



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO 28 OF 2018

HARRISON MAINA KIMANI.....APPELLANT

VERSUS

FRANCIS KARANU MACHARIA.....RESPONDENT

(Being an appeal against the quantum arising from the judgment of Hon. E. Munyi (SRM)

on the 15th day of December 2017 in Nakuru CMCC No. 326 of 2009)

JUDGMENT

1. The appellant instituted this appeal through memorandum of appeal dated 19th December 2017, challenging the Judgment and Decree issued on 15th December 2017 in Nakuru CMCC No.326 of 2009. In the trial court, the appellant sued the respondent/defendant seeking special and general damages through plaint filed on 1st April 2009. The plaintiff's contention was that on 30th November 2008 he was cycling along Nakuru- Kabatini Road at Muronyo when the respondent/defendant negligently drove motor vehicle Registration No. KAP 936L and knocked the appellant thereby occasioning serious injuries.

2. The respondent filed a defence on 8th November 2009 denying the occurrence of the alleged accident and further stated that if the same happened which is denied, the same was due to the negligence of the appellant/plaintiff.

3. After trial, the trial magistrate found that the plaintiff did not prove that the defendant was wholly or partially to blame for the accident and dismissed the claim against the defendant/respondent. He however proceeded to assess damages at Kshs 700,000 being general damages and Kshs 7,550 special damages and must be pleaded and proved. Hence she is awarded Kshs 7,550 being special damages and observed that had defendant proved his claim as required, he would have awarded Kshs 707,550.

4. Aggrieved by the court's judgment the appellant filed the current appeal and urged the court to set aside the said judgment and substitute it with a judgment of this court. The appellant raised 5 grounds for the appeal which I reiterate as follows:-

a. That the learned trial magistrate erred in law and in fact in failing to find that the plaintiff had proved its case to the required standards.

b. That the learned trial magistrate erred in law and in fact in failing to find that the defendant/respondent had not proved their case as against the Plaintiff.

c. That the learned trial magistrate erred in venturing to have issues as core issues for determination of the case.

d. That the learned trial magistrate erred in law and in fact in ignoring the evidence from the formal witness who corroborated the Plaintiff's case.

e. That the learned trial magistrate erred in law and in fact in ignoring the Plaintiff

5. The appeal was canvassed by way of written submission. The appellant filed submissions on 12th October 2021 with the respondent filing on 6th December 2021.

APPELLANT'S SUBMISSIONS

6. Counsel for the appellant submitted that the respondent's evidence in the lower court was an afterthought; that the report at the police station was made a day after the incident.

7. The appellant submitted he proved his case to the required standard as he was able to prove that the accident occurred and it involved the respondent's motor vehicle registration number KAP 936L. Secondly, that the appellant was injured in the said accident as evident by the hospital documents. Further that the respondent also confirmed the occurrence of the accident though the respondent's position is that the appellant rammed on the respondent vehicle.

8. The appellant further submitted that the respondent failed to adduce evidence to prove towing of the motor vehicle as alleged neither was inspection report of the damaged vehicle available.

9. The appellant further submitted that the issues that informed the court to make the decision were not properly set out or analyzed and not all cases require an eyewitness; further that the standards required in the instant case is not as high as in criminal cases.

10. The appellant further submitted that the reason for failing to report was because he was seriously injured at the time of the accident and the fact that the matter is still under investigation cannot be heaped on the appellant and the appellant cannot be made to suffer for the actions of police officers; that it was role of the court to weigh who between the appellant and the respondent adduced credible testimony as the accident and injury on the appellant were established.

11. The appellant urged this court to allow the appeal and enter a judgment for the appellant against the respondent for Kshs 707,550 as assessed by the trial court. He also prayed for costs and interests on the decretal sum from the date of the judgment until payment in full.

RESPONDENT'S SUBMISSIONS

12. The respondent submitted that the defendant's evidence is that, he saw the motor vehicle from a distance and during the examination the appellant's witness was credible and the witness blamed the appellant for the accident whose vehicle was over speeding while descending at a corner and the appellant had encroached on the respondent's lane. He further submitted that the respondent's evidence was not contradicted during cross-examination.

13. The respondent submitted that the appellant failed to discharge his duty of proving that the accident was caused by the negligence on part of respondent. The respondent invited this court to look at the evidence tendered in the lower court and urged this court not to interfere with the decision of the trial court but dismiss the appeal with costs.

14. The respondent submitted this court maintain the award of Kshs 100,000/= suggested in the submissions in the lower court in the event that this court finds that the accident occurred due to the negligence of the respondent.

