



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 51 OF 2013

PATRICIA KIMUYU.....APPELLANT

VERSUS

BERNARD MUTUA MUNYA.....1ST RESPONDENT

KATHI NO KAKOKA SUCCESS LIMITED.....2ND RESPONDENT

MAKINDU MOTOR LIMITED.....3RD RESPONDENT

(Being an appeal against Judgment of the Senior Magistrate's

Court at Tawa by Hon. H. M. Nganga (RM)) in

Civil Suit No. 22 of 2012 dated 26th February, 2013)

JUDGMENT OF THE COURT

1. This is an appeal against the judgment and decree of the Tawa Senior Resident Magistrate where the judgment was delivered on the 26th day of February, 2013 in which liability was apportioned at the ratio of 70:30, the Appellant to bear 70% and the 2nd Respondent to bear 30% and the 1st Respondent was awarded Shs. 120,000.
2. The Appellant's claim against the Respondents in the Subordinate Court arose from a Road Traffic Accident. According to the Plaintiff, the 1st Respondent was travelling as a fare paying passenger in motor vehicle Registration number KBL 287M along Machakos-Kitui road when the 2nd Respondent driver and the Appellant's rider riding motor cycle registration number KMCP 293J drove carelessly and negligently causing a collision and occasioning the 1st Respondent severe and extensive injuries. The 1st Respondent sued for General Damages for pain, suffering and loss of amenities which were assessed as aforesaid.
3. In her defence the appellant denied all the allegations raised in the Plaintiff and of importance also denied any consideration to the accident and solely blamed the 2nd Respondent driver in whose motor vehicle the 1st Respondent was travelling as a fare paying passenger.
4. Several claims arising from the said accident had been filed before the court, and the 3rd Respondent filed a test suit. Consequently all the suits were consolidated and Civil Suit No. 22 of 2012 (being the subject of the appeal, was selected as test suit for the purposes of determining liability. The rest of the

suits were accordingly stayed pending the judgment in this appeal.)

5. The appellant being dissatisfied with the subordinate court's judgment aforesaid, preferred this appeal citing the following grounds;

a. The learned magistrate erred in facts and law by holding that the 1st Respondent/Plaintiff had discharged his burden of proof.

b. The learned magistrate erred in both law and fact by holding Liability of 70% against the Appellant/2nd Defendant for the alleged claim in the Plaint.

c. The learned magistrate erred in facts and in law by holding that the Appellant was partly negligent in the ratio of 70%.

d. The learned magistrate erred in fact and law by disregarding the 1st Respondent's/Plaintiff's evidence including the fact that two of the Plaintiff's witnesses namely the Plaintiff himself and the Police Constable testified that it was the driver of the 2nd Respondent /1st Defendant motor vehicle registration number KBL 287M who was wholly to blame for the accident.

e. The learned magistrate erred in fact and law by disregarding the 1st Respondent's/Plaintiff's evidence including the fact that the Plaintiff's witnesses namely the Police Constable referred to a Police Abstract which found the driver of the 2nd Respondent/1st Defendant motor vehicle registration number KBL 287M who was wholly to blame for the accident.

f. The learned magistrate erred in fact and law by disregarding Appellant's/2nd Defendant's evidence including the fact that the Appellant's/2nd Defendant's witness namely the private investigator did produce an investigation report containing a police abstract that found that the driver of the 2nd Respondent/1st Defendant motor vehicle registration number KBL 287M who was wholly to blame of the accident.

g. The learned magistrate erred in fact and law by disregarding the fact that two of the Defendant's witnesses namely the Appellant herself, and the private investigator also testified that it was the driver of the 2nd Respondent/1st Defendant motor vehicle registration number KBL 287m who was wholly to blame for the accident.

h. The learned magistrate erred in fact and law by disregarding the case law supplied by the appellant which clearly supported the fact that the Appellant ought to be discharged from any liability in these circumstances.

i. The learned magistrate erred in fact and law by finding the Appellant 70% liable and ordering her to pay the sum of Kshs. 83,700/= when the said finding was contrary to the testimony and evidence produced and which said finding was not based on any authority.

6. The 1st Respondent called three (3) witnesses while the 2nd Respondent called DW3 the driver of Motor vehicle registration no. KBL 287M.

7. This court has reviewed and re-evaluated the evidence, and the only issue for determination is who was liable for the accident.

8. The appellant contents that PW1 and PW2 and all other witnesses agreed that the motor cycle was a head of the minibus and was hit from behind. PW1 actually in his evidence states that the minibus was overspending. However, this element was denied by DW3, the driver of the minibus. He testified that he was moving at a speed of 40 Km/h and that he reduced this speed when the driver of the motor cycle indicated an intention to turn to the right of the road. In determining whether DW3 was overspeeding it is

to be noted that the three passengers in the motor cycle and the driver of motor cycle (who disappeared soon after the accident) did not suffer serious injury. It is therefore prudent to accept the DW3 evidence that he was not overspeeding.

9. That notwithstanding, the DW3 hit the motor cycle from behind. This means that he was not very carefully or watchful. At the speed of 40km/h DW3 had the chance to skillfully avoid hitting the motor cycle. It is also noteworthy that the PW2 – the investigating officer, but who did not actually investigate the accident, testified that she did not know who caused the accident, but in the police Abstract, she testified that the minibus was blamed for causing the accident. The appellant called two witnesses which were not very helpful. This was because non of their witnesses witnessed the accident. It was the appellant evidence that he was the owner of the motor cycle registration no. KMCP 293J having purchased the same from the 3rd Respondent and that at the time, the accident her authorized driver was in charge. The said driver disappeared soon after the accident and did not give any evidence. The appellant's other witness was Mr. Mwenda Muthama who was the investigations officer. However he had blamed the driver of the minibus for the accident, yet he was not at the scene of the accident.

10. The appellant's case was clearly dogged by lack of credible witnesses who could testify as having witnessed the accident.

11. The trial court at page 174 of the Record of Appeal gave reasons why he blamed both drivers. For this court, DW3, the driver of motor vehicle registration no. KBL 287M was the only eye witness who described how the accident happened. His evidence was consistent and he did not attempt to exaggerate. However, it is clear that the absence of eye witnesses, for the Appellant hampered the appellant case despite the police Abstract clearly indicating that the minibus was in the wrong. Faced with these circumstances the trial court was bound to apportion liability. What is not clear was how he reached the ratio of 70:30.

12. In the finding of this court, both parties clearly contributed to the accident. If the evidence of DW3 is to be believed that he was driving at 40km/h, then he had the opportunity not to hit the motor cycle from behind. This leads to the conclusion that in any apportionment of liability the driver of the minibus cannot take a lesser blame. Considering the evidence on record this court apportions liability as follows;

- – 60% against the 2nd respondent
- 40% against the appellant.
- Since the appeal was not on quantum, this court will not interfere with the lower court's decision on quantum.
- The costs of the appeal shall be borne equally by the Appellant and the 2nd Respondent.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF NOVEMBER, 2016

E.K.O. OGOLA

JUDGE

In the presence of;

No appearance for the parties.

Court Assistant – Mr. Munyao