REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 123 OF 2015

MUTISYA MUTHANGYA.....APPELLANT

VERSUS

PAUL MANUNDU MUSILI.....RESPONDENT

J U D G M E N T

1. This is an Appeal that was filed in **Machakos High Court.** It was listed for dismissal on the **13th** day of **July, 2015.** The Appellant's Counsel **Mr. Kilonzi** who turned up expressed his interest in pursuing the Appeal, consequently a date was taken for directions. On the **17th September, 2015 Nyamweya, J.** caused it to be transferred to **Kitui High Court.** Directions were given on **20th June, 2017.** All along the firm of **Mbingi Njuguna & Co. Advocates** made no appearance despite service being effected.

2. The Appellant who was the Plaintiff in the Lower Court instituted a suit against the Respondent claiming general damages, special damages of **Kshs. 5,200/=** and costs of the suit.

3. The claim arose out of a road traffic accident that occurred on the **19th April, 2005** along **Kitui-Kalundu** road where the Appellant was a pedestrian pushing a handcart when the Respondent, the owner of motor vehicle Registration Number **KAK 843K Toyota Saloon Station Wagon** emerged from a feeder road and knocked him down. He sustained injuries. He blamed the Respondent for negligence.

4. In his statement of defence, the Respondent denied liability and blamed the Appellant for the occurrence of the accident. He averred that the Appellant failed to control his handcart while going downhill hence causing the accident and having been charged with a Traffic Offence.

5. In response the Appellant contended that the fact of being charged with a Traffic Offence was not conclusive that he was the one to blame for the accident.

6. The learned trial Magistrate considered evidence adduced and found that the Appellant was the one liable for the accident therefore dismissed the case with costs.

7. Aggrieved by the decision of the Court, the Appellant appealed on grounds that: The learned Magistrate perverted justice and acted in an impropriety manner by delaying delivery of Judgment since **18th November, 2009** to **10th March, 2010** for no apparent reasons; misdirected himself by failing to find that there was enough evidence to apportion liability and by holding that the Plaintiff was **100%** liable for the accident.

8. Only the Appellant filed submissions. It was argued that following the delay in writing of the Judgment the trial Magistrate had forgotten the evidence adduced or he had lost the flow of the trial such that he overlooked the evidence on record and as such he solely relied heavily on the police abstract and proceedings of **Traffic Case No. 515 of 2005** as a basis for his reasoning and decision. That evidence given established that the Respondent contributed to a big percentage of the occurrence of the accident. Evidence on record was overlooked. The conviction in the Traffic Case was not conclusive evidence of blameworthy on the part of a Plaintiff in a subsequent civil trial. He prayed for the Lower Court Judgment to be set aside and be substituted with a Judgment apportioning liability at **80:20** in favour of the Appellant against the Respondent with costs and interest in the Lower Court and the Appeal.

9. This being the first Appellate Court it is duty bound to re-evaluate the evidence, assess it and come to its own conclusion bearing in mind the fact that It did not have the opportunity of seeing or hearing witnesses who testified at trial **(See Selle vs. Associated Motor Boat Company Ltd (1968) EA 123).**

10. In the case of **Mbogo vs. Shah and Another (1968) EA 93** the Court clearly stated thus:

"…. It is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied

that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."

11. It was the evidence of the Appellant that he was pulling a handcart going downhill when the vehicle came from the Petrol Station and entered the main road without looking out for other road users. The motor vehicle hit the handcart and as a result he sustained injuries. On cross examination he admitted having been charged with a Traffic Offence, convicted and sentenced accordingly. However, he denied having been at fault.

12. The Respondent adduced in evidence proceedings in **Traffic Case No. 515 of 2008** where the Appellant was convicted of the offence of Careless Riding. In his testimony the Respondent argued that he was driving uphill when he encountered the Appellant who carried a heavy load of firewood on his handcart. He lost control of the handcart. The police visited the scene and blamed the Appellant who was subsequently charged in Court.

13. In the case of **Stapley vs. Gypsum Mines LTD (2) (1953) AC 663** the Court held that:

"To determine what caused the accident from the point of view of legal liability is a most difficult task. If there is any valid logical scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it….. The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but does not mean that the accident must be regarded as having been caused by the faults of all of them….."

14. This is a case where the police investigated and opined that the accident occurred following the negligence of the Appellant. **Section 47A** of the **Evidence Act** provides thus:

"A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

This is a case where the Appellant did not appeal against the Judgment of the Traffic Case. The question to be answered is whether it means that the Appellant was **100%** liable for the negligence in question?

15. In the case of **Robinson vs. Oluoch (1971) EA 376** it was held that:

"Careless driving necessarily connotes some degree of negligence and in those circumstance it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent; but that is a very different matter from saying that a conviction for an offence involving negligence driving in conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what Section 47A states. It is quite proper from a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the Plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. Accordingly, the Judge was right in not striking out the defence as a whole."

16. It is clear that the fact of a conviction having occurred does not rule out an element or question of contributory negligence. This would depend on the facts of each case.

17. The Court of Appeal in the case of **Phillip Keipto Chemwolo & Mumias Sugar Company LTD vs. Augustine Kubende (1982 – 88) IKAR 1036** was of the view that in a Civil Case both parties to an accident might have driven carelessly and each convicted of careless driving for their respective types of carelessness. Contributory negligence may arise on the strength of proceedings in a Traffic Case therefore despite the conviction the issue of contributory negligence may still be alive.

18. The Appellant averred that the Respondent joined the road suddenly from a feeder road at a high speed failing to give way to other motorists and as a result failed to avoid the accident. The Respondent on the other hand pleaded that the Appellant failed to control the handcart that was heavily loaded and he encroached on the Respondent's side of the lane hence causing the accident.

19. In reaching his decision, the trial Magistrate dismissed the allegation that the Respondent was negligent based on the fact that the police blamed the Appellant for the accident and when he went through trial the Court convicted him. He also found evidence adduced by the Respondent to have been credible.

20. I have perused the sketch plan that was drawn by the police which forms part of the record having been produced in evidence. The point of impact is not indicated. There is nothing to suggest that the handcart encroached the lane on which the Respondent was lawfully driving. The distance between the filling station and where the vehicle/handcart stopped was not given. The Appellant having opted to remain silent, there was nothing to suggest if indeed the motor vehicle emerged from the filling station. Applying common sense to the facts of the case I find that both the Appellant and Respondent contributed to the accident.

21. The allegation **Mr. Kilonzi** came up in his opening remarks in the submissions casting aspersions on the conduct of the learned trial Magistrate were unfortunate. Looking at the record, at the outset the Judgment was to be delivered on the **18th November, 2009.** On the

stated date both parties did not appear. A mention date was given for the **13th January, 2010** but there was no appearance of parties. Ultimately only the Plaintiff was present on the **10th March, 2010** and the Judgment was delivered.

22. From the foregoing I do allow the Appeal partly by setting aside the Judgment entered in the Lower Court and substitute it with a Judgment apportioning liability at **50:50** in favour of the Plaintiff against the Respondent.

23. The learned Magistrate reached a finding that he would have awarded the Plaintiff **Kshs. 95,000/=** in general damages for pain, suffering and loss of amenities had he proved his case. He pointed out that the special damages claim was not specifically proved. This was not in dispute at the Appellate stage. In the circumstances the Appellant is awarded **Kshs. 95,000/=** as general damages less contribution of **50%** which comes to **Kshs. 47,500/=.** He is also awarded costs in the Lower Court and of this Appeal.

24. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **12th** day of **June, 2018.**

L. N. MUTENDE

JUDGE