



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(KARANJA, OUKO & SICHALE. JJ.A)**

**CIVIL APPEAL NO 271 OF 2004**

**RAPHAEL N. KIBURI .....APPELLANT**

**VERSUS**

**HUSSEIN ADENDERE.....RESPONDENT**

***(An appeal from Judgment and decree of the High Court of Kenya at Nairobi (Shaikh M. Amin J)  
dated 1<sup>st</sup> day of November, 2001***

**in**

***Nairobi High Court Civil Appeal No. 43 of 1999***

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**JUDGMENT OF THE COURT**

In this second appeal, the appellant, Raphael N. Kiburi has challenged the decision of Shaikh M. Amin, J made on 1<sup>st</sup> November 2001 in Civil Appeal No. 43 of 1999. The grounds of appeal are contained in the Memorandum of Appeal dated 1<sup>st</sup> December 2004, to wit:

- a. ***The Judge failed to appreciate the evidence of the witnesses which the subordinate court had heard and seen exhibits which conclusively and properly established that the Respondent's vehicle was to blame for the accident***
- b. ***The learned judge failed to point out which of the subordinate court's findings were improper and reached a verdict allowing the appeal without giving any reasons for such a conclusion***
- c. ***The learned superior court judge arrived at a decision which was against the weight of evidence tendered in the superior court***
- d. ***Admitting and placing heavy reliance on the evidence of PW3 whose evidence was to the effect that he was not at the scene of the accident whereas and indeed the evidence was to the effect that the vehicle was in motion***
- e. ***Failing to evaluate the evidence in its entirety and arriving at a conclusion which was not supported by evidence or law***

- f. ***Failing to properly evaluate the evidence of the trial magistrate and arriving at a decision which is against the weight of the evidence as adduced and recorded.***

The appellant therefore prays for orders that:

- a. ***The appeal be allowed and the judgment and decree of the superior court be set aside and an order be entered dismissing the respondent's suit;***
- b. ***The costs of this appeal.***

The events surrounding this suit are that on 30<sup>th</sup> October 1993, there was a collision between the respondent's vehicle, TZB 544, and the defendant's vehicle, KVL 799. The respondent filed suit in the subordinate court claiming Kshs. 336,382.75, being repair charges for his vehicle TZB 544, and general damages for loss of use of the vehicle. During trial, the respondent alleged that the appellant's driver or agent, while driving the vehicle along First Avenue Eastleigh, steered the vehicle so recklessly, that it lost control and veered off the road, causing it to collide with his vehicle which was parked off the side of the road. The respondent had three witnesses: HUSSEIN ADENDERE, the respondent herein (PW1), PATRICK MAMBO, a motor assessor (PW2), and IIMI MOHAMMED, the respondent's driver (PW3). The evidence led was that the vehicle was left by its driver parked off the road and that when he returned to where it was he found that it had been knocked down. The respondent's evidence was that the appellant's vehicle was reversing onto the road when the collision took place.

The trial magistrate found that the appellant had failed to prove his case on a balance of probabilities and dismissed the suit.

Being aggrieved by the said dismissal, the respondent filed an appeal to the High Court in which he sought to overturn the trial court's findings.

The High court, (Amin J) after considering the material placed before him was of the view that the learned magistrate placed considerable reliance upon the assessors report which was made over two years after the event, and that there was a misdirection on her part in that she substituted her own hypothesis instead of relying on the evidence before her. He then surmised:

***"I come to the conclusion that the plaintiff had proved his case against the Defendant on a balance of probability and the learned trial magistrate erred in law and fact to dismiss the Plaintiff's suit."***

The learned Judge arrived at the conclusion that the appellant had proved his case on a balance of probability, allowed the appeal and awarded the appellant ksh 336,382/75.

Being dissatisfied with this finding, the appellant then lodged the present appeal in which he has proffered the six grounds of appeal outlined earlier on in this judgment.