ANALYSIS AND DETERMINATION

15. This being the first appeal the court is required to consider the evidence adduced, evaluate it and draw its own conclusions, bearing in mind that the court did not hear and see the witnesses who testified as was held in **Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123** where the court stated as follows:-

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

16. From submissions herein I find the following as issues for determination:-

- (i) Whether the appellant /plaintiff adduced evidence to prove negligence on part of the defendant and if so to what extent
- (ii) Assessment of damages.
- (iii) Who should pay costs.

(i) Whether the Appellant /Plaintiff adduced evidence to prove negligence on part of the Defendant and if so to what extent.

17. It is not disputed that road traffic accident occurred involving the appellant as a cyclist and the respondent's/defendant motor vehicle registration number KAP 936L along Nakuru – Kabatini road at Muronyo. The respondent did not deny the occurrence of the accident. There is proof that the appellant was injured in the accident and was taken to the Nakuru General hospital for treatment.

18. The trial court record shows that the appellant/plaintiff who testified as PW1 testified that he was cycling on the left side of the road when he saw a vehicle from the opposite direction with its headlights on. He said he swerved to avoid the vehicle but the vehicle knocked him down.

19. On cross-examination, the plaintiff stated that he had a reflective jacket on and was using a torch fastened on the motor bicycle and that there was a slight bend just before the scene of the accident.

20. PW3 **CI David Rono Koskei** confirmed that the accident occurred on 30th November 2008 between a peddler cyclist (the appellant) and motor vehicle KAP 936L Nissan Matatu. He produced an OB ad evidence of the said accident.

21. DW1 confirmed that on 30th November 2014, he was driving motor vehicle KAP 936L he was heading to Muronyo from Nakuru at a speed of 40Km/hr at a corner when he saw a cyclist who was not stable and he did not have lights and motor cyclist dressed normally. He said the bicycle moved backwards and in an instant hit the windscreen.

22. The respondent further stated the cyclist was going down hill and it hit the vehicle on the driver's side. He said in an attempt to avoid the accident the driver applied brakes because the bicycle was at a high speed. He blamed the cyclist for the accident. He stated the accident occurred on the left side of the road.

23. I have considered evidence adduced. The defence witness blamed the motor cyclist for failing to control the motor bike. He said he was driving at a speed of 40km/hr, by the time of the collision, the defendant had seen motor cyclist. Even if he denies that he was dressed in a reflector jacket, he said he saw him and saw how he was moving. The question that the defendant failed to explained satisfactory is, attempts he made to avoid collision after seeing the plaintiff. If indeed he was moving at a speed of 40km/hr, he should have been able to control the vehicle to avoid collision. Each of them, appellant and defendant had duty of looking out to other road users and control the vehicle or swerve in the event of such occurrences to avoid an accident. In my view there was need to apportion liability at 50:50.

(ii)Assessment of damages

24. In re-evaluating the evidence in respect to award of general damages I take note of Court of Appeal decisions to the effect that the first appellate court that award of damages is discretionary and appellate court can only interfere if the award is inordinately too high or low.

25. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

26. From the medical report by **Dr. Omuyoma**, it is evident the appellant suffered a fractured right femur, blunt injuries to the right wrist joint, lacerated wounds on the upper lip, broken two upper incisor teeth and loose lower incisor teeth.

27. In **Ali Ahmed Naji vs. Lutheran World Federation Civil Appeal No. 18 of 2003** similar injuries ought to receive similar awards. In the case of **Joseph Kimanthi Nzau v Johnson Macharia [2019] eKLR** the appellant sustained head injuries, chest injuries and lower limb injuries. The court proceeded to award general damages of kshs 800,000 for pain and suffering.

28. In the circumstance, I find the appellant proved his case on a balance of probability and proceed to interfere with the trial courts judgment and award Kshs 700,000 as compensation for pain and suffering.

29. The test to be applied in an award of special damages is articulated in the cases of **Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store Civil Appeal No. 5 of 1990** and **Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681** which laid down the principle that special damages in addition to being pleaded must be strictly proved.

30. In respect to general damages, the court was urged to grant Kshs 1,000,000 for pain and suffering. He relied on the case of **Benjamin Muela Kimono vs Daniel Kipkiring Traus & Anor HCCC No 159 of 2012**. Further, the court was urged to grant a sum of kshs 1,500,000 as compensation for the fractures of the femur and bruises and the blunt injury and the loss of two teeth.

31. Having compared injuries sustained by appellant, I am of the view that the award is not inordinately high or low and I will not interfere with the awards as assessed by the trial court. Kshs 100,000 proposed by the respondent/defendant is inordinately low.

32. FINAL ORDER

a. Liability apportioned at 50:50.

b. General damages for pain and suffering kshs 700,000.

c. Special damages of Kshs 7,550.

d. Damages in (b) & (c) to be subjected to be apportioned as per (a) above .

e. Costs of the appeal.

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RACHEL NGETICH

JUDGE

In the presence of:

Lepikas - Court Assistant

Parties Absent