



REPUBLIC OF KENYA
COURT OF APPEAL
AT MALINDI
CIVIL APPEAL 284 OF 2007

BETWEEN

KULSUM ALIBHAI1ST APPELLANT

IQBAL MOHAMED HUSSEIN2ND APPELLANT

AND

G M O (*minor suing Through his father and next friend F E O*).....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Maraga, J) dated 30th November, 2006

in

HC.C. NO. 250 OF 2003)

JUDGMENT OF THE COURT

This is an appeal against the Judgment of the High Court (D.K. Maraga, J.) (as he then was) whereby the learned trial Judge found the appellants liable for negligence to the extent of 70% and awarded the respondent against the appellants Shs.3,070,203/50 being the net general and special damages.

The respondent was at the material time a school boy in class six aged 13 years. On 19th October, 2007, he sued the appellant through his father as the next friend to recover damages for injuries sustained in a road traffic accident allegedly due to negligence of the defendant.

He averred in paragraph 4 of the plaint that on or about 11th July, 2002 at about 1 p.m. along Ronald Ngala road near High Life bar the plaintiff was standing on the pavement when the 2nd defendant so dangerously and negligently drove, managed, propelled and controlled motor vehicle registration No. KAQ 244M as to cause the same to lose control and hit the plaintiff, knocking him down thereby causing the plaintiff to sustain severe injuries.

Although the plaint was later amended, para 4 was not amended. The appellants admitted in the

Defence that the accident indeed took place involving the appellant's motor vehicle and the respondent but denied that the accident was solely caused by their negligence and pleaded that the accident was solely caused or substantially contributed to by the negligence of the respondent. The particulars of negligence by the respondent as pleaded include, suddenly running and crossing or attempting to cross the road from the front of a parked trailer parked on the rear side at close distance.

The respondent called five witnesses at the trial but three of them including Mary Wangechi Otwani (PW5), the respondent's mother did not give evidence relating to the accident. Their evidence was confined respectively to the nature and extent of injuries sustained by the respondent and to the special damages.

The material witnesses were Kepha Benjamin Mutinda (PW3) (Mutinda) and I.P Ali Ngoni (PW4). Mutinda testified at the trial, among other things, that, the respondent was his classmate in standard 6 at Ronald Ngala Primary School, that on the material day, she and three others, namely, respondent, Eric Odhiambo and Carlos John went to Sports View Hotel at lunch time to drink water, that on their way back, he and Carlos crossed the road and stood at the island and waited for the respondent and the other child to cross; that she saw a vehicle coming from Nyali direction at high speed, that the vehicle lost control, went over the pavement, hit the respondent; that the respondent was thrown ahead, that the vehicle did not stop after the accident; that the vehicle did not take any evasive action; that the road had two lanes; that the vehicle was at the outer lane and that there was no vehicle on the inner lane.

The second appellant testified at the trial, *inter alia*, that, the road was a dual carriage way; that he was driving on the inner lane from Nyali towards Saba Saba when all of a sudden a boy ran from the front side of a parked trailer and hit the left side mirror; that he was driving at low speed (40 – 45 KPH); that his vehicle did not veer off the pavement, that he stopped after the accident but drove off when he saw a crowd gathering; and that he reported the accident to the police on the following day. He however admitted that he was later charged with the offence of failing to stop after the accident; and also failing to report the accident to which offences he pleaded guilty; that he was also charged with the offence of reckless driving but was acquitted after trial.

The learned trial Judge appraised the evidence and concluded:-

“After considering all the evidence as well as the accident sketch plan produced by Inspector Ali Ngoni, PW4, I am satisfied that the second defendant did not go over the pavement. I think as it is the left side of second defendant's vehicle which hit the plaintiff and as PW3 was already on the island he (PW3) thought the plaintiff was not on the pavement. But I accept his evidence that the second defendant was driving at high speed. If he was driving at a speed of between 40 to 45 KPH as he claimed, he could, even if the plaintiff ran on to the road as he claimed have managed to stop without hitting him.”

The trial Judge also believed the evidence of IP Ngonji that the 2nd appellant did not report the accident to him on the following day. The trial Judge also considered the fact that the 2nd appellant had pleaded guilty to the traffic offences of failing to stop and to report the accident. The trial Judge ultimately made a finding that the 2nd appellant was negligent and that he wanted to conceal the fact that he was the one who had hit the respondent. Nevertheless, the trial Judge found that the respondent had contributed to the accident and said:-

“His two colleagues successfully crossed the road and Erick Odhiambo with whom he was left behind was not hit. I find that he also contributed to the cause of the accident. Having considered all the evidence on record on the issue of liability I apportion liability at 30% against the plaintiff and 70% against the second defendant.”

The appellants have appealed against the findings on liability and on the quantum of damages.

The appeal has been heard both through written and oral submissions.

The appellants both in the written and oral submissions abandoned ground 11 of the ground of appeal in

which the appellants claimed the damages awarded were inordinately high. Thus the appeal against the award of damages has been abandoned.

Mr. Shikely, the learned counsel for the appellants argued the remaining ten grounds which all relate to the issue of liability together.

Mr. Shikely submitted both in the written and oral submissions, among other things, that it was not pleaded or proved that the 2nd appellant was driving at high speed; that the trial Judge ought to have held the respondent was entirely negligent for rushing across the road when the appellant's vehicle was too close and driving on its correct side of the outer lane and that the learned Judge did not consider that the 2nd appellant was acquitted of the charge of reckless driving.

Mr. Nyabena learned counsel for respondent, on his part, submitted, *inter alia*, that, the 2nd appellant's evidence was not credible as he contradicted himself in several respects; that evidence showed that the 2nd appellant did not keep a proper look out and that the exercise of the trial Judge's discretion in apportioning liability cannot be faulted.

The appellants are inviting the Court to interfere with the findings of fact by the High Court and particularly with the judicial discretion in apportioning liability. The principles on which an appellate court can interfere with the findings of fact by the trial court are well known.

An appellate court will not readily interfere with the findings of fact of the trial court more so those findings of fact which are based on the credibility of witnesses unless no reasonable tribunal could have made such findings. **[Peters v Sunday Post Ltd [1958] EA 424, Republic v Oyier [1985] KLR 353].**

Moreover the apportionment of liability is an exercise of judicial discretion and the court will not interfere with such exercise of discretion unless the Judge came to a manifestly wrong decision or based his apportionment on wrong principles. **(Vyas Industries v Diocese of Meru [1982] KLR 114.**

There were two conflicting versions of how the accident occurred – one from Kepha Benjamin Mutinda and the other from the 2nd appellant. The road at the scene was a dual carriage way each with two lanes. The 2nd appellant was driving from Nyali towards Saba Saba. Mutinda testified that the 2nd appellant was driving on the outer lane and his vehicle which was moving at high speed lost control, climbed on the left pavement and hit the respondent who was standing outside the road waiting to cross to the other side. On his part 2nd appellant testified that he was driving on the inner lane when all of a sudden a boy hit the left side mirror of the vehicle and fell on the road. He testified further that the boy had run from the front of a parked trailer. He denied that his vehicle veered to the pavement and hit the boy. However in his evidence in cross-examination he stated:-

“I did not see the plaintiff before the collision. I saw him after he had hit the car. I did not see where he emerged from. I only heard a bhang.”

That evidence contradicts the 2nd appellant's evidence and the appellant's case as pleaded that the respondent suddenly rushed into the road from the front side of a parked trailer. Further, the 2nd respondent's evidence that he was driving on the inner lane was contradicted by the sketch plan which indicated that the point of impact was about 1½ metres from the left edge of the outer lane which was consistent with the evidence of Mutinda. Indeed, the appellant' counsel submits in the written submissions that the 2nd appellant was driving on the correct side of the outer lane.

The learned trial Judge also considered the conduct of the 2nd appellant of failing to stop after the accident and also failing to report the accident the offences to which he pleaded guilty in a traffic case. The Judge made an inference from the conduct of the 2nd appellant that he intended to conceal the fact that he was the one who hit the respondent.

On our evaluation of the evidence we are satisfied that the learned trial Judge evaluated the evidence and considered the circumstances of the accident before apportioning liability. The decision of the trial Judge on apportionment of liability is not based on the wrong principles nor is it manifestly wrong. We find no justification for interfering with the exercise of judicial discretion.

Accordingly, the appeal is dismissed in its entirety with costs to the respondent.

Dated and delivered at Mombasa this 16th day of March 2012

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR