



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 491 OF 2013

DR. WILSON KIPKORE..... APPELLANT

V E R S U S –

RUTH MUTISYA THYAKA.....RESPONDENT

(Being an appeal from the Judgement and Decree of the Honourable Andayi W. Francis (Mr.) Senior Principal Magistrate delivered on 12th September 2013)

JUDGEMENT

1. The respondent **Ruth Mutisya Tyaka**, sued the appellant **Dr. Wilson Kipkore** for material damage she suffered due to the negligence of the appellant and or his servant. She claimed that on 21st February 2004, her authorized driver was lawfully driving motor vehicle registration number KAH 624Z along Kenyatta Avenue in Nairobi when the appellant and or his agent negligently drove his motor vehicle registration number KAA 888N causing it to lose control and ram into the plaintiff's motor vehicle. When the matter came up for hearing in the trial court, the trial Magistrate found the appellant wholly liable and awarded the respondent kshs. 1,005,140/= as damages.

2. The appellant aggrieved by the trial's court decision filed this appeal on the following grounds:

- 1. THAT, the trial magistrate erred in law in entering judgment for the plaintiff when she had not demonstrated a prima facie case.***
- 2. THAT the trial magistrate erred in law in entering judgment for the plaintiff when the plaintiff had not discharged the burden of proof on negligence of the defendant.***
- 3. THAT the trial magistrate erred in law erred in law in entering judgment for the plaintiff when she had failed to discharge the burden of proof in a liquidated claim.***
- 4. THAT the trial magistrate erred in law in granting judgment for the plaintiff when the plaintiff, the plaintiff's documents and the plaintiff's testimony were at variance.***
- 5. THAT the trial magistrate misapprehended the law on burden of proof and thereby reached a wrong conclusion.***
- 6. THAT the trial magistrate erred in law in shifting the burden of duty of care to the defendant instead of the plaintiff in the material circumstances.***

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court

and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v Sunday Post Limited (1958) EA at page 424**, it was held inter alia as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

4. The respondents case as presented by **Cesar Mutiso PW1**, was that on the material day as a driver of motor vehicle registration no. KAH 624Z, he was driving along Valley road heading towards town. He claimed that upon reaching Kenyatta Avenue, a motor vehicle registration no. KAA 888N which was coming from NSSF road disobeyed the traffic lights and rammed into his front right side with an impact that caused him to land on the pavement. He further stated that the police came to the scene and he produced a police abstract to that effect.

5. The respondent also called **PW2, John Waweru Njoroge**, who testified that he assessed motor vehicle registration no. KAH 524Z at D. T. Dobie workshop and he compiled a report which he produced in court in evidence.

PW3, Emmanuel Kamuyu Nzioka who works for APA insurance as a claims officer, gave evidence on behalf of the insurance company which had insured motor vehicle registration no. KAH 624Z for the value of kshs.1,500,000/=. He stated that they had procured the services of three assessors who declared the motor vehicle a total loss and therefore they had to pay the respondent a sum of kssh.1,300,00/= less excess of ksh.75,000/= which brought the total paid to kshs.1,225,000/=. He added that they disposed of the salvage at kshs.300,000/=. He claimed that they traced the appellant through Blue Star investigators who were paid kshs.17,000/= for their services.

6. The appellant presented his case where he testified as DW1. He stated that in 2004 he used to drive motor vehicle registration no. KAH 888N and that on the material day he was driving along Kenyatta Avenue and was at the junction of Kenyatta Avenue and State house road where he indicated that he wanted to turn left into State house road. He testified that at that moment the lights were yellow as a result of which he stopped. He stated that an army lorry that was coming from Integrity Centre stopped and gave him way, he therefore proceeded towards State house road only for motor vehicle registration no. KAH 624Z to hit his motor vehicle on the left hand side. The impact pushed him across the road and he was stopped by a traffic light pole. He claimed further that the police dodged him and declined to take his statement or take his motor vehicle for inspection. He accused the police of conspiring with the respondents against him and faulted the police abstract that claimed that the accident occurred at the junction of Ngong Road and Valley road.

7. I have re-evaluated the evidence as adduced in the trial court. When this appeal came up for hearing it was directed that the same be disposed of by way of written submissions. The parties filed their respective submissions which I have taken into consideration.

