



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 9 OF 2013

JAMES KANYINGI MACHARIA.....1ST APPELLANT

ANNE NJATHI.....2ND APPELLANT

VERSUS

CRISPO KARIUKI MACHARIA.....RESPONDENT

(Being an appeal against the judgment and decree in Nyeri Chief Magistrates Court Civil Suit No. 179 of 2011 (Hon. J. Wambilyanga, Senior Resident Magistrate))

JUDGMENT

The respondent sued the appellants for both general and special damages, costs of the suit and interest calculated at court rates on the damages and costs. The claim against the respondents arose out of a road traffic accident which occurred on 2nd April, 2010 along Nyeri-Nyahururu road. The accident involved the respondents motorcycle registration number **KMCE 730 U** which he was riding at the time and motor vehicle registration number **KBK 122 L**. The motor vehicle was registered in the name of the 1st appellant but was apparently owned and being driven by the 2nd appellant at the time of the accident.

It was the respondent's case in the magistrates' court that the accident was occasioned by the negligence of the 2nd appellant whom he alleged she drove the motor vehicle so carelessly and recklessly that she caused it to knock the respondent down causing him serious injuries in the process; as a result, he suffered loss and damage for which he held the appellants responsible.

The respondents denied the respondent's claim and filed a statement of defence which they later amended to include the counterclaim against the respondent. They admitted that a road traffic accident involving motor vehicle registration number **KBK 122 L** and the respondent's motorcycle registration number **KMCE 730U** occurred on the date and place referred to by the respondent but denied being responsible for the accident as alleged or at all. They instead attributed the accident to the negligence of the respondent and held him responsible for the damage to their motor vehicle and the losses they suffered which amounted to Kshs 365,913.30/=. They also sought for costs and interests of the suit.

Upon careful consideration of the evidence before her and the submissions by the learned counsel for the respondent and the appellants, the learned magistrate came to the conclusion that both the respondent and the second appellant were responsible for the accident although the latter was largely to blame for it; she therefore apportioned liability at the ratio of 90:10 as against the appellants. Subject to this apportionment, she awarded the respondent the sum of Kshs 600,000/= in general damages and Kshs 148,064/= as special damages; she also awarded the appellant costs of the suit and interest at court rates. The appellant's counterclaim was, on the other hand, dismissed with costs.

The appellants were aggrieved by this decision and inevitably appealed against it; in their memorandum of appeal filed in court on 27th February, 2013 they raised the following grounds against the decision of the subordinate court:

1. The learned magistrate erred in law and in fact in making findings that the respondent discharged the burden of proof of his case on a balance of probabilities based on the evidence adduced in support of his case.
2. The trial magistrate erred in fact and in law in apportioning liability against the appellants taking into consideration the pleadings and the evidence adduced at the trial.
3. The learned trial magistrate misapprehended the case as put forth by the parties in their pleadings, evidence and their submissions by basing her findings on rule 77 of the traffic rules and thereby holding that the second appellant made a turn at an undesignated place.
4. The learned magistrate erred in law and in fact in disregarding relevant factors brought out by the evidence adduced clearly showing that the respondent was to blame for the accident.
5. The learned magistrate erred in law and in fact in dismissing the appellants' counterclaim against the weight of evidence adduced by the appellants in proof thereof as well as the principles of law founding the claim.
6. The learned trial magistrate misapprehended the principles governing the law of insurance in dismissing the appellant's counterclaim on the basis that transfer of ownership of the subject vehicle to the second appellant had not been concluded.
7. The learned trial magistrate erred in law in determining the appellant's counterclaim on the issues that were neither pleaded by the parties, nor arose from the conduct of the trial and were not submitted upon by the parties.
8. The learned trial magistrate erred in fact and in law in failing to take into consideration the submissions and precedents cited by the appellants on the issue of liability thus coming to the erroneous findings on liability against the appellants.

In order to appreciate whether the learned magistrate came to the correct conclusion and therefore whether there are any merits in the appellant's appeal, it is necessary for this court, as the first appellate court, to consider the evidence afresh and come to its own conclusions on findings of fact except that in doing so, it has to bear in mind that the subordinate court had the advantage of seeing and hearing the witnesses. (See **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126**).

According to the respondent, he was on his way, riding a motorcycle, to Endarasha from Nyeri. Soon after he passed Mweiga airstrip, two motor vehicles caught up with him; of the two vehicles, the appellant's motor vehicle overtook him. There was a road junction ahead of them; this junction, is on the right-hand side of the road as one faces the direction in which the three motorists were travelling. It is an intersection of the main road on which their vehicles were travelling and a rough road that leads to Ark Hotel where, as it later turned out, the two motor vehicles were headed.

