



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO.240 OF 2013

(CORAM: F. GIKONYO J)

Appeal arising from the judgment of Hon D. O Onyango (AG. SPM) delivered on 26.3.2013 in Meru CMCCNo.182 of 2010

TIMOTHY KINYUA.....APPELLANT

VERSUS

TIMOTHY MUGAMBI.....1<sup>ST</sup> RESPONDENT

R.C.C CONSTRUCTION COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT

JUDGMENT

[1] This appeal arises from the judgment of Hon D.O Onyango (AG. SPM) in Meru CMCCNo.182 of 2010 in which he dismissed the Appellants claim suit against the Respondents for general damages for pain, suffering and loss of amenities and special damages. The cause of action arose from a road traffic accident that allegedly occurred on 16<sup>th</sup> January 2010 along Meru Nkubu road. The Appellant was aggrieved by the said judgment and filed this appeal setting out the following grounds of appeal:

1. **THAT the Learned Magistrate erred in law and in fact in disregarding the evidence of the appellant and his witnesses and therefore arriving at a wrong finding.**
2. **THAT the Learned Magistrate erred in law and fact in finding that the appellant had not proved his case which on the contrary the appellant had demonstrated and proved his case and connected the 1<sup>st</sup> respondent to the accident that occurred on 16<sup>th</sup> January 2010.**
3. **THAT the Learned Trial Magistrate erred in law and in fact in disregarding the contents of the police abstract which document formed conclusive evidence as the same was not objected thereto.**
4. **THAT the Learned Trial Magistrate erred in law and in fact in selectively considering the evidence on record and specifically the evidence of the police officer and therefore occasioning the appellant miscarriage of justice.**
5. **THAT the Learned Magistrate erred in law and fact by raising the bar on the burden of proof as required in civil matters and therefore arrived at a wrong decision.**

Appellant's case

[2] It was alleged that, on 16<sup>th</sup> January 2010 at 5:00PM the Appellant he was riding his bicycle beside the main road from Meru to Nkubu when a lorry that was trying to overtake another motor vehicle and veered off the road to avoid a head on collision with an oncoming vehicle and hit him. The Appellant stated that he testified that the defendants' motor vehicle which hit him was initially registered as KG 5189 and that this information was corroborated by the traffic officer who testified that KG number is given before registration. The Appellant also stated that the details in the police abstract were never objected to during trial. Finally, the Appellant submitted that the trial court placed very high standard of proof against the Appellant. On the basis of those reasons, the Appellant urged the court to find the Respondents 100% liable for the accident herein.

### **Respondents' view**

[3] On the other hand, it was submitted for the Respondents that the Appellant failed to prove that the motor vehicle that knocked him down was that of the Respondents. According to the Respondents, the evidence shows that the Appellant was not able to know the registration number of the vehicle that knocked him down. Again, the Respondents argued that; (1) the Appellant stated in his initial report to the police that an unknown motor vehicle knocked him down; and (2) his witness who claimed to have been walking behind him when the accident occurred was also not able to see the registration number of the vehicle that knocked the appellant down. All the witness knew was that the said motor vehicle was white in colour and had foreign registration number plates. Consequently, the Respondents submitted that the appellants appeal lacked merit and urged the court to dismiss it with costs.

### **DETERMINATION**

[4] I have carefully considered this appeal, the rival submissions by the parties and the authorities cited herein. This being a first appeal, the court shall analyze and re-assess the evidence on record and reach its own conclusions except bearing in mind that it neither saw nor heard the witnesses testify. On this duty of court, see *Selle v Associated Motor Boat Co. [1968] EA 123* and *Kiruga v Kiruga & Another [1988] KLR 348*.

[5] In my re-evaluation, I will not rehash the evidence as it is part of record. The Appellant's evidence as was recorded by the trial magistrate was that; on 16<sup>th</sup> January 2010, he was riding a bicycle from Meru towards Nkubu. When he reached Gitimbine he saw two motor vehicles which were heading to Meru. It was his evidence that one of the motor vehicle was overtaking the other vehicle when a lorry which was coming from Meru veered off the road to the left lane in order to avoid head-on collision. In the process, the lorry hit him off the tarmac. It was his further evidence that the lorry had registration number KG 5189 but now KBL 613B. He told the trial court that he got the registration number of the lorry later.

[6] Of significance, the Appellant in cross examination stated that he has evidence to show that RCC Construction owned the lorry in question and he produced records dated 16.1.2010. But at another point in cross-examination, he stated that he had nothing to show that KG 5187 was subsequently registered as KBL 613B. PW 3 who was said to have witnessed the accident stated in cross examination that he could not recall the registration number of the lorry but the number was not Kenyan.

[7] The 1<sup>st</sup> Respondent testified as DW2. He stated that, at the material time herein, he was employed by the 2<sup>nd</sup> Respondent as a driver. At the time, he was driver of KG 5187, make Atego, Mercedes. He told the court in cross-examination that he does not know the current registration number of KG 5187. He denied ever being at the scene of the accident or being involved in the accident of 16.1.2010. He stated that on 17.1.2010 while in town he was alerted that some strangers were taking details of the registration of vehicle registration number KG 5187. Later that afternoon, he was arrested on allegation that he had crushed a person. He denied the allegations and was released. He was arrested again and he denied involvement in the accident and he was released again.

[8] From the evidence above, although the Appellant was involved in an accident on 16.1.2010, the identity of the vehicle which hit him is clearly in controversy. It was the duty of the Appellant to prove that;

**(1) He was hit by motor vehicle KG 5187 which was subsequently registered as KBL 613B; and**

**(2) The driver of that vehicle was negligent as a result of which he was injured.**

I will, therefore, scan for other evidence on these issues.

### **Police abstract challenged**

[9] The police abstract herein was thoroughly been objected to by the Respondents. When such objections arise, the Appellant should provide evidence to identify the vehicle which hit him. I should state here that, a Police abstract draws from the police investigation report on the accident. Therefore, its contents are based on the results of investigation by the officer investigating the accident in issue. Accordingly, a contestation of the contents of a police abstract should be resolved by resorting to the results of the investigation on the accident. Thus, the OB and investigation file for the accident is crucial. DW1 PC Oliver Momanyi, a police officer attached to Meru Traffic Office testified produced accident report in OB number 11 of 16<sup>th</sup> January 2010. He told the court that the report shows that there was an accident involving the Appellant and unknown motor vehicle. But, the notes in the side margins of the OB Report mentioned ‘‘canter and white lorry’’. In cross-examination, he stated that the Police Abstract shows that motor vehicle KG 5187 was make Atego which he is not aware whether it is Mercedez. DW2 stated that Atego was Mercedez. Contrast this with the notes in the margins of the police Report which talked of Canter and white lorry. This piece of evidence is important as the records from the registrar shows the lorry registration number KBL 613D was Blue in colour. This lorry is not mentioned at all in the investigation report. In addition, DW1 did not tell the court how investigations established that KG 5187 was the lorry which hit the Appellant and that it was the one which was subsequently registered as KBL 613D. Mere fact that a vehicle with foreign number plate hit the Appellant does not mean any vehicle. The particular vehicle which bore the specific KG number plate must be identified through its registration mark within our registration system. None of this was established. There is a major lapse there. Consider what DW2 narrated; the unceremonious manner in which some strangers took details of the vehicle he was driving on 17.1.2010; and shortly thereafter he was arrested. Such incidents and information ought to have been proved by the Appellant through police investigations. In this case, there was no evidence to controvert the claims by DW2. I wonder why it was necessary to get details of the lorry in such unorthodox manner if the Appellant really had seen and noted the registration number of the lorry which hit him. I also wonder why the police did not obtain record from the registrar of motor vehicles to show that, before formal registration, KBL 613D was initially KG 5187. In sum, there was no evidence to show that:

(i) Motor vehicle registration number KG 5187 hit the Appellant; and

(ii) And that, the said motor vehicle registration number KG 5187 was subsequently registered as and is KBL 613D.

Accordingly, the Appellant did not prove that he was hit by KG 5187 which was subsequently registered as KBL 613D.

[10] In light of the foregoing, I am not able to impeach the following remarks and findings by the Learned Magistrate with regard to the Appellants evidence:

**‘‘I have carefully considered the evidence by both the plaintiff and the defendants. From the record the only evidence that points to the 2<sup>nd</sup> defendants motor vehicle KG 5178 being involved in road traffic accident is from the plaintiff. I have examined the evidence of the plaintiff during further cross examination. It emerged that the plaintiff had reported to the police that he was knocked down by an unknown motor vehicle. This was confirmed when the defendants called a traffic police officer (DW1) who produced as OB extract indicating that the plaintiff had reported being knocked down by an unknown motor vehicle. It is not clear therefore when and how the plaintiff got to get the details of the motor vehicle to be KG 5178.**

**It does not help the plaintiffs case that the alleged eye witness to the accident testified that he was not able to see the registration details of the motor vehicle that knocked the plaintiff. I find it incredible that the plaintiff who was knocked by a motor vehicle from behind and injured could have seen the registration details of the motor vehicle in question and not the eye witness. It is not clear how the plaintiff got the registration details of the motor vehicle that was filed into the police abstract. Unfortunately the person who filed the police abstract was not called to shed light on the contents thereof. The police abstract itself indicates that the case was pending investigations. The 1<sup>st</sup> defendant testified and denied being involved in the accident on 16<sup>th</sup> January 2010. He was cross examined by the plaintiffs advocate and his evidence remained unshaken. Under the circumstances I do not believe that the police abstract whose author is not known should be used as proof that the 2<sup>nd</sup> defendant's motor vehicle KG 5178 indeed knocked down the plaintiff. I find therefore that the plaintiff has failed to prove on a balance of probability that the 2<sup>nd</sup> defendant's motor vehicle KG 5178 being driven by the 1<sup>st</sup> defendant indeed knocked him and caused him bodily injuries. The plaintiffs claim therefore fails."**

[11] The upshot of my above analysis is this. The trial magistrate did not impose upon the Appellant any higher onus of proof than is required in law. The Appellant simply did not prove on balance of probabilities that motor vehicle KG 5187 or KBL 613D hit him. But before I close I must state that it is the duty of traffic police to investigate an accident to the required standard. They should triangulate and verify through investigations any information provided by witnesses in respect of an accident lest we should be thrown back to the dark days when unscrupulous ambulance chasers used to fake accidents. I am not, however, saying this particular one was a fake; except that, it is not clear how details of the vehicle herein were obtained and recorded as true state of things by the police. Accordingly, I find and hold that the Appellant did not prove his case on the standard set in law. The appeal is dismissed with no order as to costs. It is so ordered.

**Dated, signed and delivered in open court at Meru this 9<sup>th</sup> day of May 2017**

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**F.GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Mwanzia advocate for applicant

M/s. Nelima advocate for respondents – absent

Appellant – present

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**F.GIKONYO**

**JUDGE**