8. The appellant submitted that the burden of proof to assert negligence lies squarely on the respondent who did not discharge that burden of proof since she failed to show that the loss she suffer was attributed to the negligence of the appellant. He argued that the respondent did not specifically plead the particulars of damages she had suffered as is required in liquidated claims. He further averred that the respondents claim was purely speculative and that the burden of proof didn't shift to the appellant at any point.

9. The respondent on her part submitted that according to the evidence that is undisputed the respondent's vehicle was heading towards town while the appellants vehicle was approaching from the right side of the respondent. She argued that both parties have conceded to the fact that there were traffic lights at the scene and further that the appellant conceded that the respondent was going to town and therefore had the

right of way. She further pointed out that the appellant admitted that the lights were yellow but instead of stopping he proceeded to enter onto the road for the vehicles that had a right of way. She argued that the appellant by the mere fact that he could not see the respondent's vehicle approaching was an indication that he was careless and did not obey traffic rules. She added that given that the road the appellant was joining had multiple lanes, he had a duty to ensure that the other lanes on the left of the military truck were clear before proceeding on. She dismissed the argument advanced by the appellant that her driver was drunk since he did not adduce any evidence to substantiate this claim. She averred further that she had proved her case by calling PW2, the motor vehicle loss assessor to adduce evidence who compiled an assessment report. She added that the appellant did not contest any of the payment made as was claimed by PW3, **Emmanuel Nzioka**.

10. Having set out the background of this appeal I will now consider the merits or otherwise of this appeal. The grounds of appeal as raised by the appellant all touch on liability which he claims was not well arrived at by the Honourable magistrate in her judgment. In particular, he avers that the respondent did not establish a prima facie case since she failed to discharge the burden of proof on negligence against the appellant. He further claimed that the plaintiff's document and testimony were at a variance and that the Honourable magistrate erred by shifting the burden of duty of care to the appellant.

11. According to the evidence adduced by parties, it is clear that the accident occurred at the intersection of Kenyatta Avenue and State house road. It is also apparent that the appellant was coming from town and therefore must have been on the extreme right lane for him to access the state house road. It is also clear that the respondent on the other hand was also on Kenyatta Avenue heading to town when the accident happened. The appellant admitted in his evidence that the traffic lights which were operational at the time were yellow which signified that he ought to have stopped and give way to the motor vehicles heading to town which he did. It is however, evident that the military vehicle that was on the extreme right lane heading to town gave him way allowing him to proceed. That being the case, and given that the traffic lights were yellow, it was upon the appellant to be cautious and drive at a lower speed since there are multiple lanes and the motor vehicles heading to town could be moving at a high speed since they had the right of way. Just because one motor vehicle had given him way did not mean that other vehicles in the subsequent lanes had also stopped to give him way. The appellant owed them a duty of care. The appellant admitted that he could not see the other oncoming vehicles, the more reason why he should have been more careful in crossing the Kenyatta Avenue road into State house road.

12. The appellant claims that the police abstract contradicted the precise roads where the accident occurred. I have examined the police abstract. The same reads that the accident occurred at the junction of Ngong road/ Valley Road/ State House avenue and Kenyatta avenue involving the two subject motor vehicles. The police blamed the appellant for the accident. The appellant claimed that the police were subjective in favour of the Respondent but despite his allegations, he did not produce evidence to substantiate his claims. The Appellant further testified that, the Respondent's authorised driver was under the influence of alcohol, but he did not prove these allegations. Upon shifting of the blame to the respondent on claims of alcoholism, then the burden of proof shifted to him to proof his claim, which he failed to do.

13. The evidence as adduced by the parties is solid. I am not convinced that the respondent was to blame for the accident at all. She had the right of way and she exercised that right at that particular moment. She was not negligent and the appellant owed her a duty of care. I therefore uphold the decision of the trial court as far as liability is concerned since I find that the respondent discharged her burden of proof on a balance of probability.

14. The appellant has not challenged the award on damages by trial court of kshs.1,005,140/= and I will therefore not disturb the same.

15. In the end, the appeal is dismissed. The respondent to have the costs of the appeal and the suit.

Dated, Signed and Delivered in open court this 16th day of September, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent