



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT MOMBASA  
CORAM: KWACH, LAKHA & KEIWUA, JJ.A.  
CIVIL APPEAL NO. 284 OF 2000  
BETWEEN

BENEDICT MWAZIGHE ..... APPELLANT  
AND  
BANDARI TRANSPORTERS LIMITED  
  
DAVID WAMBUA ..... RESPONDENTS

(Appeal from a judgment of the High Court of Kenya at  
Mombasa (Tutui Comm of Assize) dated 16th June, 2000  
in  
H.C.C.C. NO. 665 OF 1984)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This appeal is from the judgment of the superior court (Mrs P.M. Tutui, Commissioner of Assize) delivered on June 16, 2000 in its Civil Case No. 665 of 1984 in which she held that, although a police abstract report had been tendered in evidence before the court, no evidence had been tendered by the plaintiff to show whether the police had abandoned their intention, intimated in the police abstract report, that they intended to charge the plaintiff with careless driving of his vehicle thereby causing the accident. The Commissioner also observed that the defendant's defence attributed certain acts of negligence to the plaintiff. The Commissioner further found that since the police abstract report and the defendant's defence are part of the court record, it was therefore upon her to decide whether the plaintiff had proved his case which was based on negligence.

The accident occurred on March 17, 1982, and it involved the plaintiff's vehicle registration number KTE 245 and it happened along Mombasa - Nairobi Road. The 2nd defendant was driving vehicle registration number KTC 434 on behalf of the 1st defendant. He is alleged to have driven it carelessly and caused it to collide with that of the plaintiff and thereby occasioning serious injuries to the plaintiff. That defendant was alleged to have driven the vehicle at excessive speed and had failed to keep any look out to avoid the said accident. The plaint has set out particulars of injuries the plaintiff suffered as head injury (concussion), fracture of 2nd and 3rd ribs, communitated fractures of femur shaft, laceration of the left arm and multiple bruises on both legs and back. The plaintiff had also claimed special damages in the sums of KShs.1,000/= for a medical report, KShs.100/= and KShs.24,000/= respectively for a police abstract and for professional medical treatment from the Aga Khan Hospital.

The defendants filed a defence in which the collision was admitted but denying that the accident occurred as a result of the factors alleged by the plaintiff and specifically denied the particulars of negligence attributed to the 2nd defendant and the plaintiff was put to strict proof. The defence countered the allegations of negligence alleged against the 2nd defendant in the plaint by laying out in the defence the particulars of the plaintiff's negligence. The plaintiff did not, as required of him by **Order VIII rule 17 of the Civil Procedure Rules** , file a reply to the defence which had alleged negligence on his part. There are some particulars of negligence in the defence which by their nature required to be traversed specifically by the plaintiff. The plaintiff had been alleged to have cut across the path of the defendant's vehicle suddenly and unexpectedly and had also attempted to enter Port Reitz Road through the wrong half of the road.

The accident was reported to the police who issued a police abstract report dated May 25, 1982. The defendant did not attend the hearing of the suit when it came for hearing on March 6, 2000, during which trial the plaintiff gave evidence which was not challenged. We note, however, that the only

document the plaintiff tendered to show that the accident did take place, was a police abstract report which the superior court had noted, did not indicate whether the police had changed their mind not to charge the plaintiff for causing the accident. The court had this to say regarding the plaintiff's failure to prove the allegation of negligence he attributed to the 2nd defendant:

*"Apart from the plaintiff no further evidence was called to throw more light on the issue of negligence. The plaintiff did not deny the particulars of negligence attributed to him by the defendant and no reply to the said defence was either filed. Further, the plaintiff chose not to say anything about the intention by the police to prefer charges against him. One of the particulars of negligence attributed to the plaintiff is that he attempted to drive across the defendant's path of travel suddenly and without notice having emerged from behind a bus with the intention of turning into Port Reitz Road. I find it difficult to accept the plaintiff's version that the defendant was wholly to blame for the accident and especially so because he has not in my view proved any fact of negligence attributed to the defendant."*

The aforesaid passage from the judgment of the Honourable Commissioner of Assize, in our view sums up what the plaintiff was expected to have done to prove his case. The plaintiff did not even attempt at the trial to dispute the defendant's version of the cause of the accident which had attributed negligence to him. In our judgment, to require the plaintiff to displace the allegations of negligence made against him in the defence, is not the same thing as requiring him to prove his case beyond reasonable doubt as is required of the prosecution in a criminal trial. It is simply that the plaintiff has not proved his case to the required standard on a balance of probability.

Accordingly, we hold that the appellant had not proved his case on liability and we dismiss the appeal with costs.

Dated and delivered at Mombasa this 27th day of July, 2001.

R. O. KWACH

-----

JUDGE OF APPEAL

A. A. LAKHA

-----

JUDGE OF APPEAL

M. OLE KEIWUA

-----

JUDGE OF APPEAL

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

DEPUTY REGISTRAR