



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 37 OF 2013

IMPERIAL BANK LIMITED.....APPELLANT

VERSUS

DAVID KAMANZA NGUTA alias DAVID KAMANZA....RESPONDENT

J U D G M E N T

Introduction

1. On 13/3/2013, Hon. E.K. Usui, (PM) delivered a judgment in Kwale PMCC No. 179 of 2011 by which he apportioned liability at 70:30 in favour of the plaintiff (now respondent) as against the defendant (now Appellant, and awarded to the Respondent general damages in the sum of Kshs.520,000/= and special damages of Kshs.8,800/=.

2. The Appellant was aggrieved by the decision and filed the current appeal by the Memorandum of Appeal dated 26/3/2013 and filed in court the same day. The Memorandum of Appeal challenges the whole of the decision on four (4) grounds couched as follows:-

i. The Learned Trial Magistrate misdirected herself in treating the submissions of the Appellant on liability very superficially thereby erroneously arriving at a wrong conclusion on liability.

ii. The Learned Trial Magistrate did not consider or sufficiently consider the issue of contributory negligence attributed to the Respondent.

iii. The Learned Trial Magistrate proceeded on wrong principles when assessing the liability to be apportioned to the Respondent.

iv. The Learned Trial Magistrate erred in fact in finding that the Appellant was largely to blame for causing the accident when the evidence on record indicates that the Respondent was to blame for causing the accident.

3. Even though the grounds are four, all challenge only the finding on liability and I will thus consider the appeal to be against the finding on liability only and not the assessment of damages.

4. This being a first appeal challenging a decision grounded on trial courts finding of facts the principle upon which the court proceeds is that there is no right to interfere unless the finding is based on no evidence at all or that the trial court was plainly wrong in its appreciation of the evidence and

circumstances[1].

Analysis of evidence led at trial

5. At trial the Respondent as plaintiff called three witnesses being the doctor who examined the plaintiff and prepared a medical report; PW 1, A police officer who attended to produce the police records, PW 2 and the plaintiff himself, PW 3. For the Appellant one Shazad Kasmani who a passenger in the vehicle alleged to have caused the accident gave evidence.

6. From both sides of the divide the fact and occurrence of the accident is not denied. What was contested is the manner the accident occurred. An analysis of the evidence regarding how the accident occurred can only be the evidence of PW 3 and DW 1 being the only persons present when the accident occurred. Therefore to determine how the accident occurred the evidence by the two must be analyzed.

7. PW 3, the Respondent said in his evidence in Chief

“On 21/12/10 at about 7.00pm I was at Maganyakulo along Lunga Lunga Msa road. I was from left hand side to right as we face Mombasa. I was crossing I had crossed. A vehicle from Ukunda to Mombasa came fast and hit me. I had crossed the lane on the left. I stood past the yellow lane when I was hit. The vehicle did not hoot. It veered off and hit me. It was driving very fast. I had seen it before I crossed. I was sure I would cross before he arrived but the driver got confused.

When I was hit I landed on the windscreen and then thrown off the road on the right hand side just near road. The vehicle stopped on the road. I tried to avoid the accident but the vehicle came to my lane and hit me.

8. And in cross examination he went on:-

“It was at 7.00pm. The vehicle had its lights on. I saw it before I crossed and I still crossed. There was no Zebra crossing at the point. The road is straight at scene. It’s not true I ran across the road. It’s also not true I was on phone. I was never called to testify in any Traffic Case. I do not know if he was charged. I was not on the wrong”.

9. Against that evidence, DW 1, had the following account of the accident in his evidence in chief:-

“On 21/12/10 about 7.00pm, I was residing in Mombasa so I used to commute by company car. It was Registration KAU. I cannot recall. It was KAU 174D. On the way to Mombasa that day at about 7.00pm as I drove along a pedestrian abruptly crossed from right-hand side. He had been standing on side of road waiting to cross. The driver applied emergency brakes but we were too close. He hit the pedestrian. I sat at front seat passenger. Point of impact was on left hand side of vehicle”.

