



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, OKWENGU & AZANGALALA, J.J.A.)**

**CIVIL APPEAL NO.282 OF 2014**

**BETWEEN**

**CHARLES OGOLLA OBIERO.....APPELLANT**

**AND**

**JOSEPH MUNYAMBU KAREGA.....RESPONDENT**

***(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ougo, J.), dated 12<sup>th</sup> September, 2014***

***in***

***H.C.C.A. No.513 of 2010)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

[1] This is a second appeal arising from a suit originally filed by **Charles Ogolla Obiero** (herein the appellant), in the Chief Magistrate's Court at Nairobi. The appellant had sued **Joseph Munyambu Karega** (herein the respondent) seeking general and special damages for personal injuries suffered by him, and special damages of Kshs.132,600/= for damage to his motor vehicle. The appellant contended that the damages arose as a result of an accident involving his motor vehicle and that of the respondent, which accident was caused by the negligence of the respondent. The respondent denied the appellant's claim and filed an amended defence and counter-claim in which he maintained that the accident was caused solely by the negligence of the appellant. The respondent also similarly counterclaimed special and general damages for personal injuries and special damages of Kshs.344,064/= for damage to his motor vehicle.

[2] The suit was tried by a senior principal magistrate who having heard the evidence for the appellant and the respondent delivered a judgment in which she rejected the respondent's evidence and held that the accident occurred as a result of the respondent's motor vehicle overtaking and colliding with the appellant's vehicle at a speed which was unreasonable. The trial magistrate also found that there was no evidence connecting the injuries allegedly suffered by the respondent with the accident in question. Consequently, the trial magistrate found the respondent fully liable for the accident, rejected his counter-claim and entered judgment in favour of the appellant for Kshs.250,000/= as general damages and Kshs.150,500/= as special damages.

[3] The respondent who was dissatisfied with that judgment lodged an appeal before the High Court. The learned judge of the High Court, who heard the appeal by way of written submissions, noted that there were two versions given as to how the accident occurred, and that the evidence adduced by the police was not helpful as the investigations were never concluded. She faulted the trial magistrate for holding the respondent 100% liable for the accident relying on the evidence of the appellant and the police abstract report.

[4] The learned judge further faulted the trial magistrate for rejecting the respondent's counter-claim maintaining that lack of medical evidence was not fatal to the respondent's claim. The learned judge concluded her judgment as follows:

***“However having held that it is not possible to ascertain who caused the accident in the absence of independent evidence of the Investigating Officer, I find that I cannot award the damages in the counter-claim. Having stated so, the appeal is allowed with costs. The judgment and decree of the lower court are set aside and in their place an order is made dismissing the respondent's suit with costs.”***

[5] In his memorandum of appeal before us, the appellant has challenged the judgment of the learned judge of the High Court on five grounds as follows:

***“(i) That the Honourable Judge erred in law in failing to consider the evidence of (sic) Loss Assessor thereby arriving at an erroneous decision.***

***(ii) That the learned Judge erred in law in interfering with the factual findings of the trial court in total disregard of the evidence on record thereby arriving at an erroneous decision.***

***(iii) That the learned Judge erred in law by applying the wrong principles in her finding that it was not possible to ascertain the party who caused the subject accident thereby arriving at an erroneous decision.***

***(iv) That the learned Judge erred in law by failing to exercise her discretion judiciously thereby arriving at a decision that was grossly unfair to the appellant.***

***(v) That the learned Judge erred in law by condemning the appellant to pay costs both in the subordinate court and the High Court despite making a finding in her judgment that she was unable to establish who was to blame for the subject accident.”***

[6] In her judgment, the learned Judge properly directed herself by referring to the case of ***Ephantus Mwangi and Another vs Duncan Mwangi Wambugu [1982-88] 1KAR 278***, wherein it was stated that a Court of Appeal will not normally interfere with the finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of evidence or a trial court is shown demonstrably to have acted on wrong principles. Therefore, the issue before us is whether in departing from the findings of the trial magistrate the learned Judge properly applied this principle in re-evaluating the evidence and demonstrated that the findings of the trial magistrate were either based on no evidence or a misapprehension of the evidence or that the trial magistrate acted on wrong principles such as to negate the conclusion of the trial magistrate.

[7] In ***Peters v Sunday Post Ltd (1958) EA 424***, Sir Kenneth O'Connor, P of the Court of Appeal for Eastern Africa, relying on ***Watt v Thomas (1) [1947] AC 484*** stated as follows:

***“It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”***

[8] The duty of a first appellate court was aptly stated in *Selle and Another vs. Associated Motor Boat Company Ltd and Others* (1968) EA 123 as follows:

*“The court must reconsider the evidence, evaluate 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..... 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 the witness is inconsistent with the evidence in the case generally.”*

[9] The judgment of the trial court shows that the trial magistrate analyzed the evidence as follows:

*“The issue is who was to blame for this accident. The plaintiff in his testimony has stated that the defendant was overtaking at a high speed and collided with his vehicle. The defendant on the other hand stated that the plaintiff who was coming from the other side was intending to join a feeder road to Mathare North without giving way. That the defendant was driving at a speed of about 60-80 KPH. The plaintiff’s evidence is that his vehicle was damaged on the front towards the right. This was corroborated by the evidence of the assessor PW2. This is evidence of a head on collision and supports the evidence of the plaintiff that the defendant was overtaking.*

*The defendant’s version on the other hand is not plausible. If the plaintiff had turned suddenly to join the feeder road on the left as one heads to Thika Road, then the damage on the plaintiff’s vehicle would have been on the left not right front. Besides the defendant did not avail any photographs of his vehicle or assessment report. Though he testified that both vehicles were inspected at police station and his vehicle found to be OK while the plaintiff’s vehicle was found to be un-roadworthy, he did not produce any inspection report. There is no document to support that claim. Instead, the police blamed him for the accident (exh 5).*

*The defendant did not have a police abstract and never recorded any statement. The reasons for not doing so are not plausible in the circumstances herein. I am satisfied that he was overtaking and collided with the plaintiff’s vehicle. A speed of 60-80 KPH which he stated is beyond the limit in the said area which is actually densely populated. I take judicial notice of the same. He was the cause of this accident. He is 100% liable.”*

[10] It is evident from the above that the trial magistrate gave clear reasons as to why she found the appellant’s version credible. The reasons include: the fact that the evidence of the appellant regarding the point of impact was consistent with the evidence of damage given by the motor vehicle assessor who testified as PW2; secondly the fact that the evidence regarding the point of impact and damage to the appellant’s vehicle, was consistent with a head-on collision arising from an overtaking vehicle; thirdly, the fact that the respondent’s version as to how the collision occurred, was not consistent with the damage to the motor vehicle; and fourthly, the trial magistrate doubted the respondent’s evidence because he failed to avail the assessment report that would have confirmed the evidence regarding the damage to his motor vehicle.

[11] In her judgment the learned Judge similarly noted that there were two versions as to how the accident occurred. The learned Judge records the two versions as follows:

*“The record of appeal as presented had the evidence of PW4 (now respondent) as follows; he drove motor vehicle KPE 003 along Outering road keeping left after midnight. The other vehicle KAA 628U came to his side of the road as it was overtaking and that was when collusion (sic) occurred. The road was straight and the other car did not indicate that it was overtaking and the impact of the accident was on the right side of the vehicle. DW2 (now appellant) stated that he drove his vehicle through Outering from Embakasi at around 11.30 p.m. On the same Outering road there was a junction which is a feeder road on the left side as you head to Thika Road general direction. The feeder road being Mathare North. Motor vehicle registration KPE 003 was coming from Thika direction intending to join the feeder road*

***to Mathare North. It did not stop to give way as he did not expect him to just branch to the feeder road. He concluded that his vehicle was damaged on the right front.”***

[12] It is evident the appellant’s version was that the accident occurred as result of the respondent’s vehicle overtaking while the respondent’s version was that the accident occurred as a result of the appellant’s vehicle branching into a feeder road. The learned Judge’s finding was that both vehicles were moving on opposite directions, which explained why both vehicles had damaged front sides. However, she noted that it was difficult to ascertain who caused the accident, and it was on this basis that she allowed the appeal.

[13] The learned judge did not make any finding as to whether the accident occurred as a result of one vehicle overtaking the other or as a result of one vehicle suddenly branching into a feeder road. In this regard the learned Judge failed to evaluate the evidence of the appellant and the respondent both of whom were eyewitnesses to the accident. The learned Judge failed also to take into account the evidence of **Moses Njoroge Kariuki**, the insurance assessor who examined the appellant’s motor vehicle and produced a report that showed that the damages to the appellant’s motor vehicle was on the front towards the right. This report was important in providing evidence regarding the point of impact in the collision of the two vehicles.

[14] The learned Judge appeared to have faulted the trial magistrate for relying on the police abstract report. This was based on the fact that the trial magistrate took into account the police abstract, which revealed that the police blamed the respondent for the accident. Since the officer who visited the scene of the accident and made the conclusion blaming the respondent was not called as witness, at best the police abstract report could only be used to confirm the fact that there was an accident reported. It was therefore wrong for the trial magistrate to use the abstract as evidence confirming that the respondent was to blame for the accident as in the absence of the evidence of the officer who made the conclusion, the conclusion was no more than hearsay evidence. We find that the trial magistrate erred in relying on the police abstract report. Notwithstanding this mistake, there were other reasons already adverted to that were given by the trial magistrate that were sufficient to support the findings of the trial magistrate on liability.

[15] Of relevance is also the fact that the trial magistrate found that the failure by the respondent to make any statement, or produce any police abstract report of the accident, or assessment report showing the damage to his vehicle went towards the credibility of his evidence. Although the respondent explained why he was not able to get the police abstract report or make a statement to the police, he did not provide any explanation for his failure to produce the assessment report a document that was crucial to prove his damages claim and this was telling. In light of the finding of the trial magistrate on liability, it was obvious that the respondent’s counterclaim had failed.

[16] With due respect, we find that the learned Judge failed to properly analyze and re-evaluate the evidence. There was clear evidence adduced by the appellant that coupled with the evidence of the insurance assessor was sufficient to lead to a finding regarding how the accident occurred and who was liable. The learned Judge did not address this evidence. Indeed, while the learned Judge found it evident that both vehicles were moving towards different directions, and that they had damages on the front right sides, she did not consider the implication of this finding in regard to the two versions on how the accident occurred. In our view, it is unlikely that both vehicles would have suffered damages to the front if one vehicle was in the process of branching into a feeder road as alleged by the respondent. The learned Judge also appears to have been confused concerning the evidence of the appellant on the point of impact at one point stating that the damage to the appellant’s motor vehicle was on the front left side of the vehicle and at another time stating that the damage was on the front right side of the vehicle

[17] Further the evidence of the investigating officer though desirable was not mandatory. In the circumstances, we find that contrary to the finding of the learned Judge, the trial magistrate properly evaluated the evidence and gave cogent reasons as to why she believed the appellant’s version. Thus the learned Judge had no good reasons for departing from the findings of the trial magistrate and erred in failing to defer to the findings.

**[18]** Accordingly, we allow this appeal, set aside the judgment of the learned Judge and substitute therefor judgment in favour of the appellant together with costs and interest thereon on the special damages at court rates from the date of filing suit, and general damages from the date of the judgment of the Magistrate.

We dismiss the respondent's counter-claim with costs.

**Dated and Delivered at Nairobi this 31<sup>st</sup> day of March, 2017.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

I certify that this is a

True copy of the original

**DEPUTY REGISTRAR**