



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL CASE NO. 105 OF 2015

THE GUARDIAN COACH LIMITED.....1ST APPELLANT

KENNEDY ONDUKO.....2ND APPELLANT

VERSUS

DAVID GATI CHACHA.....RESPONDENT

JUDGMENT

THE GAURDIAN COACH LIMITED (1st appellant) and KENNEDY ONDUKU (2nd appellant) have filed this appeal against the Judgment in favour of **DAVID GATI CHACHA (Respondent)** which held that the appellants were 100% liable. This was a test suit on liability only and its outcome was applied to all the claims related to the accident which occurred on **2nd February 2013** at **NTULELE BRIDGE**, along Narok road.

The respondent herein was a passenger in the appellant's bus registration No. **KBA 154N** which he alleged to have been driven negligently and recklessly by the 2nd appellant and he lost control of it and hit another motor vehicle.

PW1 (the Respondent) told the trial court that he was travelling in the appellant's bus from Nairobi, and the bus was being driven very fast even as it negotiated a corner. **ANNE KAVUNDU (PW 2)** who was also travelling in the same bus told the trial court that :-

“Between Ntulele and Narok at a sloppy place and (sic) I noticed it was swaving (sic) and it knocked a pick Up. The Pickup was headed towards Nairobi and we are on the opposite side. The accident occurred on the side of the Pick Up sight (sic).”

She described the bus as being driven fast even as it descended a slope and was moving in a zigzag motion. It hit the Pickup which was on its proper lane and came to a stop on the opposite lane (ie the Pickups lane).

The appellant's witness **CPL DAVID CHUMU (DW1)** of Migori Police Station was not the Investigating Officer but told the trial court that when the bus begun descending **ORANGULE** area, the driver noticed the pickup which was from the opposite direction. As he approached the said pickup, the pickup hit a pot hole and lost control. The pickup driver swerved to his right and left side before colliding with the oncoming bus. The investigation was carried out by **SGT MURAGE** who recommended that an inquest be conducted because the person who was to blame was the pickup driver who passed away. The inquest had not been finalized as at the time of the hearing of the Civil suit.

The 2nd appellant (**KENNEDY**) told the trial court that while driving motor vehicle registration KBN 154N from Nairobi to Sirare and as he got to Ntulele Bridge he saw a pickup approaching from the opposite direction before it hit a pot hole, burst a tyre and began moving in a zigzag motion. DW2 did not describe what happened thereafter but stated:-

“I was going down slope. An accident occurred after we collided.”

In essence DW 2 blamed the driver of the pickup for the accident.

The trial magistrate noted that CPL David Chumu who produced the police file in relation to the investigation carried out by Sergeant Murage and PC Josephine had recorded as follow.

“After visiting the scene and the statement, I found truly there was a pot hole which was in the middle of the road and it was dangerous to road users which also contributed to the cause of the accident. So I may say that both drivers were careful but due to the nature of the road, they were unable to control (sic) the accident.

The trial magistrate held that the driver of both motor vehicles should have been able to spot the pot holes on the road as well as any on coming vehicles since both were descending from opposite directions. The trial magistrate pointed out that both drivers were expected to be able to control their respective vehicles considering the condition of the road, unless they were driving too fast. He was of the view that had the 2nd Appellant been more careful by driving much slower on a descent and upon seeing the other motor vehicle moving in a zigzag manner, he could have stopped or slowed down the motor vehicle perhaps from the other driver a chance to go back to his lane.

The argument by the respondent’s counsel that the condition of the road was to blame for the accident was rejected as being weak because:-

“invariably drivers are meant to be cognisant of the conditions of the road and expected to exercise caution at all time”.

Consequently judgment was entered in favour of the Respondent against appellant on grounds that the 2nd appellant drove the motor vehicle negligently and carelessly.

The appeal contests these findings on grounds that in finding the appellants liable, the trial magistrate ignored the fact that the pickup registration No. KAP 997N hit a pot hole and swerved towards the defendant oncoming bus. This court is urged to set aside the judgment entered against the appellants on liability.

The appeal was disposed of by way of written submissions. The appellants counsel submitted that there was no justification whatsoever for finding the appellants liable for the accident saying recommendations by the investigating officer absolved them from blame, and in any event the investigating officer had pointed out that both drivers were careful but that the condition of the road led to the accident.

The appellant’s counsel also argued that the trial magistrate seemed to trip over himself and made a finding which conflicted with his own analysis and reasoning. This is because the trial magistrate had stated that both drivers should have been able to spot the pot hole on the road as well as any coming motor vehicle and were expected to control their respective motor vehicle considering the condition of the road, unless they were driving too fast.

The Respondent counsel submitted that the Trial Magistrate considered defendant evidence and submissions before making his decision which was why he addressed the issue of what was reasonably expected of both drivers, and even rejected the attempt to blame the condition of the road as the cause of the accident.

