REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 196 OF 2010

EDWARD MWANGI MUCHOKI……APPELLANT

VERSUS

HARRISON MANGURU……1ST RESPONDENT

CLEMENT WAMITI……2ND RESPONDENT

(Being an appeal from the judgment and decree delivered in Nyeri Chief Magistrates Court Civil Case No. 106 of 2007 (Hon. D.K. Ole Keiwua) on 5th August, 2010) at Nyeri)

BETWEEN

EDWARD MWANGI MUCHOKI……PLAINTIFF

VERSUS

HARRISON MANGURU…….1ST DEFENDANT

CLEMENT WAMITI…….2ND DEFENDANT

JUDGMENT

The appellant was the plaintiff in a suit which apparently was initially filed in the High Court at Nairobi as **High Court Civil Case No. 133 of 1987** against the respondents for general damages, costs of the suit and interest thereof.

The plaintiff's claim against the respondents arose out of a road traffic accident and was mainly based on negligence; he contended in his plaint that on the 28th day of February, 1985 at about 3.15 pm, he was lawfully riding his motor-cycle registration number KRD 665 along Nyeri-Mukurweini Road when the second respondent so negligently drove, managed and controlled vehicle registration number KUX 540, which was then owned by the first respondent, that he caused it to collide with the plaintiff's said motor-cycle. Consequently, so the plaintiff averred, he was injured and thereby suffered loss and damage.

The plaintiff particularised in his plaint what he thought was the defendant's negligence, the injuries he suffered and the special damages. I note, however, that there is no prayer for special damages in the prayers in the plaint.

The defendants denied the plaintiff's claim and in their amended statement of defence filed in court on

10th June, 2009 they, in particular, denied that the second respondent was negligent; they also denied that the first respondent was the owner of motor vehicle registration number KUX 540 or that the second defendant was its driver.

The defendants admitted that the road traffic accident occurred but they denied that it arose out of the second defendant's negligence. They attributed the accident solely to the negligence of the plaintiff. Further they denied that the plaintiff suffered any injuries or that he suffered any loss or damage and in any event he was the author of his own misfortune.

In a rather short judgment, the learned magistrate dismissed the plaintiff's claim. From what I gather in this judgment, the plaintiff's suit was dismissed because the police did not investigate the case. He established that the plaintiff had no riding licence and therefore he was not lawfully on the road. The learned magistrate also held that the plaintiff's evidence on the ownership of the motor-cycle was inconsistent with his pleadings and in his view the plaintiff had not proved his case on a balance of probabilities.

At this juncture it is necessary to consider the evidence at the trial and evaluate it afresh; it is only after such an evaluation that this court can come to its own conclusions as to whether, based on the evidence available, the learned magistrate made the right decision. Being the first appellate court, this court is bound to take this course but bear in mind that it is only the trial court that had the advantage of seeing and hearing the witnesses first hand; this has always been the legal position that binds this court whenever it is exercising its appellate jurisdiction. Amongst a host of decisions in which the Court of Appeal has upheld this statement of law is the decision in **Okeno versus Republic (1972) EA 32** where the Court was emphatic that:-

An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof).

No doubt the appeal the Court was dealing with arose from a criminal trial but the legal obligation of an appellate court to evaluate and analyse the evidence afresh is common both to civil and criminal appeals; thus though the court's pronouncement was made in the context of an appeal from a criminal trial, it applies with equal force to an appeal borne out of a civil case. I suppose it is for this reason that the words of Court of Appeal for East Africa in this case are echoed by the same Court in a civil appeal in **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court (Sir Clement Lestang, V.P) said:-

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

The record shows that one **Dr Eliud Mwangi Wachanga (PW1)** testified as the first and the only witness of the plaintiff; in his evidence, the doctor testified that he is a physician and acting in that capacity he examined the plaintiff to establish whether he had been injured. He compiled a medical report in which he

concluded that the plaintiff sustained fractures "of the olecranon process of the right elbow and the right patellar (knee cap)". The examination was done and the report compiled 23 years after the accident. As at this time, it was the doctor's opinion that the plaintiff "*had no major complaints and check X-ray showed tension wires in situ but no osteo-arthritic changes in both joints."* The doctor also opined that there was "*full range of joint movements in the right knee joint but full extension of the right elbow is limited to 10 degrees, the limitation of the right elbow does not interfere with the joint's function."* The doctor's report was duly admitted in evidence in support of the plaintiff's claim.

The plaintiff himself testified that on 28th February, 1985 he was riding a motor bike from Kirundu to Miriti when he was involved in road traffic accident. As a result he broke his right leg and elbow; his hand was also broken. The accident was reported to the police who issued him with a P3 form and a police abstract.

It was the plaintiff's evidence the owner of the lorry was the second defendant while the first defendant was its driver at the material time. He produced a search certificate from the registrar of motor vehicles in proof of the fact that the first defendant was the owner of the vehicle.

The plaintiff also produced court proceedings in **Karatina District Magistrates' Court Traffic Case No. 202 of 1985** in which the second respondent had been charged with and convicted of the offence of dangerous driving as a result of the accident in issue.

Because of the injuries that the plaintiff sustained, he testified that he was hospitalised at Tumutumu hospital for three days and later admitted at Nyeri Provincial General Hospital for two weeks. It was his testimony that as a result of the accident he could not walk properly.

In answer to questions put to him in cross-examination, the plaintiff said that he had a learners licence for class G vehicles and that it was issued on 27th February, 1985, just a day before the fateful day.

Only the first defendant testified on behalf of the defence; he admitted that indeed an accident did occur on 28th February, 1985 and that it was reported to the police. According to him the plaintiff had a driving licence but not a "riding licence". He testified that the plaintiff was negligent and therefore caused the accident. The witness admitted, however, that it was the second defendant who was driving the vehicle in question and that he himself was not at scene of the accident. He also admitted that the driver was charged and convicted for the offence of dangerous driving.

From the evidence on record I gather that it was common ground between the parties that a road traffic accident involving the plaintiff and the first defendant's vehicle did occur on 28th February, 1985.

It was also common ground or rather it was proved at the hearing that as a result of this accident, the second defendant was charged and convicted on his own plea of guilty of the offence of dangerous driving contrary to **section 47(1)** of the **Traffic Act, Cap 403**, Laws of Kenya. In the circumstances the first question for determination, in my humble view, would be whether the conviction of the second defendant *per se* was conclusive proof of the defendant's negligence in the subsequent civil proceedings arising from the road traffic accident. Related to this question was whether despite the defendant's conviction of the criminal offence arising out of the accident, the plaintiff still bore the burden of proving his case on a balance of probabilities and if so whether he did actually prove his case as required. The last issue whose answer would necessarily be influenced by the answers to the first two questions was whether the plaintiff was entitled to damages and costs of the suit as prayed in the plaint.

It would appear from the appellant's written submissions in support of his appeal that the plaintiff relied entirely on the prosecution and conviction of the second defendant in **Karatina District Magistrates' Court Traffic Case No. 202 of 1985** to prove negligence on the part of the second defendant and the defendants' liability for the accident. This is what he said:-

"As to who was responsible for the accident, the driver of the motor vehicle/ 2nd defendant had been

charged with two(2) counts, dangerous driving and driving without a licence. He was convicted for both counts and sentenced to pay a fine of Kshs. 700/= and Kshs. 100/= or to be imprisoned for 30 days and 7 days respectively. Proceedings of the said traffic case No. 202 of 1985 at the District Magistrate's court at Karatina were produced by the plaintiff as exhibit No. 4.

In his judgment the learned magistrate did not consider the evidence adduced by the plaintiff, particularly, the proceedings of the traffic case hence arrived on a wrong decision."

Perhaps because of the reliance on the on the conviction of the second defendant, the plaintiff was not keen to give any evidence in his testimony to court of how the accident happened and more importantly, how the second defendant was negligent in driving, controlling or managing his vehicle as to cause the accident. In his testimony, this is all he said about the accident:-

"I am Edward Mwangi Muchoki from Mukurweini on 28.2.1985 while riding a motor bike from Kirundu to Mihuti. I did not get to Mihuti as I was involved in an accident. I broke my leg and right hand were broken. The accident was reported to the police. I have a police abstract…defendant charged Traffic Case No. 202 of 1985 at Karatina court from careless driving and he was fined Kshs. 700/=."

Although the flow of his testimony is not so clear, the omission to state how negligent the driver of the motor vehicle driver was and how such negligence caused the accident is quite obvious. The question then is, was it sufficient for the plaintiff to solely rely on the conviction of the second defendant to prove negligence on the part of the second defendant without proffering any evidence of such negligence?

This question was raised in **Chemwolo & Another versus Kubende (1986) KLR 492** where the Court of Appeal considered the import of a conviction in a road traffic accident related offence on the civil proceedings that may ensue from the same accident. The Court considered **section 47A** of the **Evidence Act** in this regard and said;

"…section 47A of the Evidence Act (cap 80) declares that where a final judgment of a competent court in criminal proceedings has declared any person to be guilty of a criminal offence, after the expiry of the time limited for appeal, judgment shall be taken as conclusive evidence that the person so convicted was guilty of that offence. It follows that in civil proceedings which are contemplated, Mr Chemwolo's conviction will be conclusive evidence that he was guilty of carelessness. But that does not matter because it may also be that Kubende was guilty of carelessness, and if were to be so, then the position would be as explained in Queens Cleaners and Dyers Ltd versus EA Community & Others (supra); and despite Mr Chemwolo's conviction, the issue of contributory negligence may still be alive if the facts warrant it."

I understand the Court of Appeal to have been saying that a conviction of a road traffic related offence is not by itself a conclusive proof in the civil proceedings that may ensue that the convicted person was wholly responsible for the accident; in such proceedings, for instance for a claim in damages in tort, evidence may be led to prove the contrary and where facts are so established, it may be that the victim had a hand in the accident and thus the convicted person may only have contributed to it. The extent of such contribution and thus the apportionment of liability is a question of fact and therefore a matter of evidence.

Prior the decision in **Chemwolo & Another versus Kubende** this same question was addressed in **Robinson versus Oluoch (1971) EA 376** where the Court of Appeal for East Africa held that a person convicted of careless driving may allege that another person was also guilty of negligence which caused or contributed to the accident. The Court said:-

"The respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very

different matter from saying, as Mr Sharma would have us say, that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. That is not what section 47A states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."

Taking cue from the foregoing decisions, the conviction of the second defendant of the offence of dangerous driving would lead to the conclusion that at the very least, he probably contributed to the road traffic accident in which the plaintiff is alleged to have sustained injuries and for which he was seeking damages. He may as well have been solely responsible for the accident not necessarily because he was convicted of the related offence in the criminal trial but because the evidence in the subsequent civil proceedings leads to this conclusion. This then begs the question, was there any evidence of the extent of the second defendant's contribution to the accident?

It has been noted that all that the plaintiff presented before court was the proceedings in the criminal trial of the second defendant perhaps believing this to be sufficient proof of his case against the defendants, jointly and severally. From his statement in court, it is not clear how the accident happened and much as the second defendant may have contributed to the accident only because he was convicted in the criminal trial it is difficult to apportion any particular measure of liability to him in the absence of any evidence in this regard. Whether he was solely responsible for the accident or the extent to which he may have been partly responsible should have come out clearly from the plaintiff's evidence. Without such evidence there is no material upon which the trial court or this court can apportion liability and any attempt to attach any measure of responsibility to either of the parties would only be speculative and not based on any evidence. The law would not countenance such an action.

Going by the cited decisions, it was not sufficient for the plaintiff to simply throw at the court the proceedings in the criminal trial and say "the defendant was charged and convicted and therefore he was liable for the accident"; the evidence of the defendant's contribution to the accident must be proffered and leave it court to determine whether, on the basis of this evidence, the defendant was solely responsible for the accident or the extent his contribution to the accident. I understand this to be what **section 109** of the **Evidence Act (Cap 80)** to be all about; this provision of the law says:-

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Considering that the defendants attributed the accident to the plaintiff's negligence, the question of how much each of the parties may have contributed to this accident came to the fore and in this circumstances the burden fell upon the plaintiff to prove that either the second defendant was solely responsible or he contributed to the accident. My analysis of his evidence is that he did not discharge this burden on a balance of probabilities.

Going back to the questions raised, the answer to the question whether the conviction of the second defendant *per se* was conclusive proof of the defendant's negligence in the subsequent civil proceedings is in the negative; the plaintiff still bore the burden to prove the extent to which the second defendant contributed to the accident, if not for anything else, to assist the court to apportion liability if the evidence called for such apportionment. The second question on whether the plaintiff as under obligation to proof his case on a balance of probabilities was intertwined with the first question and therefore the answer to the first question settles the second question as well.

On the final question as to whether the plaintiff's claim was merited, I would conclude that if the plaintiff did not proof the extent of the defendants' liability it matters not that he may have suffered injuries and

thereby incurred loss and damage. He may well have been aggrieved but in the absence of proof of his grievances and in particular the extent of the defendants' liability he is not entitled to compensation. For this reason, it would be futile to venture into the extent of the injuries that the plaintiff may have sustained as a result of the road traffic accident and what would have perhaps been a near adequate compensation of damages payable to him.

For the foregoing reasons I would dismiss the appeal with costs to the respondents.

Signed, dated and delivered in open court this 2nd day of October, 2015.

Ngaah Jairus

JUDGE