



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAI, JJ.A.)

CIVIL APPEAL 329 OF 2010

BETWEEN

V O W (Minor) suing through

Uncle and next friend E O W.....APPELLANT

VERSUS

PRIVATE SAFARIS (E.A.) LIMITED.....RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court

of Kenya at Nairobi (Okwengu, J.) delivered on 25th March, 2010

in

Civil Appeal No. 143 of 2008)

JUDGMENT OF THE COURT

The original action was commenced through a plaint filed by the appellant **V O W (Minor)** suing through his Uncle and Next Friend **E O W** filed at the Chief Magistrates' Court at Nairobi against the respondent **Private Safaris (E.A.) Limited**. It was alleged that on the 11th February, 2006 the appellant was riding a bicycle along Ngong Road near Dagoreti Corner when the respondent's driver drove motor vehicle registration mark KAM 515T with negligence as a result of which an accident occurred and the appellant was injured. Various particulars of negligence were set out and it was prayed that the appellant be awarded general and special damages.

The respondent filed a defence to the claim where the entire claim was denied. It was alleged in the defence that the accident occurred as a result of the negligence of the appellant's uncle and next friend. Particulars of negligence by uncle and next friend were set out in the defence.

The suit was heard by W.E. Mokaya, Senior Resident Magistrate, who in a judgment delivered on 28th February, 2008 dismissed the suit on account that liability had not been established by the appellant against the respondent. The appellant appealed to the High Court but H.M. Okwengu, J (as she then was) did not find any merit in the appeal which was dismissed in the judgment delivered on 25th May, 2010.

Those findings provoked this second appeal premised on the Memorandum of Appeal filed on behalf of the appellant where six grounds of appeal are set out. In essence the appellant complains that the learned Judge erred in law in failing to reach a finding on all issues placed before the court by the appellant; that the learned Judge erred in reaching a finding that “the trial magistrate who had the advantage of seeing the demeanour of witnesses rejected the appellant’s evidence”, that the learned judge erred in holding against the appellant when no particulars of negligence had been alleged against the appellant in the defence and that the learned judge had failed to consider authorities submitted by the appellant in support of the first appeal.

This is a second appeal and we remind ourselves that we can only deal with issues of law, but not go back to findings of fact which the trial court established and which have been reconsidered and reevaluated by the first appellate court, unless we find that the two courts below considered matters they should not have considered or failed to consider matters they should have considered, or looking at the entire decision it is untenable and not supportable in law – see the case of **Fred Ben Okoth v Equator Bottlers Limited [2015] eKLR**.

What was the case placed before the trial court?

The appellant testified on 31st October, 2007 and said that he was then 17 years old. That is to say he was about 16 years old when the accident occurred on 11th February, 2006. He stated that he was riding his bicycle to school on the material day and was riding on the left side of the road. He stated that he saw the respondent’s motor vehicle which had lights on because it was about 6.30 in the morning and that the vehicle hit him. He said that the respondent’s motor vehicle moved from the right side to the left side and hit him as a result of which he lost consciousness and found himself in hospital.

A police officer **P.C. Charles Karumba** attached to Kilimani Police Station produced a Police Abstract Report issued by the said police station and stated that the appellant was blamed for the accident but that such blame was purely based on the allegation by the respondent’s driver. He further stated that he -the witness – was not the investigating officer and had not visited the scene of accident.

The other witness was the appellant’s uncle and next friend who brought the suit on his behalf and his evidence had nothing useful to the case on the issue of liability.

For the defence **Paul Mwangi Waithaka** the driver of the accident motor vehicle testified that on the material day as he was driving at the said place he saw something ahead; that he stopped his motor vehicle and that the appellant who was riding a bicycle hit the right side of the motor vehicle. He stated that he was not speeding and that it was the appellant who hit the motor vehicle while it was stationary.

That was the totality of the evidence placed before the trial court.

The learned trial magistrate did not find for the appellant on the issue of liability finding instead that the appellant had failed to establish any negligence on the part of the respondent’s driver. The learned magistrate found that the evidence of the appellant and that of the respondent were at variance and that neither version was useful to the court in establishing liability. The learned magistrate further found that the evidence of the police officer who was called by the appellant as his witness tended to support the respondent’s case and, for all this the case was dismissed. The learned Judge, on first appeal, analysed the evidence placed before the trial magistrate and found that although the collision between the appellant and the respondent’s driver was not in dispute, the evidence before the trial magistrate was not conclusive on the cause of the accident. Relying on the provisions of **Section 107** of the **Evidence Act** which requires he who asserts facts on which he desires a court to give judgment on any legal right or liability to prove them, the learned Judge found that the appellant had not discharged that duty and this led to dismissal of the appeal.

After considering the record of appeal, the Memorandum of Appeal, the submissions made and the law and while reminding ourselves that this is a second appeal we take the following view of the same.

The appellant, who was about 16 years old at the time of the accident, testified that he was riding a bicycle to school when he saw the respondent's motor vehicle which, according to him, crossed from the right side of the road to the left and hit him. He lost consciousness and came to in hospital. The police officer called in support of the appellant's case did not visit the scene of accident; he did not investigate the same but merely produced a Police Abstract report which, although it attributed blame for the accident on the appellant, such attribution was based purely on the report made by the respondent's driver to the police. The opposite version on causation was by the respondent's driver who admitted to seeing the appellant before the accident but that on seeing the appellant he stopped the motor vehicle and the appellant hit himself against the motor vehicle causing damage to it and suffering injuries. The respondent's driver was not seriously challenged on this version of events and the record shows a casual cross-examination of this witness where there was no serious challenge especially on whether it was indeed true that this witness stopped the motor vehicle and that the appellant then hit himself against the stationary motor vehicle. It was necessary in the circumstances where the respondent's driver made such statement of fact for a serious challenge to be mounted in cross-examination to show that his version was not true at all. This was not done. All that the appellant's counsel did was to lead the appellant in saying that an accident occurred but there was no other evidence placed before the trial court to support or corroborate such evidence. The appellant's next witness – the police officer – was not helpful of the appellant's case at all. All he did was to produce a Police Abstract Report where the police blamed the appellant for the accident without any supporting evidence. What was the use of such evidence which was not supportive of the appellant's case in any way? The learned trial magistrate was faced with a situation where the appellant merely established that an accident took place but there was no attempt to prove to the required standard or at all how such accident had taken place. The trial magistrate had no option in the circumstances but to dismiss the case. As was properly held by the learned judge on first appeal it was the duty of the appellant to establish facts on which the court would rely to find for the appellant absent which the appellant was not entitled to a finding in his favour as negligence alleged had not been proved.

The trial magistrate found that the appellant had been unable to prove how the accident occurred at all. The High Court, on first appeal, was of similar view. These were concurrent findings of fact. In a second appeal like this one, we must resist the temptation of delving into matters of facts. As aforesaid, we are constrained to confine ourselves to matters of law unless we can be shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. We are satisfied on the facts placed before the two courts that the appellant did not establish causation of the accident on a balance of probabilities and the two courts below were entitled, as they did, to hold against the appellant.

One issue that was not raised by the parties but which detained our minds for a while was whether there was a legal issue raised relating to the age of the appellant who was about 16 years old at the time of the accident. This is because children of tender years who are not legally responsible for their actions will not ordinarily be liable in negligence. So the question would have been whether the appellant was entitled to that legal protection. We have perused various case law which we need not set out here and find that a child of 16 years old is not a child of tender years. At that age the appellant had a duty to keep a proper look out as he rode his bicycle on a busy road like Ngong road and he failed to discharge that duty.

The appeal has no merit and we dismiss it with costs to the respondent.

Dated and Delivered at Nairobi this 7th day of April, 2017.

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR