



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CIVIL APPEAL NO.51 OF 2019

BETWEEN

SAMWEL ONDITI.....APPELLANT

AND

MBOYA OTHIM.....RESPONDENT

(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's CMCC No. 77 of 2014 by Hon. T.Obuttu –Senior Principal Magistrate).

JUDGMENT

1. Samwel Onditi, the appellant herein, was the defendant in Homa Bay Chief Magistrate's CMCC No. 77 of 2014. This was a claim that arose from a road traffic accident on 14th September, 2013. The accident involved motor vehicle registration number KAK 978U and motor vehicle registration number KBU 258EZ. The respondent who was a passenger in motor vehicle registration number KAK 978U sustained injuries. He blamed the driver of motor vehicle registration number KBU 258EZ for the accident. He was awarded of Kshs.150, 000/= general damages and special damages of Kshs.5, 200.00.

2. The appellant was dissatisfied with both general and special damages and filed this appeal. He was represented by the firm of Mose, Mose & Millimo Advocates. He raised eight grounds of appeal as follows:

- a) The learned magistrate erred in law and fact in holding the appellant 100% liable for the occurrence of the accident.
- b) The learned magistrate erred in law and fact in awarding damages in favour of the plaintiff against the defendant without any legal and/or evidential justification while absolving both the plaintiff and the third party.
- c) The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion.
- d) The learned magistrate erred in law and fact in awarding kshs.155,200/- as General damages without any legal and/or evidential justification as against the defendant/appellant herein while completely absolving both plaintiff and the third party who had been charged in court.
- e) The learned magistrate erred in law and fact in failing to appreciate as follows:
 - i) That the evidence adduced in support of the plaintiff's case was incongruous with the pleadings.
 - ii) That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining damages awarded as against the defendant/appellant herein.
- f) The learned magistrate erred in law and fact in awarding excessive damages without regard to the defendant's submissions.
- g) The learned magistrate erred in law and fact by awarding excessive damages beyond the scope of evidence and or legal entitlement.
- h) The learned magistrate erred in law and fact in entering judgment in favour of the plaintiff against the defendant in spite of the

plaintiff's miserable failure to establish her case more especially on damages.

3. The appeal was opposed by the respondent. He was represented by the firm of Kerario Marwa & Company Advocates.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. From the grounds of appeal we can distil two issues for determination. These are whether the learned trial magistrate erred in finding the appellant 100% liable for the accident and whether the general damages were inordinately high.

6. According to the respondent and the witnesses who were travelling in motor vehicle registration number KAK 978U, the accident occurred when the driver of motor vehicle registration number KBU 258EZ was overtaking another motor vehicle ahead of his and therefore collided head on with the vehicle from the opposite direction. This evidence was not challenged.

7. The appellant in his pleadings denied that the accident complained of occurred. He then pleaded in the alternative and blamed the driver of motor vehicle registration number KAK 978U for the accident. This kind of pleading amounts to doublespeak and adds no value to the pleadings. He did not testify to give his version of the accident to the court. I therefore find that the learned trial magistrate was justified to find the appellant 100% liable for the accident.

8. An appellate court will only interfere with an award of the trial court in general damages if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

...an appellate court will not disturb an award of damages unless it is so, inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.

9. The appellant contends that the award of Kshs. 150, 000/= general damages was inordinately high. The respondent sustained the following injuries:

- a) Tender and swollen right shoulder;
- b) Dislocation of the right shoulder;
- c) Bruises on the right shoulder; and
- d) Bruises and lacerations on the right hand.

10. At the time of the examination, the respondent was in fair general condition but had reduced movement in the right shoulder.

11. The respondent at the trial court had proposed an award of Kshs. 90,000.00 as fair and adequate compensation. He relied on **Eastern Produce (K) Ltd (Savani Estate) vs. Gilbert Muhunzi Makotsi [2013] eKLR** and **Godwin Ireri v Franklin Gitonga [2018] eKLR**.

12. In **Godwin Ireri** case, the respondent had a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. For this injuries he was awarded Kshs. 90,000.00. This are less severe injuries than what the respondent herein suffered. In the **Eastern Produce (K) Ltd (Savani Estate)** case, the respondent slipped into a hole which had a pruned branch. This pricked his left foot on the upper side (dorsal). He was awarded Kshs.70, 000.00. Again this was an injury less severe than what the respondent in the instant case suffered.

13. The upshot of the foregoing, is that there is no reason for me to interfere with the award by the learned trial magistrate. The appeal is dismissed with costs.

DELIVERED and SIGNED at HOMA BAY this 25th day of January, 2022

KIARIE WAWERU KIARIE

JUDGE