REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 5 OF 2013

DAMARIS WANJIRU NDERI

STANLEY MWANGI KURIA……. APPELLANTS

VERSUS

GEORGE NGERO KANYI…….RESPONDENT

(Being an appeal against judgment and decree in Nyeri Chief Magistrates' Court Civil Case No. 119 of 2009 (Hon. E.K. Makori, SPM) on 7th February, 2013)

DAMARIS WANJIRU NDERI

STANLEY MWANGI KURIA…….PLAINTIFFS

VERSUS

GEORGE NGERO KANYI…….DEFENDANT

JUDGMENT

The appellants sued the defendant in the magistrates' court for general damages (under the Law Reform Act, cap 26 and Fatal Accidents Act, cap 32) and special damages. They also sought for interest on damages at court rates and costs of the suit. They sued in their capacity as administrators of the estate of **Paul Nderi Mwangi** (the deceased).

According to the amended plaint filed in court on 20th July, 2009, the appellant's suit arose out of a road traffic accident which occurred on 15th August, 2008 along Naromoru-Kiganjo road; the accident involved motor vehicle registration number KAL 927 K owned by the respondent at the material time. At the time of the accident the deceased is said to have been travelling in the ill-fated motor vehicle as an authorised and therefore a lawful passenger. He died as a result of the injuries he sustained in the accident.

It was the appellants' case that the respondent was negligent in driving, managing or controlling his motor vehicle and hence the accident.

In his defence, the respondent admitted that he owned vehicle registration number KAL 927K and that it was involved in an accident on 15th day of August 2008; he, however denied that the accident was

occasioned by his negligence but rather attributed it to the driver of motor vehicle registration number KAT 627F. According to the respondent, the accident was solely caused or substantially contributed to by the negligence of the driver of this latter vehicle.

At the conclusion of the hearing; the learned magistrate dismissed the appellants' suit on the sole ground that liability had not been proved against the respondent. The appellants appealed against the learned magistrate's decision and raised the following grounds: -

1. The learned magistrate erred in law and in fact in failing to take into account the appellants' evidence and submissions;

2. The learned trial magistrate erred in law and in fact in failing to consider the appellants had joined issues in the reply to the defence;

3. The learned trial magistrate erred in law and in fact in stating the whole of the plaintiffs' claim failed without addressing the evidence adduced;

4. The learned magistrate erred in law in finding that negligence was not proved when it was a collision involving two vehicles;

5. The learned magistrate erred in law in failing to find that the judgement was entered against the 3rd party;

6. The learned magistrate erred in law in assessing damages which were extremely low; and,

7. The learned trial magistrate erred in law and in fact in failing to consider all the evidence, pleadings, facts and the law before him and in failing to make a finding on each and every issue raised by the parties.

In the learned magistrate's judgment, the appellants were not at the scene of accident and therefore they were understandably not in a position to give an account of how the accident occurred. The only eyewitness account of what transpired was from the respondent who attributed the accident to the driver of motor vehicle registration number KAT 627F that apparently was involved in a collision with the motor vehicle in which the deceased was travelling.

It followed that the failure of the appellants' case turned on the determination of the issue of liability for the accident in which the deceased died. Despite the several grounds that the appellants have raised in their appeal, I am of the humble view that it is this particular issue of liability that is central to their appeal.

The record shows that the only witness whom the appellants called to testify on their behalf was police constable **Joseph Ngera (PW1)** who was then attached to Naromoru police station at the material time. It was his evidence that the accident involved motor vehicles registered as KAL 927 K and KAY 627F (it is indicated in the abstract as KAT 627F) and as at the time he testified the cause of the accident was still under investigations. But in answer to questions during his cross-examination, he referred to a sketch map which showed that the collision was in the lane in which the defendant's motor vehicle was travelling, which was its left-hand side; in fact, so he testified, the collision was almost off the road apparently to the far left of the respondent's vehicle. From his investigations, this officer established that in an attempt to overtake another vehicle or other vehicles, motor vehicle registration number KAT 627F veered from its lane into the lane in which the respondent's motor vehicle was travelling; the two vehicles were travelling in opposite directions and hence the head-on collision.

The deceased's wife **(PW2)** testified but her evidence mainly dwelt on her fact of marriage to the deceased; her and children's dependency on him and the expenses she incurred as a result of the accident and the subsequent funeral expenses accruing from the death of her husband. She obviously did not have any evidence on who was to blame for the accident since she was not at the scene of the accident.

Fredrick Mwai Muriithi (DW1), on the other hand, testified on behalf of the respondent. His evidence was that he was the respondent's employee and he was driving the respondent's vehicle at the time of the accident. On the material night, he was driving from Naromoru to Nairobi when he saw vehicles coming from the opposite direction; they were apparently overtaking each other when one of them, motor vehicle registration number KAT 627F drove into his lane and hit the vehicle he was driving.

According to this witness he swerved to the far left but he could not avoid the collision; the point of impact, according to him, was on the pedestrian path, off the road.

This witness' testimony is, as noted, the only eyewitness account of how the accident occurred and by and large is consistent with the evidence of the investigations officer in its material respects the most important of which were that the respondent's driver was on his proper lane prior to the collision; that the respondent's driver attempted to avoid the accident by swerving to the far left to avoid motor vehicle KAT 627 F; and, that this latter vehicle was overtaking, apparently, without any due regard to oncoming traffic and in this particular case, the respondent's vehicle.

