



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AKIWUMI, TUNOI & PALL, JJ.A.)

CIVIL APPEAL NO. 215 OF 1997

BETWEEN

1. KENYA BREWERIES LIMITED

2. JOHN MAINA KARANJA APPELLANTS

AND

ALEX EPHRAIM INDUSWE RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Justice Juma) dated 11th December, 1996

in

H.C.C.C. NO. 2529 OF 1995)

JUDGMENT OF THE COURT

The second appellant who was driving in the course of his employment with the first appellant, the car of the latter, was in an action brought against both appellants by the respondent, found to have contributed fifty per cent to the cause of the motor accident in which the respondent sustained injuries. The learned judge then ordered that the appellants jointly and severally, pay general and special damages of Kshs.225,000.00 and Kshs.44,481.00 respectively, to the respondent. The appellants were also ordered to pay the costs of the suit. The appellants have appealed against the related judgment of the learned judge on the grounds that the learned judge erred in his findings as to the speed at which a car may be safely driven and that the second appellant had failed to keep a proper look out.

Briefly, the facts of the case according to the respondent, were that on the morning in question, he wanted to cross Outer Ring Road and before doing so, saw approaching from a distance on his left, the car which was being driven by the second appellant. He felt it would be safe for him to cross the road and indeed, did so. But after he had done so, the car which was being driven at a high speed by the second appellant, swerved off the road on to the pavement where he was hit by the right front part of the car. He was badly injured as a result of this. On his part, the evidence of the second appellant was that on his way, and as he approached the turning on his left into Baba Dogo Road, he saw that a number of vehicles coming from the opposite direction, had stopped and were waiting to turn into Baba Dogo Road. He continued driving when all of a sudden, the respondent dashed into the road from behind one of these waiting vehicles, less than a meter away from the car, before he could apply the brakes of the car, its right front part had hit the

respondent. As a result of this, the right front headlamp of the car was damaged and the respondent was thrown against the windscreen of the car which also got broken. The second appellant said that at the time of the accident, he was driving safely, between 40 - 45 kph. He produced a sketch plan of the accident which supported his description of how the accident had occurred. He also admitted that there were many kiosks along the road as well as many people who were walking alongside on their way to work that morning.

The learned judge held on the evidence before him, that the respondent:

".. was negligent in the circumstances. He misjudged the distance and the time the vehicle would take to reach where he was crossing. He had seen vehicle on the left, yet he chose to cross."

And then rejecting the respondent's story that he had already crossed the road when he was hit on the pavement by the car the second appellant was driving, the learned judge went on to say that:

"There is no reason why the second Defendant should have decided to suddenly leave the road and swerve off the road to collide with the Plaintiff."

So far so good. Then, having recalled that the second appellant knew that the road was a busy one and that people were likely to cross it, and without rejecting the second appellant's story that the respondent rushed out into the road from the back of one of the waiting vehicles, went on to observe and we think quite rightly, that the second appellant should have kept a proper look out.

But according to the learned judge, the second appellant did not keep a proper look out for the following reasons:

"He stated that he was driving between 40 - 45 kph. At that speed one should be able to stop suddenly without much difficulty. I hold that he was driving faster than the speed he indicated. I assess liability as against the Plaintiff at 50% and as against the 2nd Defendant at 50%."

If the possibility of emerging danger is reasonably apparent such as in this case, where a driver is bound to take precaution against the possibility that someone concealed from view by a stationary vehicle might suddenly emerge from behind the vehicle, then the second appellant must take necessary precaution. Because of this, the second appellant was travelling at a speed of between 40 - 45 kph. The learned judge then propounded the theory that travelling between 40 - 45 kph would under the existing circumstances at the time, amount to keeping a proper look out since:

"At that speed one should be able to stop suddenly without much difficulty."

But as already shown, the learned judge concluded that since the respondent was hit by the car, then the second appellant must have been travelling over more than 50 kph at the time of the accident and could not therefore, have been keeping a proper look out. This conclusion is not based on any evidence given at the hearing. It is obvious that this conclusion that the learned judge came to, and which is not founded on any evidence produced at the trial, that he would not have regarded the second appellant as not keeping a proper look out if he had been travelling at speed between 40 - 45 kph, is based on his own assumptions or experience. His conclusion that the second appellant must have been travelling over 50 kph because he failed to brake in time and was therefore not keeping a proper look out, is also similarly flawed.

The learned judge seems to have turned himself into an expert in driving skills and came to the conclusion he did as to the negligence on the part of the second appellant, based solely on his theory as to what one can do when driving below or above 50 kph. A similar point arose in the English Court of Appeal case of Regina v Simbadyal Times Law Report October 10 1991, a case where the trial judge had compared handwritings and reached conclusions on the comparisons. In the judgment of that court Lord Justice Watkins said that:

"... It was further complained that the judge had turned himself into a handwriting expert and

compared examples of the defendant's signature. A judge who did that would be vulnerable to proper criticism. A judge should not be seen as a witness who held himself out as capable of comparing handwriting and reached conclusions on the comparison."

In the appeal before us the learned judge had held himself out as a technical expert in driving skills and reached conclusions based on that, in finding that the second appellant contributed fifty per cent to the accident that caused injuries to the respondent. The learned judge erred in doing this and his conclusion that the second appellant must have been driving at a speed which was more than 50 kph and which in the given circumstances amounted to not keeping a proper look out, but which would have been otherwise, if only he had been driving between 40 - 50 kph, is difficult to sustain.

In the result the appeal is allowed, the judgment of the learned judge attributing fifty per cent contributory negligence to the second appellant is set aside and the claim against the appellants is hereby dismissed. The appellants will have the costs of this appeal as well as those of the court below.

It is so ordered.

Dated and delivered at Nairobi this 10th day of February, 1998.

A. **M.** **AKIWUMI**
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JUDGE OF APPEAL

P. **K.** **TUNOI**
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JUDGE OF APPEAL

G. **S.** **PALL**
.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.