The vehicle behind the respondent slowed down as it approached the junction apparently to turn join feeder road leading to the hotel but the appellant's vehicle which, as noted, was the vehicle in front, only slowed and pulled over to the left after it had passed the junction. It was the respondent's evidence that it had travelled for about 200 meters beyond the junction. Realising that she had missed to take the right turn, the second appellant attempted to turn and drive back to the junction. It is in the course of this attempt that her motor vehicle collided with the respondent's motorcycle. The respondent admitted that the second appellant indicated that she intended to drive to the right but since he was also driving at a high speed all he could do was to swerve to the far right of the road to avoid a collision between the two

vehicles. Despite his efforts to avoid the accident, his motorcycle was hit on its left side as a result of which he was thrown off the road. His left thigh was also fractured in the process. Traffic police officers arrived at the scene almost immediately and one of them, police constable **George Omollo (PW3)** testified that they found the respondent next to his motorcycle, on the right side of the road. The appellant's motor vehicle was also on the same side of the road.

Despite the appellants' denial of how the accident occurred, the 2nd appellant's version of events was no different from that of the respondent. She testified that she was not just the driver of motor vehicle registration number KBK 122L at the time material to the suit but that she was also its owner though it was registered in the name of the 1st appellant. It was also her evidence that she together with her friends were on their way from Nairobi to Aberdares Country Club (which I suppose is the same place as that which the respondent referred to as the Ark Hotel); her friends were in a different car behind hers. She admitted that before she arrived at the turn to the Country Club she overtook the respondent who was riding on a motorcycle; however, she passed the junction and drove on for a distance of about 50 metres after the junction at which she was to turn. It was her evidence that she missed the turn because she was not sure where it was but when she realised her mistake she attempted to turn back and it is then that the respondent collided into her vehicle. The point of impact was on the right side of the road; that is, on the left lane in the direction of Nyeri town. The motorcyclist rested on the right side, off the road, after he was knocked. She claimed that as a result of the accident her motor vehicle was damaged. She sought compensation from the respondent by way of a counter-claim.

Constable Omolo acknowledged issuing to the respondent a police abstract on 12th May, 2010; however, it was not indicated in the abstract whether the investigations had been completed or not; neither was there any suggestion of whether any of the two motorists was to be charged and if so the nature of the charges that were to be preferred against either or both of them. The officer suggested in his evidence that he issued this police abstract before he completed the investigations; in his own words, he stated thus;

“Yes, I completed investigations after I issued the abstract of 12th May, 2010.”

Curiously though, the same officer had issued another police abstract much earlier, in particular on the 8th April, 2010, in which he had not only blamed the respondent for the accident but he had also indicated that he intended to prefer a charge of careless riding of a motor cycle against him. If the officer's evidence is anything to go by, the question that immediately arises is how he could possibly have come to the conclusion that the respondent was to blame for the accident on 8th April, 2010, when he only completed his investigations after the 12th May, 2010. In the absence of any plausible explanation for this discrepancy, the conclusion that one can logically come to is that the officer was simply not truthful and therefore an unreliable witness; it followed that his evidence was not creditworthy.

Going by the evidence of the 2nd appellant and the respondent and even the police officer himself, the facts of how the accident happened are not in dispute. For instance, it is not in dispute that the 2nd appellant's vehicle overtook the respondent's motorcycle and thus she was aware that the respondent was a rider behind her; it is not in dispute that the 2nd appellant surpassed the junction at which she ought to have turned to the right but only realised her mistake after she had passed the junction; constable Omolo estimated the distance she had covered beyond the junction to be 36 metres though the 2nd appellant herself put it at between 50 to 100 metres. It is also not in dispute that the accident occurred when the 2nd appellant attempted to turn and drive back to the junction.

The photographs of the 2nd appellant's damaged vehicle taken after the accident showed that the point of impact was at the front right side of the vehicle.

My assessment of this evidence leads me to the conclusion that the 2nd appellant was solely to blame for the accident. These facts point to an irresistible conclusion that she obviously attempted to make a U-turn at an undesignated place on a highway and more so when it was not safe to do so. In driving the way she did, the 2nd appellant did not have regard to the safety of other motorists and in particular the 2nd

appellant. When I consider the points of impact on both his motor cycle and the 2nd appellant's vehicle, I am bound to believe the 2nd respondent that he attempted to avoid the accident by riding to the far right. The 2nd appellant herself admitted in her evidence that her vehicle was 90 degrees across the road and the point at which it collided with the motorcycle was on the right lane. I also find the undisputed facts about the part of the respondent's body that was injured and the position he and his motor cycle landed after the collision to be consistent with his version of events. In my humble view, he did all that a reasonable motorist would do in the circumstances to avoid the accident. As a matter of fact, there was no basis why the learned magistrate apportioned liability between him and the second appellant as the facts point to the 2nd appellant's negligence; however, since he did not cross-appeal, I have no reason to interfere with the learned magistrate's apportionment of liability.

The only concern I would have had with the 2nd appellant's case is whether general damages were proved. My doubts on this aspect of the respondent's case arise from the fact that the evidence on the injuries he sustained was not given by a medical doctor but by a person who described himself as an "occupation therapist". He testified that he examined and prepared a report on the nature and extent of the injuries that the respondent sustained; his report was, however, admitted in evidence as a medical report in proof of the injuries without any objection by the appellants. After considering the record and the submissions they filed both in the lower court and in this court, the appellants do not appear to have taken issue with this evidence; neither is there such a suggestion in the grounds of appeal against the decision of the learned magistrate. The issues for determination as framed by the appellants in their submissions are instructive that the medical evidence has all along been less of a concern to them. In any event, I suppose it could not have been open to the appellants to raise this issue at this stage if it was not taken at the subordinate court in the first place. The appellate jurisdiction with which this court is clothed restricts it to dealing only with those issues which have been placed before it. It is for this reason that I am restricted from venturing into the competency or lack thereof of any piece of evidence that the appellant themselves appear to have been comfortable with.

