



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 557 OF 2009

PATRICK KAHIKU MURITU.....APPELLANT

VERSUS

PAUL MUTUKU1ST RESPONDENT

JULIUS UKUNYU2ND RESPONDENT

MILKA N. KILANDI..... 3RD RESPONDENT

JUDGEMENT

1. Paul Mutuku Nguta, the 1st Respondent herein filed a compensatory suit against Julius Ukunyu, Milka N. Kilandi and Patrick Kahiku Muritu, being the 1st Respondent, 2nd Respondent and the Appellant respectively before the Senior Resident Magistrate's Court, Thika vide the plaint dated 18th September 2006 and amended on 4.4.2007. In the aforesaid plaint, the 1st Respondent sought for judgment in the following terms:
 - a. *Special damages for ksh.72,750/=*
 - b. *General damages for pain, suffering and loss of amenities.*
 - c. *Cost of future medical treatment.*
 - d. *Cost of the suit.*
 - e. *Interest on (a), (b), (c) and (d) above.*
 - f. *Any other/further relief, this court may deem just and fit to grant.*
2. Hon. L. W. Gicheha, the then learned Senior Resident Magistrate heard the suit and in the end she awarded the 2nd Respondent judgement for ksh.450,000/= as general damages and ksh.72,750/= as special damages. She also made an order directing Milka N. Kilandi and Patrick Kahiku Muritu to each shoulder 50% liability. Being dissatisfied with the aforesaid decision, the Appellant preferred this appeal.
3. On appeal, the Appellant put forward the following grounds in his memorandum
 1. ***THAT the learned trial magistrate erred in law and in fact in failing to find that the first Respondent had failed to adduce satisfactory evidence to establish and/or prove a case of negligence against the Appellant on a balance of probability and in not dismissing the first Respondent's case against the Appellant on the issue of liability.***
 2. ***THAT the learned trial magistrate erred in law and in fact in assessing contributory negligence against the Appellant at 50% in the absence of supportive evidence.***
 3. ***THAT the learned trial magistrate erred in law and in fact in failing to find that the first***

Respondent contradicted his pleadings by his evidence.

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.
5. I have considered the written submissions together with the oral submissions. I have further re-evaluated the case that was before the trial court. I have already stated that the 1st Respondent, filed a compensatory suit claiming for damages for the injuries he suffered on 16.7.2006 while on board motor vehicle registration no. KWG 986. The aforesaid motor vehicle is said to have collided with motor vehicle registration no. KAQ 525U. The 1st Respondent had been given a lift by Julius Ukunyu, the 2nd Respondent using motor vehicle registration no. KWG 986. The 1st Respondent tendered evidence showing that motor vehicle registration no. KWG 985 collided with KAQ 525U in the middle of the road. He told the trial court that lorry KAQ 525U left its side of the road coming to the side of KWG 986, thus hitting it. The 1st Respondent produced medical documents to show the amount of injured on treatment. The 1st Defendant (Appellant) blamed the lorry driver for the accident. The Defendants closed their case without summoning witnesses to testify in support of their case. The learned Senior Resident Magistrate came to the conclusion that the plaintiff and the Defendant having collided in the middle of the road, then liability has to be shared in equal measure. The Appellant (Patrick Kahiku Murita) has now complained that the gapping contradictions which emerged should have entitled the trial magistrate to dismiss the 1st Respondent's case. The Appellant pointed out that there was evidence tendered showing that the 1st Respondent admitted that his testimony differed from what he pleaded. It was pointed out that in one instance the 1st Respondent said both motor vehicles left their lanes and met in the middle of the road. On the other hand it is also pointed out that the witness further stated that he saw the lorry leave its side and concluded that his testimony by saying he had not seen the lorry before the accident. The Appellant urged this court to set aside the trial magistrate order and substitute it with an order dismissing the suit. It is further argued that the 1st Respondent did not discharge the burden of proof. The Appellant further argues that the 1st Respondent had admitted during cross-examination that the 2nd Respondent's vehicle veered off the road. The Appellant urged this court to find that the 1st Respondent had departed from his pleadings hence the trial magistrate arrived at an erroneous finding of 50% liability.
6. The 1st Respondent has beseeched this court to reject the Appellant's arguments. He pointed out that his evidence and that of Enock Wanyonyi (PW3) are in agreement that both motor vehicles were to blame for the accident.
7. I have carefully re-evaluated the evidence tendered before the trial court on liability. The key witness who testified on liability before the trial court one Paul Mutuku Nguta (PW 2) and P.C. Enock Wanyonyi (PW 3) according to PW 2 the two motor vehicles collided in the middle of the road. PW2 specifically stated that the lorry i.e KAQ 525U left its side of the road and came to the side of KWG 986 where it hit it. In cross-examination PW2 stated that both motor vehicles left their sides of the road and met in the middle of the road. PW 2 categorically blamed the driver of motor vehicle registration KAQ 525U for leaving his lane and crossing into the one of KWG 986. P.C Enock Wanyonyi (PW 3) merely produced the police abstract form. He was not the investigating officer. The evidence of PW 3 was of no probative value in this case. The main evidence therefore is that of PW2. A critical analysis of PW 2's evidence will tend to show that the driver of lorry registration no. KAQ 525U veered off his lane and hit motor vehicle registration no. KWG 986 in the middle of the road. It would appear the driver of motor vehicle registration no. KWG 986 tried very to avoid colliding with the lorry. I am satisfied that the learned Senior Resident Magistrate arrived at an erroneous finding on liability. A critical examination of the evidence will reveal that the driver of lorry registration no. KAQ 525U should shoulder a higher percentage of blame worthiness as opposed to the driver of motor vehicle registration no. KWG 986. I will in the circumstances find the lorry driver 70% while the driver of the saloon car is to shoulder 30% liability.

8. In the end the appeal partially succeeds. Consequently the order apportioning liability at 50% - 50% is set aside and substituted with an order directing the Appellant to shoulder 70% liability while the 2nd Respondent should shoulder 30% liability.

9. In the circumstances of this appeal, I think a fair order on costs is to order that each party bears its own costs. Costs of the suit is remaining awarded to the plaintiff (1st Respondent herein). Since there was no appeal against quantum, I direct that the awards given before the trial court be subjected to the new percentages on apportionment of liability given on appeal.

Dated, Signed and delivered in open court this 8th day of April, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent