REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 28 OF 2010

AMOS WAFULA ……. APPELLANT

VERSUS

HUMPHREY WACHIRA

ABRAHAM KIPKETER SEUREY …. RESPONDENTS

J U D G M E N T

This appeal arises from the decision and judgment of the Chief Magistrate at Kitale in CMCC. No. 504 of 2009 in which the Appellant, Amos Wafula, had sued the respondents Humphrey Wachira and Abraham Kipketer Seurey, for damages arising from injuries suffered by the appellant when he was hit and knocked down by a motor vehicle Reg. No. KAK 348 B Mitsubishi lorry belonging to the first respondent and driven at the time by the second respondent.

In his plaint dated 29th July, 2009, the appellant averred that the said motor vehicle was so negligently and carelessly driven and/or managed and/or controlled by the second respondent such that it knocked him down and caused him bodily injuries on the ….....

The particulars of negligence were provided by the appellant who went ahead to invoke the doctrine of “res-ipsa loquitor” and vicarious liability and pray for damages against the two respondents who responded by filing a statement of defence dated 21st October, 2009 in which they deny the allegations made by the appellant and contend that if any accident occurred, then it was solely or substantially caused by the negligence of the appellant as indicated in the particulars of negligence.

The respondents therefore prayed for the dismissal of the appellant's case with costs.

After the trial of the case, the learned trial magistrate considered all the evidence placed before her and arrived at the conclusion that the appellant's case had not been proved as required and was therefore fit for dismissal with costs to the respondents.

Being aggrieved by the decision of the learned trial magistrate, the appellant lodged this appeal on the basis of the grounds contained in the memorandum of appeal filed herein on 29th July, 2010 by his advocate Messers G. O. Barongo & Co. Advocates.

The appeal was heard by way of written submissions and in that regard submissions were filed by the appellant and respondents on 10th February, 2014 through their respective advocates.

This is a first appeal. The duty of this court is therefore to re-visit the evidence and draw its own

conclusion bearing in mind that the trial court

had the advantage of seeing and hearing the witnesses **(See, Selle Vs. Associated Motor Boat Company (1968) EA 123).**

In summary, the appellants case was that on the material date, the appellant (PW1) was walking along the Kapenguria /Kitale road heading towards the direction of Kitale when the respondents' vehicle also headed to Kitale knocked him down while in the process of overtaking a saloon vehicle.

The appellant indicated that the driver of the respondents' vehicle (a lorry) realized that he could not overtake and therefore made an attempt to return to his path thereby causing the accident.

The appellant indicated that he was assisted by people and taken to hospital where he was admitted on that material 5th March, 2008 and discharged on 26th March, 2008. He said that the accident was reported to the police and a police abstract (P. Ex. 2) issued. He produced a police medical examination report i.e P3 form (P. Ex 3) and a further medical report by Dr. Njenga (P. Ex. 4) both showing the extent of the injuries resulting from the accident. He said that a good Samaritan called Elias Juma took him to the hospital while he was unconscious. He blamed the driver of the lorry for the accident.

A clinical officer, Reuben Bunyasi (PW2) filled and signed the necessary P3 form on the basis of the treatment notes availed to him and on the basis of the medical exam which was carried out by himself. He indicated that the appellant was treated by several doctors while on admission at the Kitale District Hospital.

Dr. Samuel Chege Njenga (PW3), a medical practitioner in Kitale carried out a further medical examination of the appellant and compiled the necessary report. (P. Ex.4).

Cpl Nzina Rogers (PW 4), of the traffic section Kitale Police Station, confirmed the occurrence of the accident and said that it involved the respondent's lorry and the appellant. That, the lorry was being driven towards Kapenguria when it hit a pedestrian cross the road from the left to the right side. That, the accident report was made by the driver of the lorry and entered in the necessary O/B by a P.C Kandie who was the investigating officer in the matter.

The evidence of Cpl Rogers (PW4), marked the close of the appellant's case. The respondents did not lead any evidence in support of their statement of defence. Nevertheless, the duty to establish the claim as against them lay with the appellant on a balance of probabilities.

Having considered the appellant's evidence, the learned trial magistrate held the view that the involvement of the respondent's vehicle in the accident was doubtful and in any event, the ownership of the vehicle was not proved. The learned trial magistrate was also of the view that the claim could not stand as it appeared from the appellant's own evidence that he was to blame for the accident since he conceded that he was crossing the road when he was hit, a fact which was confirmed by the police officer (PW4).

The learned trial magistrate therefore dismissed the appellant's case with costs to the respondents and opined that had the claim succeeded, a sum of Kshs.100,000/= would have been adequate compensation in terms of general damages.

This court's view on the basis of the evidence adduced in the trial is that the appellant's case was largely uncontraverted. The occurrence of the accident was not disputed. It was indeed established that the appellant was hit and injured by a motor vehicle Registration No. KAK 348B Mitsubishi Lorry belonging to the first respondent.

The police abstract (P. Ex. 2) provided sufficient information proving that the material vehicle

belonging to the first respondent was involved in the accident.

The fact that the second respondent was the driver of the vehicle at the material time was not disputed and the first respondent's ownership of the vehicle was not substantially disputed.

There being no dispute or substantial dispute with regard to the occurrence of the accident and the ownership of the ill-fated vehicle, the crucial issue arising for determination was liability on the part of the respondent. The particulars of negligence provided by the appellant and his evidence in court indicated that the second respondent (driver) was to blame for the accident. In as much as he caused his vehicle to hit and injure the appellant while he was walking either along the road or beside it. The particulars of negligence provided by the respondents indicated that the appellant was hit while crossing the road or walking on the wrong side of the road.

There was no evidence from the respondents to establish their allegation of negligence against the appellant. However, the appellant after initially being evasive conceded that he was hit while crossing the road. This fact was corroborated by the evidence of the traffic police officer (PW4) and went along way to indicate that even through the second respondent was negligent in the manner that he drove his vehicle by way of failing to exercise proper look out, the appellant was also negligent by disregarding his own safety while crossing the road.

The view of this court with regard to liability is that both the appellant and the second respondent took blame for the accident. However, the second respondent was more to blame as he should have foreseen that pedestrians were likely to cross the road thereby placing on him a duty to drive his vehicle with great care and avoid any mishaps such as the material accident. This court would place liability at 60% for the respondents and 40% for the appellant.

On damages, the appellant would be entitled to Kshs.1,000/= being proven special damages and Kshs.200,000/= general damages not as opined by the learned trial magistrate but on the basis of the injuries suffered by the appellant and comparable previous decisions cited by the appellant and the respondents in their final submissions before the trial court.

In sum, this appeal is allowed to the extend that the judgment of the trial court is hereby set aside and substituted for a judgment in favour of the appellant against the respondents jointly and severally in the total sum of Kshs.201,000/= together with costs and interest less 40% contributory negligence i.e Kshs.120,000/=.

The appellant shall have the costs of the appeal.

J. R. KARANJA,

JUDGE

(Delivered and signed this 12th day of February, 2014.)