Mr Mogeni learned counsel for the appellant urged all these grounds together. The main thrust of his argument was that the court was supposed to evaluate the evidence that had been presented before the trial magistrate and having done so arrive at its own independent decision (see ***Selle and Another vs Associated Motor Boat Company Limited & Others (1968) EA 123***). It was learned counsel's submission however that the first appellate Court did not adhere to these basic parameters and as a result, it arrived at a wrong decision. According to him, the Judge merely recited the evidence of the trial court, and placed more reliance on the evidence of PW1 and PW3. He submitted that these two witnesses were not at the scene and therefore, their evidence was hearsay. Moreover, learned counsel went on, the Judge wrongly noted that the trial court had relied on the assessors' report, yet the trial magistrate in her judgment explicitly states that she did not consider the assessors report. The appellant also faults the superior court for not giving reasons for finding for the plaintiff.

On his part Mr Gichuru, learned counsel for the respondent urged that the learned Judge reached a correct

decision after evaluating the evidence of the trial court. He contended that the High court Judge appreciated that DW1, Raphael N. Kiburi - the defendant -was not a witness to be believed, and that the police had blamed the appellant for the accident and impounded his vehicle.

As this is a second appeal, we are enjoined to consider only issues of law. In addition, as has often been stated in this court, the court of appeal will only interfere with the findings of fact should it be evident that the lower court has considered matters that it ought not to have considered, or failed to consider relevant matters placed before it 'or looking at the entire decision, it was perverse.

In rendering itself on a second appeal, the Court may consider whether the first appellate court properly analysed and re-evaluated the evidence on record. See *Damiano Migwi V Timothy Maina Waitugi [2009] eKLR (Civil Appeal 335 of 2003)* the court expressed itself in the following terms:

***“It is an issue of law, as stated in the 1<sup>st</sup> ground of appeal, to consider whether the first appellate court properly analysed and re-evaluated the evidence on record as it is its duty to do at that stage. A first appellate court has a duty to reappraise the entire evidence on record and make its own findings of fact on the issues, while allowing for the fact that it had not seen the witnesses testify, before it could decide whether a trial court’s decision could be supported – see Peters v Sunday Post Ltd [1959] EA 424, and Selle & Another vs. Associated Motor Boat Company Ltd & others [1968] EA 123.”***

See also *Mwangi v Wambugu [1984] KLR 453* where this Court stated that:

***“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial judge’s finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”***

The appellant’s issues arise out of the appreciation of the facts by the High Court, which observed that the trial Magistrate placed considerable reliance on the assessor’s report, which had been made almost two years later. This is a serious misdirection as it is obvious from the trial court’s judgment that she did not rely on this evidence, as she found, and correctly so, that since the investigation had been conducted two years after the accident, the report could not be used to determine who or what caused the accident.

It is also apparent that the High Court did not properly consider the record and judgment of the trial court. Had the High Court done so, it would not have arrived at the conclusion that the trial Magistrate erred in failing to consider the evidence of PW3 who was the driver of the respondent’s motor vehicle. He only came on the scene after the collision had taken place, and the trial magistrate could not rely on his evidence to determine the cause of the accident. This comes out clearly in the judgment of the trial court, and the learned Judge of the High Court would have noted this if he had re-evaluated the evidence adduced before the trial court.

It is our finding that this failure by the learned Judge to re-evaluate the evidence as required in law was prejudicial to the appellant’s case. Had the learned Judge discharged this duty, he would certainly have arrived at a different finding.

In the circumstances, we are satisfied that this appeal has merit. We allow the same and set aside the judgment and decree of Amin J dated 1<sup>st</sup> November 2001, and substitute therefor an order reinstating the judgment and order dated 12<sup>th</sup> January 1999 made by the trial court, with the result that the respondent’s suit in the Chief Magistrate’s court stands dismissed with costs.

The appellant shall have the costs of this appeal as well as the costs in the superior court.

Dated and delivered at Nairobi this 5<sup>th</sup> day of July, 2013.

**W. KARANJA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

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