As much as the police officer testified that the investigations into the cause of the accident were still on, it was clear from his own evidence that it was the driver of motor vehicle registration number KAT 627 F who was to blame for the accident. Put differently, the respondent's driver was blameless and the learned magistrate properly directed himself on the evidence when he came to the conclusion that based on the material before him, there was no proof of negligence on his part.

Counsel for the appellants submitted that it was not clear from the evidence who between the two drivers was to blame for the accident and cited several decisions where it has been held that in such circumstances the two drivers must be held liable. This is what counsel submitted:

> ***The court was treated to evidence which could not establish who was to blame for the accident. There was (sic) conflicting versions of how the accident occurred. It was therefore clear that there was no concrete evidence to determine which motor vehicle was to blame, the one of the respondent and the 3rd party motor vehicle. In the circumstances the liability for the accident could have been on both drivers. The respondent having abandoned the claim against the 3rd party therefore should have been found 100% liable.***

With due respect to the learned counsel, he appears to have misapprehended the evidence on record; I have not found any conflict in the evidence on the manner in which the accident occurred. It has already been noted that the appellants' witness' testimony was consistent with that of the respondent's driver on how the accident occurred. It would not have been difficult for any analytical mind to reach the conclusion on who between the two drivers was to blame for the accident, at least for purposes of the appellant's suit.

As far as the decisions cited by the learned counsel for the appellants are concerned, I would say that I agree with them in principle but I find that they all apply to cases where it is not apparent from the available evidence to whom liability should attach in circumstances where there is more than one possibility of how the accident occurred. For instance, in **Farah versus Lento (2006) KLR 123** the Court of Appeal held as follows:

> ***In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both the drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. (See page 130).***

In coming to this conclusion, the court cited with approval the decisions in **Barclay-Steward Limited & Another versus Waiyaki (1982-88) 1KAR 1118; Baker versus Market Harborough Industrial Co-operative Society (1953) 1WLR 1472 (**per Lord Denning at page 1476) and **Welch versus Standard Bank Ltd (1970) E.A 115**.

In **Kago versus Njenga (1981) KLR 186** the appellant was a passenger in a car that collided with a bus driven and belonging to the respondents. The appellant commenced in the High Court a suit seeking damages for injuries suffered as a result of the accident. His case was that the accident was caused by the negligence of the respondents and he sought to rely on the doctrine of *res ipsa loquitor*. The respondents maintained, *inter alia*, that the accident occurred on account of factors beyond the driver's control. The trial judge found the respondents not negligent the accident having been caused by a tyre burst. In dismissing the appellant's appeal the Court of Appeal held as follows:

> ***For the defence to rebut the presumption of negligence arising from res ipsa loquitor it was for the defendants to avoid liability by showing either that there was no negligence on their part which contributed to the accident, or that there was a probable cause of the accident which did not connote negligence on their part or that the accident was due to circumstances not within their control***.

I found the decision in **Kirby versus Leather (1965) 2 ALL ER 441** to be of little relevance to the appellants' case because the only question on which the report was made was whether the action against the appellant was statute barred. The law report was not concerned with the issue of who was to blame for the accident.

It must be remembered that the burden was always on the appellants to prove on a balance of probabilities that the accident was caused by the respondent's driver. **Section 107,108** and **109** of the Evidence Act, cap 80 placed this burden on the appellants; **section 107 (1)(2)** is clear that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, bears the burden to prove those facts; in other words, he who asserts must prove. **Section 108** goes further to emphasise this point and states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109 on the other hand, is specific on proof of a particular fact that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Considering that the respondent had denied liability, all that was required of him was to traverse the appellants' averments in this regard; this he did and he went further to give evidence on how the accident happened. His version of how the events unfolded culminating in the grisly accident was not controverted by the appellants.

It is appreciated that respondent attributed the accident to the negligence of a third party and even averred in his defence that he would take third party proceedings against him. The defendant probably had in mind **order 1 rule 15** of the Civil Procedure Rules which cater for this kind of situations. According to that rule where a defendant claims as against any other person (normally referred to as "the third party"), that the defendant is entitled to contribution or indemnity against him yet he is not a party to the suit, then he can apply for a third party notice to issue against him.

By and large this rule is meant to cover the defendant in the event a decree is passed against him. In default of appearance by the third party, he is deemed to admit the validity of the decree obtained against such a defendant and his own liability to contribution or indemnity. **(See order 1 rule 17 of the rules).** It follows that if plaintiff's suit against a particular defendant fails, as it did in the appellants' case, the inclusion of the third party in the proceedings would not be of any help to him. This goes to emphasise the point that the need for the defendant to take third party proceedings under **order 1 rule 15** of the rules is not an alternative to the plaintiff's legal obligation to discharge the burden of proving his case against the defendant.

If I have to say anything more on this case, it was not in doubt that two vehicles were involved in the accident; this was clear from the evidence of the respondent's driver and that of the appellants' witness who even produced a police abstract to boot. Since it was not clear to the appellants who was to blame for the accident from the very beginning, they should have taken advantage of **order 1 rule 7** of the Civil

Procedure Rules and joined the owners and drivers of the two vehicles in the suit so that the issue of liability could be determined between them; that rule provides:

> ***1.(7). Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.***

In the alternative, it was open to them to amend their pleadings when it became clear from the evidence of their own witness that the driver of motor vehicle registration number KAT 627 F was to blame for the accident. They opted not to take any of the two available options and their inaction turned out to be fatal to their claim.

I am satisfied that the learned magistrate came to the correct conclusion in dismissing the appellants' suit; it follows that the appellants' appeal has no merits and I hereby dismiss it with no orders as to costs.

Dated, signed and delivered in open court this 10th February, 2017

Ngaah Jairus

JUDGE