Haye Bishan Singh & Sons LTS & another v Tonui (Civil Appeal 21 of 2020) [2024] KEHC 13503 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13503 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CIVIL APPEAL 21 OF 2020

JR KARANJA, J

OCTOBER 31, 2024

BETWEEN

HAYE BISHAN SINGH & SONS LTS ..... 1ST APPELLANT

SIMION ONDARI OGECHA ..... 2ND APPELLANT

AND

SHEILA CHEROTICH TONUI ..... RESPONDENT

JUDGMENT

1. This appeal is against the judgment of the Senior Resident Magistrate delivered on 15th July, 2020 in Kericho CMCC No. 168 of 2016, where the Appellant, Hayer Bishan Singh & Sons Ltd and another were the Defendants in the suit which was institued by the Respondent Sheila Cherotich Tonui, claiming damages on account of a road traffic accident which occurred on 15th February, 2015 at Chepkutung along the Kericho-Sotik road involving the Appellant's motor vehicle Registration No. KBZ 639J Toyota Hilux and a motor vehicle Registration No. KBX 280Q in which the Respondent was travelling as a lawful fare paying passenger.

2. It was pleaded in the plaint dated 20th November, 2015, that on the material date the Appellant's motor vehicle was so carelessly, negligently and recklessly driven such that it collided with motor vehicle registration No. KBX 280Q thereby causing severe injuries to the Respondent.

3. It was also pleaded that as a result of the accident the Respondent suffered loss and damages for which she blamed the Appellant company and prayed for both general and special damages against it together with costs of the suit and interest.

4. The Appellant denied the claim and filed a statement of defence in which it contended that if the accident did indeed occur then it was solely due to the negligent acts and/or omissions of the driver and/or owner of motor vehicle Registration No. KBX 280Q. the Appellant expressed an intention to

take out a third party notice against the owner of the said motor vehicle for purposes of contribution and/or indemnity.

5. At the hearing of the case, the Plaintiff/Respondent (PW1) testified and availed two witnesses, a medical officer at Kericho County Referral Hospital . Dr. Risper Irene Chepngetich (PW2) and a traffic police officer, PC Samson Okoth (PW3). Ironically, the Appellant closed its case without first opening it by calling a witness or two to support its pleading and defence to the Respondent's claim.

6. Be that as it may, after the hearing, the Trial Court rendered its judgement in favour of the Plaintiff/ Respondent for the total sum of Ksh 361,037/= made of Ksh 350,000/= general damages and Ksh 11,037 special damages.

   The Respondent was also awarded cots of the suit and interest.

7. Being dissatisfied with the judgement the Appellant preferred the present appeal on the basis of the grounds set out in the memorandum of appeal dated 10th August, 2020 filed herein by Muma Nyakaka & Co. Advocates. The Respondent opposed the appeal through the firm of Obondo Koko & Co. Advocates.

8. The appeal was canvassed by written submission which were filed by both parties through their respective advocates. The appeal and its supporting grounds were given due consideration by this court together with the rival submissions and being a first appeal the duty of the court was to reconsider the evidence availed at the trial court draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, Sielle vs Associated Boat Co. Ltd [1968]EA 123).

9. In that regard, the evidence adduced by the aforementioned witnesses (PW2) and PW3) and the Respondent (PW1) in this court's opinion raised two basic issued for determination viz the question of liability and the question of quantum of damages. On both issues, the evidence led by the respondent was uncontroverted and remained so throughout the trial by dint of the fact that the Appellant failed to lead evidence in support of his defence.

10. Nonetheless, it was incumbent upon the Respondent to stablish and prove the elements of negligence of the part of the appellant.

    The allegations of negligence or carelessness or recklessness made by the Respondent against the driver of the Appellant vehicle had to be proved to the required standard if the Appellant was to be held liable to the Respondent in damages.

11. Some of the allegations included that the Appellant's vehicle was driven at a speed which was far too excessive in the circumstances and that the vehicle was driven without due care and attention such that the driver failed to keep a proper lookout, maintain effective control of the vehicle, heed and appreciate the nature of the road and driving while intoxicated on under the influence of prohibited substances.

12. The Respondent did not have to prove all the allegations. proof of one or more of the allegations was sufficient to hold the Appellant responsible for the accident and its consequences either solely or with contribution from the Respondent or any other road user. The Respondent was a mere passenger in a public service vehicle, her contribution to the accident was almost non-existent unless she decided to engage the driver in endless banter such that he failed to exercise proper lookout and caused the collision between his vehicle and that of the Appellant.

13. The occurrence of the accident was not disputed and its manifestation was in the from of collision between two vehicles i.e motor vehicle registration No. KBZ 639J Toyota Hilux pick- up belonging to the Appellant and motor vehicle registration No. KBX 280Q Matatu belonging to a third party.

14. A collision between two vehicles traveling in opposite directions would raise an inference that either one of the drivers was to blame wholly for the accident or both in equal or unequal measure. The trial court found that the driver of the Appellants vehicle was to blame wholly for the accident.

15. In so finding, the trial court rendered itself as follows;-

    But the Defendant failed to rebut in any form, the evidence put on record by the Plaintiff. The Plaintiff's version on how the accident arose, that the Defendants motor vehicles were caused to collide through carelessly or negligence remain uncontroverted in evidence. The doctrine of "res ipsa loquitor" as applied in the case of Embu Rustle Road service Ltd vs Rimii EALR [1968] where once the Plaintiff showed that an accident occurred in circumstances that ought not to , the burden shifts to the Defendant in rebutting negligence as alleged, again in favour of the Plaintiff in this case"

16. Clearly, the trial court based its conclusion on liability on the fact that the Appellant did not lead evidence in disproving and/or rebutting the allegations of negligence made against its driver by the Respondent. Further, that the doctrine of "res-psa loquitor" applied to the circumstances of the case since the Appellant failed to rebut the negligence attributed to itself though its driver.

17. As noted hereinabove it was incumbent upon the plaintiff/respondent to prove negligence on the part of the appellant notwithstanding the fact that the appellant did not lead any evidence by calling witness to rebut or disprove the respondents allegations.

18. There is no liability without fault and a plaintiff must therefore prove any allegations of negligence made against a Defendant in a claim based on negligence such as the present claim.

    Under section 107 of the *Evidence Act* "whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

19. In this case, the burden to prove that the appellant was wholly to blame for the accident lay with the Respondent and could not be lifted off her by the mere fact that the appellant failed to controvert her allegations by calling witnesses to testify in its favour.

20. In any event, the Appellant resisted the respondents claim by filing a statement of defence and appearing at the trial through its legal representative/counsel who cross examined the Respondent and her witnesses and filed the final submissions on behalf of the Appellant in answer to the Respondent's final submissions.

21. It may also be noted that the Appellant through its diver Simon Ondari Ogecha, who was the second defendant and is the second Respondent herein actually filed a witness statement in court dated 7th June, 2017. It's effect was to rebut and disprove the respondents allegations of negligence against the appellant and put blame on the driver of the matatu motor vehicle Registration No. KBX 280Q.

22. The Respondent, in her written statement dated 20th November, 2015 which she adopted as her evidence when she testified at the trial blamed the Appellant's driver for the accident without being specific or substantiating her statement that the said driver was negligent and careless. In her testimony in court, the respondent confirmed that the accident involved a collision of two vehicles but she could not really show that the Appellants driver was to fully blame for the accident.

23. The Respondent's witness PC Samson Okoth (PW3) of traffic Base Kericho produced two police abstract reports of the accident and indicated that the driver of the matatu Registration No. KBX 280Q who unfortunately sustained fatal injuries in the accident was to blame for the accident by his careless overtaking of a motor vehicle and ended up colliding head on with the appellants Toyota pick up.

24. In totality, the respondent's evidence suggested that both drivers of the Appellant's vehicle and the matatu vehicle were to blame for the accident, but the driver of the matatu bore the greatest blame by his negligent manner of driving his vehicle thereby creating the dangerous situation which resulted in the collision of the two vehicles.

25. The Appellant drivers blame could be attributed to his failure to keep a proper lookout for other road users in order to avoid any mishaps associated with road usage. Unless, the Appellant's driver was driving his vehicle recklessly at excessive speed the could have avoided the accident by taking proper action to avoid the oncoming matatu vehicle while its driver was overtaking another vehicle, hitherto recklessly.

26. It would therefore follow that the finding by the trial court that the appellant's driver was to wholly blame for the accident for reasons that the Appellant did not controvert the Respondent's evidence or on account of the doctrine of "res-psa loquitor" was against the weight of the evidence, hence erroneous.

27. It is the finding of this court that the accident was attributable to the negligence of the driver of the two vehicles with the driver of the matatu having the greatest blame. In that regard, its herein found appropriate to apportion liability at the ratio of 60% for the matatu driver of motor vehicle Registration No. KBX 280Q and 40% for the driver of the Appellant's Toyota Pick UP registration No. KBZ 639J.

28. On the question of quantum of damages, the medical report by Dr. Chepngetich Risper (PW2) indicated that the Respondent suffered blunt trauma on the right chest and right leg, bruises on the left leg and multiple Bruises on the right palm and arm. She was treated at Kericho District Hospital and appeared to have fully recovered without any residual permanent disability.

29. The trial curt considered the injuries and comparative case law cited by both sides and awarded a sum of Ksh 350,000 general damages for pain and suffering. Special damages were placed at Ksh 11,037/= being the amount specifically pleaded and proved.

30. In a personal injury claim such as the present one the assessment of damages is guided by the principles that award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained, the award should be commensurable with the injuries sustained, previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

31. Previous awards have to be taken into account to maintain stability of awards but factors such as inflation should be taken into account. The awards should not be inordinately low or high (see Boniface Waiti & Another vs Micheal Kariuki Kamau (2007)eKLR). This court agrees with the findings of the trial court on the question of damages awarded to the respondent as it has not been shown herein that the trial court departed from the aforementioned guidelines or principles on award of damages for personal injuries.

32. In sum, this appeal succeeds on the question of liability but not quantum of damages. In that regard, the finding of the trial court on liability be and is hereby set aside and substituted with a finding that both driver of the two vehicle were to blame for the accident at a ratio of 60:40% for the driver of the Matatu vehicle and the driver of the Appellants vehicle respectively.

33. The award of damages made in favour of the Respondent be accordingly shared between the Appellant and the driver/owner of the motor vehicle Registration No. KBX 280Q whom the Respondent should pursue for his "portion" of the damages.

34. Ordered accordingly.

J.R. KARANJAH.

JUDGE.

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER, 2024.

In presence of;-

Mr. Okoko for Respondent

Appellant. Present

Simon. Court Assistant.