I have also noted that the appellants have not questioned any of the awards made by the magistrates' court either under the head of special damages or general damages. Looking at the grounds of appeal and the submissions they have filed in this court, it is apparent that the appellants appear to have been more concerned with the issue of liability and their counterclaim than with the extent of damages payable. For this reason, I will also not pretend to question the awards made by the learned magistrate; I will instead leave them undisturbed.

Turning to the appellants' counterclaim, it is obvious that it was made, on the discounted notion that the respondent was negligent and therefore responsible for the accident. If liability was not proved and therefore did not attach, there was no basis upon which the appellants could lay any claim against the respondent. For this reason alone, the counterclaim ought to have failed.

If I have to say anything further on this counter-claim, I note that it was instigated at the instance of an insurance company which, according to its representative, Isaack Odhiambo Otieno, paid the sum of Kshs 335, 213.30 towards repairs and Kshs 30,000/= for hire of an alternative car for its insured. The company was therefore effectively seeking reimbursement of the sums paid as a result of the occurrence of accident or the insured event under the doctrine of subrogation. This being the case, the hurdle the appellants still had to surmount, assuming they had proved liability against the respondent, was whether the insurance company could competently enforce its rights under this doctrine in the name of the 2nd appellant rather than through the 1st appellant.

The 2nd appellant was consistent in her testimony that the motor vehicle was hers though it was registered in the name of the 1st appellant at the time of the accident. I found no reason to doubt her because the 1st appellant did not testify. I am of course aware that according to **Section 8 of the Traffic Act Cap. 403**, the person in whose name the vehicle is registered is presumed to be the owner of such vehicle unless there is evidence to the contrary. It says:

8. Owner of vehicle

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

As far as the appellants' case is concerned, what the Act refers to as "the contrary" is, in my humble view, the evidence by the 2nd appellant that the vehicle belonged to her and not the 1st appellant. As noted, the 1st appellant did not testify and so her evidence in this regard was not controverted.

It is well settled that under the doctrine of subrogation, the underwriter or the insurance company is entitled to every right of the assured including the right to compensation due to the insured where, as it was in the appellants' case, the owner of the motor vehicle was alleged to have suffered damages and loss as a result of the road traffic accident (**see *Castellain versus Preston (1883) 11 QBD 380, per Bret LJ***). In such a case, however, the insurance company can only make its name on behalf of and in the name of its insured.

The evidence presented by the by the insurance company, which included a motor accident report form and the assessor's report on the nature and extent of the damage to the insured vehicle, showed that the insured was the 1st appellant and that the 2nd appellant was only the driver of the motor vehicle at the time of the accident. This information obviously contradicted the 2nd appellant's assertion that, save for formalisation of the transfer of the vehicle, she was its owner. But if the court was to take her at her word, it would mean that the insurance company could not enforce its subrogation rights in her name because there was no evidence of any contract of insurance between her and the insurance company. I understand the insurance company to have been very much cautious of this limitation when Isaack Odhiambo, its legal officer, stated in his testimony:

If an insured disposes of the motor vehicle the policy lapses. I am not aware that Mr Kanyingi had disposed of the motor vehicle to Anne. Of course action could have been different if we knew first defendant had disposed of the motor vehicle. That information was not disclosed to me but it is not the first time it is happening. If that information of ownership could have been disclosed the cause of action could have been different but (sic) the interests involved are usually different.

If the evidence of the 2nd appellant was to be disregarded and the court proceeded on the assumption that the motor vehicle belonged to the 1st appellant, then the predicament that the insurance company found itself in was that the 1st appellant did not testify. The implication of the omission of the 1st appellant's testimony was that the appellants' counterclaim could not possibly succeed in the absence of the evidence of the owner of the motor vehicle. As much as special damages were pleaded in the counter-claim, they were to be proved too. In my humble view, no one else was better placed to prove them other than the owner of the motor vehicle himself. Suffice it to say, as far as the insurance company's subrogation rights were concerned, damages cannot be said to have been proved if the person through whom they were claimed did not testify to establish their nature and extent. It is trite that special damages must not only be pleaded but they must be proved as well. Talking of the need to plead as well as to prove special damages, the Court of Appeal said in ***Maritim & Another –v- Anjere (1990-1994) EA 312 at 316***, that:

In this regard, we can only refer to this court's decision in *Sande –v- Kenya Cooperative Creameries Limited Civil Appeal No. 154* where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.

The appellants' counter-claim which, as noted, was in effect the insurance company's claim failed this test of proof and therefore their claim was bound to fail.

The inevitable conclusion that I have to come to is that I find no merit in the appellants' appeal. I hereby dismiss it with costs.

Dated, signed and delivered in the open court this 5th May, 2017

Ngaah Jairus

JUDGE