knocking the Respondent as a consequence of which she sustained injuries.

Sospeter Wanyama Nyongesa the Respondent in Civil Appeal No. 70 of 2014 in the suit filed in the magistrate's court along Usenge-Bondo Road where the defendants motor vehicle Registration No. KAW 147Z Toyota was carelessly and recklessly driven or managed thereby causing the same to knock the plaintiff's motor cycle from behind and as a consequence caused him to sustain injuries from which he suffered damage. The claim by Yvonne Okinyo the Respondent in High Court Civil Appeal No. 71 of 2014 who was a pedestrian is that she also suffered injuries after being knocked down by the vehicle.. They both blamed the accident on the negligence of the defendant and/or its driver or agent.

The Appellant in its statement of defence in both files denied the claim and/or any negligence. The appellant without prejudice averred that if an accident occurred (which was denied) then the same was

due to the sole and/or contributory negligence of the motor cycle owner, rider, who is the Respondent.

Appellant gave the particulars of negligence on the rider. Appellant blamed the rider riding at excessive speed, riding a defective motor cycle, riding in a zig-zag manner, loosing control of the motor cycle, riding on the wrong side of the road, veering into the path of the motor vehicle and abruptly turning whilst the motor vehicle was overtaking and hence ramming into the motor vehicle.

After, a full hearing in which the Respondent gave evidence and the Appellant called the driver of the motor vehicle KAW 147Z as a witness, the trial court found the Appellant 100% liable and awarded Sospeter Wanyama Ksh.200,000/- and Vyonne Okinyo Ksh.170,000/- general damages for pain, suffering and loss of amenities.

Dissatisfied with the judgment and decree the Appellant preferred this appeal on the following main grounds: -

- 1. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on liability before here superficially and consequently coming to a wrong conclusion on the same.***
- 2. The learned trial magistrate grossly erred in finding the defendant 1005 liable.***
- 3. The learned trial magistrate erred in not taking into account the evidence presented before her in totality and in particular the evidence presented on behalf of the Appellant.***
- 4. The learned trial magistrate erred in failing to hold that the Respondents had failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondent.***
- 5. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits entered and thereby arrived at a decision unsustainable in law.***

Mr. Nyamweya counsel for the Appellant who argued this appeal submitted on only one issue that the trial court erred in not finding that the Respondent Sospeter who was the motor cycle rider contributed to the occurrence of the accident and therefore should have borne some contribution on liability. He submitted that there was evidence that Sospeter the motor cycle rider suddenly braked and decided to turn to the right side of the road without indicating thereby causing the accident. He submitted that had Sospeter indicated his intention to turn right the accident would not have occurred.

Mr. Singalale for the Respondent submitted that the trial magistrate found the Appellant's driver liable because of his negligence in driving at excessive speed of 70KPH instead of 50 KPH on that road; that there is evidence on record that Sospeter indicated his intention to branch to the right side, but the motor vehicle that was following him hit him from behind.

This is the first appeal. The duty of the first appellate court was stated by the Court of Appeal in **Abok James Odera T/a A. J. Odera and Associates Vs John Patrick Machira T/a Machira & Co. Advocates (2013) eKLR** thus: -

“In a first appeal from the High Court, the Court of Appeal should reconsider the evidence evaluate it itself and draws its own conclusion 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 responsibly of the court is to rule on the evidence on record and not to introduce extraneous matters nor dealt with the parties in the evidence.”

The single issue raised in the appeal and which commends itself for determination is whether the Appellant's driver was solely responsible for the accident and also the Respondents contribution to the occurrence of the accident so as to bear some liability. PW 1 Sospeter, testified how the accident occurred thus: -

“On that day I was from Bondo headed to Usenge. I was riding a motor bike. Then a vehicle that was behind me hit me. We were at Usigu area when I got hit. The vehicle hit me from behind. I was riding the motor cycle on the left side of the road. The vehicle hit me and threw me in a ditch on the right side. The vehicle was registration No. KAW 147Z. I got injured. I passed out. I was taken to Got Ajulu Hospital. I sustained injuries on my head, back and shoulder. I sustained cuts on my head. Also on my chest. My neck got twisted. I was then referred to Bondo District Hospital. I have the treatment book for Got Ajulu MFI P.1). i also have the summary documents from Bondo Hospital MFI P.2. A and B.

I reported the accident at Bondo Police Station. I was provided with a P3 (MFI P.3) I was also issued with a police abstract (MFI P.4). I also went for a check-up at Dr. Okombo. Medical Report (MFI P.5). I was informed by the police that the vehicle belonged to Kenya Research Foundation it had been written on the vehicle. I blame the driver of the vehicle for causing the accident, he was over speeding.”

In answer to cross-examination by advocate for the Appellant, he replied: -

“I was riding my motor bike. The left side of the vehicle hit me. I was on the left side of the road, the vehicle threw me off the road to the right side of the road in a ditch. I had seen the from my side mirror. The vehicle was being driven at high speed. When I noticed the vehicle approaching me, I moved to the left. The road is a tarmac one. People were there because we were almost reaching the junction.”

The Appellant called DW I John Mosedi Obeli who testified that On 3rd day of December 2008, he was driving motor vehicle registration number KAW 147Z, Toyota Prado as its driver having been employed by the Defendant herein as such. That on fateful day he had been assigned to drive the said vehicle towards Usenge from Kisumu and that when he reached Usigu there was a motor cyclist who was driving towards the same direction with him and on reaching Usigu market the said motorcyclist went ahead of him and turned abruptly to the right. I swerved to the right to avoid collision and that when the cyclist saw that he was going to hit him he jumped off the motorcycle and fell in a ditch. He stated further that there were two (2) young girls on the right side who ran away and instead fell and were injured. He thus blamed the plaintiff herein as he left from the edge of the road on the left and abruptly turned to the right side.”

The learned trial magistrate analyzed the evidence on the occurrence of the accident and liability and rendered himself in the judgment thus: -

“He did confirm further that it was at Usigu Market that the accident occurred. Is the speed of 70Km/Hour a speed to be driven at a market place the answer is No. the traffic rules provides for a speed of 50 Km/hour at a market place.”

From the evidence on record, there is no doubt that an accident involving motor vehicle Registration No. KAW 147Z Toyota Prado and the motor cyclist Sospeter occurred. Sospeter testified that he was in front of the motor vehicle and had indicated that he was turning to the right side of the road. The DWI, the driver testified that when he saw that Sospeter turning to the right, he also swerved to the right side where upon than Sospeter fell into a ditch. The point of impact according to the sketch was on the extreme right side of the road. This evidence supports Sospeter’s assertion that the Appellants driver veered to the right side of the road where he knocked him. This is the finding of fact by the trial magistrate.

I have carefully considered the record of the trial court. The first appellate court is guided by the principle stated in the Court of Appeal in ***Nkube Vs Nyamira*** 1983 KLR llwaw, ***Kneller, Hancox JJA J:*** -

“A Court of Appeal will not normally interfere with the finding of the fact by a trial court unless it is based on no evidence or a misapprehension of evidence or the Judge is shown demonstrable to have acted on wrong principle in reaching his conclusion.”

Having carefully considered the record, the appeal and the submissions by the Appellant and Respondent's. I am satisfied from the evidence that the finding of the 100% liability on the part of the Appellant was premised on sound and credible evidence on record. I therefore, do not find merit in these appeals and dismiss with other costs.

Dated, signed and delivered at Kisumu this 5th day April 2017.

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R N RIECHI

JUDGE