REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 38 OF 2013

DAVID KARIUKI.....APPELLANT

VERSUS

ESTHER MUTHONI WANGUI.....RESPONDENT

(Being an appeal from the judgment of the Resident Magistrate in Kandara Resident

Magistrates Court Civil Case No. 175 of 2008 (Hon. E. Boke) delivered on 20th May, 2010)

JUDGMENT

In a suit filed in the subordinate court against two defendants, the appellant being one of them, the plaintiff sought for damages, both special and general, in compensation for the injuries she is said to have sustained as a result of a road traffic accident involving a motor vehicle registration number KTP 355, Toyota lorry (the vehicle) and an unregistered motor bike on which the respondent was riding as a passenger.

It was the respondent's case that the road traffic accident was caused by the negligence, recklessness or carelessness of the appellant who was then driving the vehicle at the time owned by one Brown Maina Wairuko. Though Mr Wairuko is not party to the appeal he was sued in the subordinate court for being vicariously liable for the acts and or omissions of the appellant.

It is worth noting that the said owner of the vehicle neither entered appearance nor filed any defence to the respondent's claim; at the respondent's request, an interlocutory judgment was entered against him in default of appearance or defence. The respondent was then directed to set down the suit for formal proof.

As for the appellant he filed a defence and denied all the allegations raised against him.

In her judgment, the learned magistrate held that the appellant together with the owner of the vehicle were 70% liable for the accident; she awarded the respondent the sum of Kshs. 200,000/= as general damages less 30% of what was held to be her contribution towards the accident.

In his memorandum of appeal the appellant assailed the learned magistrate's judgment on several grounds including the allegation that the there was no basis for apportionment of liability of the accident at 70% to 30% against the defendants; that the learned magistrate erred to find for the respondent when the facts indicated that she was perpetuating an illegality at the time the accident occurred; and that the learned magistrate erred when she made an award on quantum yet there was no evidence on the injuries sustained.

Both counsel for the appellant and the respondent agreed to have the appeal determined by way of written submissions; they indeed filed and exchanged the submissions which I have carefully considered in this judgment.

While considering the grounds upon which the appellant's appeal is based it is a legal obligation on the part of this court, as the first appellate court, to assess the evidence afresh and come to its own conclusions regardless of the findings of the subordinate court; however, I have to bear in mind that it is the subordinate court that had the advantage of seeing and hearing the witnesses. This is what was held in **Okeno versus Republic (1972) EA 32**. In that case the court of appeal was of the view 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).***

The record of appeal does not have the complete record of proceedings in the magistrate's court. I managed to trace the subordinate's court record in Civil Appeal No. 147 of 2013 which is one of the three appeals that the appellant filed against three different respondents who had sued him in the subordinate court for damages as a result of the same accident. The other appeal is Civil Appeal No. 144 of 2013.

According to the record from the subordinate court, one of three suits filed against the appellant, that is Civil Suit No. 174 of 2008, was selected as a test suit in determination of the question of liability. As noted the learned magistrate held that the appellant was 70% liable and thus this proportion of liability cut across the two other cases against the appellant. The only difference in the decisions of the three cases was the quantum of damages payable.

Perhaps it is for this reason that the appellant raised the same grounds of appeal against the subordinate court's judgment in all the three appeals. I have also noted that the submissions filed by counsel for the parties in the three appeals are all similar.

In these circumstances, it would naturally follow that my findings on the liability in this appeal will be adopted as the findings on this issue in Civil Appeal No. 144 of 2013 and Civil Appeal No. 147 of 2013.

The respondent's evidence on the accident was that on the material date she was riding on a motorcycle together with her sister and her child as passengers. They were travelling on Kagunduini road when a lorry, registration number KTP 355 overtook them and suddenly turned to the left without any indication. Due to the lorry's abrupt turn the motorcycle on which they were riding hit the lorry on its front left. She claimed to have sustained a broken left hand.

The respondent's sister, **Nancy Wanjiku (PW2)** testified that she was with her sister, the respondent herein, when the accident occurred. She told the court that the motor cyclist who was carrying them was a friend who came to their rescue because they could not find a vehicle to take them home. She also testified that while on their way a lorry overtook them and suddenly turned to the left and hit the motor cycle they were riding. According to her testimony the lorry obstructed them. The point of impact was at the front of the lorry.

The police officer who booked the accident report was police constable Paul Opapa who was then stationed at Kabati police station; he confirmed the report was booked as **No.13 of 27/27/08.** According to the report of the police officers who visited the scene, it was confirmed that the lorry indeed made a turn from the main road to join a feeder road. As at the time this witness testified the case was still under investigation and nobody had been charged of any offence as a result of this accident. According to him he could not conclude as to who was to blame for the accident.

Peter Mocha Mungai was an eye witness to the accident. According to his testimony, the accident lorry overtook the motor cycle and then turned at a junction without its driver indicating that it was about to turn. As a result of the lorry's abrupt turn, the motorcycle rammed it. This witness took photographs of the accident scene which he sought to produce in court as evidence but counsel for the appellant objected to their production; the objection was sustained.

The appellant testified that he was driving the vehicle in issue on the material day. He confirmed to have seen a motorcycle riding in a manner he described as "zigzag". According to this witness, the accident occurred when the motor cycle attempted to overtake the lorry but because there was an oncoming vehicle it hit the lorry on its left side when attempted to go back to its lane.

From the evidence of all the witnesses at the hearing it is clear that a road traffic accident involving motor vehicle registration number KTP 355 was involved in a road traffic accident with a motor vehicle on which the respondent was riding together with her sister. The only question in this appeal, as it was at the hearing, is how the accident occurred.

The respondent and her sister were consistent that the accident lorry overtook the motor cycle on which they were riding and then made an abrupt turn to the left without any warning whatsoever from the lorry's driver. Consequently the motor cycle and the lorry collided and the point of impact was the front left side of the vehicle.

Besides the evidence of these two witnesses there was an eye witness who saw how the accident happened; he corroborated the evidence of the respondent and his sister that the lorry overtook the motor-cycle and suddenly turned left and thereby caused the collision between the motor-cycle and the lorry.

On his part the driver of the lorry said that it was the motorcycle which was attempting to overtake the lorry but aborted this attempt when its rider noticed an oncoming vehicle and sought to revert to its lane. It is then that the motor-cycle hit the lorry on its left side.

If the motorcycle was overtaking the lorry from the right it is difficult to see how it ended up hitting the lorry on its left side when it aborted the attempt to overtake the lorry; that is certainly not probable. The only plausible reason why this witness' testimony appears to be made up is because he was indeed turning to the left without warning other road users and in particular the motorcycle that he had overtaken, when the collision occurred.

It is noted that in his evidence, he testified that he drove for about ten metres after the collision. He confirmed that police officers came to the scene of the accident. According to the police officer who testified, the police who went to the scene confirmed that the lorry had made a turn to a feeder road. Yet in his evidence the appellant never mentioned anything about turning to the feeder road. It is more probable that indeed the accident occurred when the appellant made a turn to the feeder road without any sort of warning to other motorists and in particular the rider of the motorcycle on which the respondent was riding.

Although the learned magistrate held that the appellant was 70% liable for the accident, the evidence available, indicates that the appellant was solely responsible for the accident. There was no evidence that the motorcyclist contributed to the accident merely because he was carrying excess passengers or because his motorcycle was not registered. However, since the appellant did not cross-appeal on this issue I choose not to interfere with the contribution attributed to each of the parties for the occurrence of the accident.

The other crucial issue that I have considered in evaluation of the evidence proffered at the hearing is the proof of injuries sustained. Apart from claiming that she broke her left hand, there is no evidence that was produced to prove that the respondent broke her arm or was injured as alleged. I anxiously read through the entire record including the original file from the subordinate court but I have not found any sort of evidence that was formally produced in proof of the respondent's allegations.

When the learned magistrate awarded her general damages for the injuries she is alleged to have sustained, this is what she said:-

> "***In terms of general damages, it is not in dispute that the plaintiff was injured in the accident therefore though she did not produce any medical report during her evidence in c.c 174/08, pleadings show that she was injured on the upper and lower limbs."***

It is clear that the learned magistrate awarded the damages on the basis of allegations that were not proved. The appellant denied in his defence that the respondent sustained any injuries and put her to strict proof; it is not clear why, in the face of this denial, the learned magistrate concluded *that "it is not in dispute that the plaintiff was injured"*.

It must be recalled that when the respondent's counsel asked for interlocutory judgment against the owner of the vehicle, he also requested that the suit be set down for formal proof. This request was granted and therefore even if the appellant had not denied that the respondent sustained bodily injuries as a result of the accident, she had the burden of proving that indeed she was injured in the manner she pleaded in her plaint. I understand this to be what formal proof entails. If pleadings were sufficient as the learned magistrate seemed to suggest, it would not have been necessary to set the suit down for formal proof.

Counsel for the appellant raised this issue in the memorandum of appeal and in the submissions filed on the appellant's behalf but I have not been able to gather the respondent's answer on this question in the submissions filed on her behalf. It is only in the submissions filed in the subordinate court that counsel for the respondent commented on this issue that:-

> ***"According to Dr Karanja's medical report dated 29th August, 2008 which parties have agreed to be admitted without calling the maker confirms that the plaintiff sustained harm which have (sic) recovered."***

With due respect to the learned counsel for the respondent, there is no evidence of such agreement on record and certainly it does not exist otherwise the learned magistrate would have referred to it in her judgment rather than rely on the respondent's pleadings to conclude that the respondent must have been injured without any other proof.

My analysis of the evidence led at the hearing leads me to make the conclusion that the injuries allegedly sustained by the respondent were not proved on the balance of probabilities or in any other manner. That being the case there was no basis upon which the learned magistrate awarded general damages. I will allow the appeal on this ground. Accordingly, the learned magistrate's judgment delivered on 20th May, 2010 is set aside and substituted with an order dismissing the suit. Parties shall bear their own costs in the subordinate court and in this court.

Signed, dated and delivered in open court this 6th day of October 2014

Ngaah Jairus

JUDGE