10. An on cross-examination the witness said:-

“Our driver was travelling to Mombasa. He stood on our left hand side. I had seen him standing with some people. About 3.

I do not know what they were doing. They were not facing the road. My car was doing about 70kmph. The driver is no longer with us. The pedestrian fell in front of the vehicle after he was hit about 4 metres away. He hit wind shield. The vehicle stopped 10 metres from the point of impact. Vehicle never ran over vehicle. He fell on wind shield and when vehicle stopped. He rolled about 1 ½ metres away. The motor vehicle stopped on the road. There was not alternative to swerve. I can’t recall if there was an oncoming vehicle or not. The wind shield of the motor vehicle was shattered. He was taken to hospital by same vehicle. There was nothing to inspect it. It is not true the pedestrian was off the road. It is not true

that if he was hit in motion he would have landed far and not on windscreen.

The pedestrian was hit on left hand side of road. It was too fast so driver only applied emergency brakes. The pedestrian had already stepped on the tarmac".

11. After analyzing the evidence by the two witnesses, the court found and held as follows:-

"The evidence by the police officer actually shows that the plaintiff was hit as he just began crossing the road. I find there is overwhelming evidence that the plaintiff contributed to the accident. It was at night and he should have exercised caution in his estimation as to the speed of the oncoming motor vehicle. The defendant's driver on the other and having seen the group of pedestrian on the road should have prudently anticipated that they could cross. Given that it was night, the driver was aware that his speed could have been easily miscalculated by the pedestrian. He ought to have reduced his speed. I find he was negligent to a greater extend. The court will apportion liability as follows:-

30% against the plaintiff

70% against the defendant".

12. For this court to interfere with the conclusions of facts by the trial court, it must be convinced as said before, that the finding is based on no evidence at all or just perverse. This is because the trial court had the benefit of hearing seeing and observing the witnesses as they testified.

13. This court has undertaken its mandate as a first appellate court to reevaluate and reappraise the entire evidence and record and I am unable to find that the finding by the trial court calls for interference by this court.

14. The totality of the evidence on record is that the Respondent was crossing the road at a straight stretch ahead of the Appellants motor vehicle. The pedestrian could be seen by the passenger in the motor vehicle from a distance. While that passenger DW 1, had no duty, not being the driver the driver had the duty to keep a look out and take precaution so as not to knock a careless person stupidly crossing the road. The rule of the road is that he who is already on the road has a right of way even if he be there unlawfully. In equity the maximum first in time is stranger in law would apply. Going by the evidence of DW 1, if the motor vehicle was doing 70KPH on a straight road, it was therefore possible to not only see the Respondent in time and take the necessary evasive action but also not to hit him. That the Respondent is alleged to have suddenly crossed the road is not borne out by evidence. The evidence by DW 1 is indeed sketchy in material aspects. He did not bother to tell the court at what distance he first saw the Respondent and at what distance he started his adventure to cross the road.

15. All in all he was not the driver of the motor vehicle to tell the court what maneuvers he undertook to around the accident. Based on that state of evidence and noting that the Respondent did say in evidence that he was hit after crossing the road coupled with the evidence of the police officer that there were skid marks whose length was undisclosed only point to an inference that the motor vehicle was most probably at a high speed. That is the only reason the driver was not able to stop or just control it to avoid the collision. I say all these because I lack the benefit enjoyed by the trial court of observing the witnesses testify. That is the more reason I must be hesitant to interfere with the trial courts findings on facts based on evaluation of the evidence taken.

16. In this matter one cannot say that there was no evidence to support the trial courts finding apportioning liability at 70:30% in favour of the Respondent. There is therefore no reason to interfere.

17. The upshot is that the Appeal lack merit and it is dismissed with costs to the Respondent.

Dated and delivered at **Mombasa** this **17th** day of **July 2017**.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Mary Njoki vs Kinyanjui Mutheru[1985] eKLR; 55m vs E.N. B [2015] eKLR & Mbogo vs Shah [1968] E.A. 93