It was submitted on behalf of the Appellants that the mere involvement of the appellants motor vehicle in

the accident was not prima facie evidence of the driver's liability. The court was urged to be guided by the Court of Appeal decision in **SAMMY NGIGI MWAURA VERSUS JOHN MBUGUA KAGAI and ANOR [2006] eKLR** which upheld Tunya J findings that a wrong party had been sued as follows:-

“.....I do not comprehend as to why the lorry driver and his employer if they be different persons, were not sue. All indication on the ground and in evidence before me point to them as the principal cause of the accident. A mere collision of two vehicles or a vehicle and a person by itself without proof of negligence is insufficient for establishment liability.”

In the light of the foregoing this Court is urged to find that the trial magistrate erred in holding that the appellants were 100% liable for the accident as the finding contradicted the evidence if presented in court.

The Respondent's counsel on the other hand, drew this court's attention to the case of **ROBERT GICHUHI MAINA =vs= JOHN KAMAU (2004) (2004) e KLR** where the High Court in finding the defendant 100% liable reasoned that although a rough road can cause an accident, over speeding can also cause an accident and the driver is the person who is in control of the speed.

In the above cited case the court stated:-

“The speed of a vehicle in relation to the particular road conditions was a most material factor and one which normally was within the control of the driver of the vehicle and there was certainly a duty on of driver to keep a proper lookout to ascertain the condition of the road and about th speed of the vehicle to it.”

This finding counsel argues, is confirmed by the evidence of PW1 and PW2 who both stated that the appellants motor vehicle moving at a fast speed as it went on a descending portion of the road, and so the appellant's driver could not control the motor vehicle and avoid the collision.

It is further argued that if the appellant believed what the police said about the other motor vehicle being largely or wholly to blame for the accident, then they should have enjoined the owner of the pick up as a Third Party.

Certainly the mere fact that police attributed blame on the deceased pick up driver would not prima facie prove that the position taken by the appellant is gospel proof. This is because:-

- a) The very police officer who blamed the pick up driver, also stated that both drivers were careful, but it was the condition of the road which led to the accident.
- b) The inquest recommended to be conducted with a view to establishing who should be charged if at all for the accident has not been concluded.
- c) The mere fact that one driver is charged for a traffic offence and even convicted does not necessary mean that the driver of the other motor vehicle involved in the collusion is completely blameless – see **PHILIP KEIPTO CHEMWOLO & ANOR =vs= AUGUSTINE KUBEND (1982-88) 1 KAL page 1036 at 1039 – 1049** where the Court of Appeal pointed out that even a conviction in a traffic case does not prima facie that the other driver was not negligent and may have contributed to the accident. I concur with the Respondent's counsel that the trial magistrate infact took into account the scenario as described by both the appellant's and respondent's witnesses, and which is why he resolved that:-

“The drivers of both motor vehicle should have been able to spot the potholes on the road as well as any on coming vehicle since both were descending from opposite directions. Further they were expected to be able to control their respective vehicles considering the condition of the road UNLESS (emphasizes mine) they were driving too fast. I am of the view that had the 2nd defendant been more careful by driving much slower especially on a descending road, and upon seeing the pick up approaching in a zig-zag manner, then he could have stopped or slowed down

perhaps giving the other driver a chance to get back to his lane. The argument made by the defendant that the condition of the road was to blame for the accident is a weak one, because invariably drivers are meant to be cognisant of the conditions of the road and are expected to exercise caution at all times.”

In my opinion, this was a well grounded manner of reasoning and indeed finds support in the case of **ROBERT GICHUHI MAINA =vs= JOHN KAMAU (2004) e KLR**. The only gap I detect from the trial magistrate's decision is that having so aptly noted the fault of each driver, liability was then visited on the appellants at 100% yet there was evidence to show that the pickup driver also contributed to the accident.

This takes us back to the question where there is evidence, presented by the defence that a Third party (not joined) contributed to the accident, and the plaintiff is also aware that blame is being cast **OR** apportioned on another driver, should the defendant take up 100% of liability? This I must point out is different from the situation where only the defendant is blaming a Third Party for the collision or accident but his failed to join that third party.

What about in instances where the plaintiff is not aware that the driver of the Third Party's motor vehicle is being blamed BUT, the evidence presented in court and noted by the court demonstrates that both drivers are to blame, should the defendant be held 100% liable because failure to enjoin the Third party.

I think this is where the case of **SAMMY NGIGI MWAURA (supra)** applies – there was really no reason why the Respondents elected not to sue the owner of the pick -up, if the legal advisers had exercised due diligence.

Yet I do not, find it prudent to interfere with the finding to the extent that the Appellant can only be blamed for partly contributing to the accident because the other party has not participated in the proceedings. If the Third Party had been enjoined, they would have borne a percentage of liability. The appeal is dismissed and Appellants bears costs of appeal.

DATED, SIGNED and DELIVERED at MIGORI this 11th day of NOVEMBER, 2016

H. OMONDI

JUDGE