



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 169 OF 2019

LOGISTICS SOLUTIONS LTD.....APPELLANT

VERSUS

STEERE MAVU MWAMBELA.....RESPONDENT

(An appeal from the Judgment and decree of Hon. Kiage, Senior Resident Magistrate,

delivered on 18th July, 2019 in Mombasa Senior Resident Magistrate's Court

Civil Case No. 1243 of 2017).

JUDGMENT

1. The plaintiff (respondent) had in the lower court case sued the defendant (appellant) for an accident that happened on 25th January, 2017 at corrugated sheets are along the Nairobi Mombasa road. The respondent averred that motor vehicle registration No. KTCB 035M/ZE 6877 owned by the appellant, was driven negligently thereby colliding into her when she (sic) was lawfully standing at the bus stage. That the respondent had sustained severe injuries as a result of the accident.

2. It was also averred that after investigations were conducted, the police held the appellant's driver liable for the accident. The respondent had prayed for general damages, special damages of Kshs. 12,178.00, costs of the suit and interest.

3. The appellant in its statement of defence filed on 24th August, 2017 denied any negligence on its part and averred that the accident was caused wholly and/or substantially contributed to, by negligence of the respondent.

4. The Trial Magistrate apportioned liability at 40% against the respondent and 60% against the appellant. General damages in the sum of Kshs. 450,000/= was awarded to the respondent, less 40% contribution. Judgment was entered in the sum of Kshs. 277,306.80/= as against the appellant.

5. The appellant was dissatisfied with the said decision and on 16th August, 2019 it filed a memorandum of appeal, raising the following grounds of appeal –

(i) That the learned Trial Magistrate erred in law and fact and misdirected himself in finding the appellant liable notwithstanding the evidence on record to the contrary;

(ii) That the learned Trial Magistrate erred in law and fact in failing to properly analyze the evidence before him which clearly established that the respondent was substantially to blame for the subject accident for dashing out into the road unexpectedly thereby causing the subject accident;

(iii) That the Trial Magistrate erred in law in failing to appreciate and apply the principles applicable in a claim for negligence;

(iv) That the learned Trial Magistrate erred in law and fact in finding the appellant liable on the face of the available evidence; and

(v) That the learned Trial Magistrate erred and misdirected himself in law by assessing damages that were manifestly excessive and incomparable to the current judicial awards for analogous injuries.

6. This court was requested to review and/or set aside the Judgment/decree by the Trial Magistrate dated 18th July, 2019 and for the costs of

the appeal to be borne by the respondent.

7. In written submissions filed on 28th September, 2020 the law firm of Murimi, Ndumia, Mbago and Muchela Advocates for the appellant attributed the accident which happened on 25th January, 2017 solely to the respondent. They stated that the respondent's witness who testified as PW2 was emphatic that the subject accident was entirely caused by negligence on the part of the respondent. That the said witness said that the respondent was hit while trying to cross the road.

8. It was contended that the said evidence was at variance with the respondent's evidence where he alleged that he was standing off the road at the time of the accident. It was submitted that PW2 testified that the respondent did not confirm that the road was clear of vehicular traffic before crossing it and concluded that the motor tractor had the right of way since there was no pedestrian walk at the locus in quo. It was submitted that the foregoing was a pointer to the respondent's negligence.

9. The appellant's Counsel stated that the evidence of DW1 was not challenged in any material particular and it was clear that the respondent tried to cross the highway before the motor tractor had completely passed him. That DW1's evidence was that he could not avoid the accident as the respondent was hit by the rear end of the trailer being hauled by the motor tractor.

10. The appellant's Counsel in submitting on the pedestrian's duty of care relied on the decision in **Livingstone Otundo v Naima Mohamed** (a minor suing through their next friend) Nairobi Civil Appeal 110 of 1996 and **Patrick Mutie Kimau & another v Jane Wambui Ndurumo** [1997] eKLR.

11. This court was urged to find that the respondent failed to adhere to the provisions of the Highway Code by dashing into the highway and failing to take any extra precaution before crossing the road.

12. The appellant's Counsel in urging this court to reduce the amount awarded in general damages, relied on decisions in **West (H) and Son Ltd v Shepherd** [964] AC 326 **Hassan v Nathan Mwingi Kamau Transporters and Others** [1986] KLR 457 and **Jabane v Olenja** [1986] KLR 661, to the effect that awards made must be reasonable and assessed with moderation as excessive awards will lead to monstrously high premiums for insurance.

13. It was stated that the respondent's injury was of minimum severity and that the sum of Kshs. 150,000/= would be a fair amount to recompense him for pain, suffering and loss of amenities. To support the said submission, he relied on the decisions in **Luka Osoro v Daniel Cheruiyot** [2008] eKLR, **Augustine Mogire Moreka v JMO** [2018] eKLR and **Fast Choice Company Ltd v Morris Kinyanjui** [2011] eKLR. It was indicated that in the said decisions, the claimants suffered similar injuries if not more grave than those suffered by the respondent herein and awards of Kshs. 150,000 – 200,000/= in general damages were awarded for pain and suffering.

14. In written submissions filed on 12th October, 2020 by the law firm of Mutisya & Co. Advocates for the respondent, it was stated that the respondent was hit by the rear of the appellant's truck while attempting to cross the road and that the word "attempting" was used by both the respondent and the police officer (PW2). It was stated that the authorities cited by the appellant's Counsel involved pedestrians who dashed onto the road.

15. The respondent's Counsel stated that although PW2 was of the opinion that liability should be apportioned on a 50:50 basis, the Trial Magistrate apportioned liability at 40% against the respondent and 60% as against the appellant. It was submitted that the respondent could not be held fully to blame for the accident because the appellant had a degree of negligence as pleaded and proved and that liability should be upheld by this court.

16. On the issue of damages, the respondent's Counsel urged this court not to disturb the award made by the Trial Magistrate. It was indicated that the respondent sustained serious injuries and that the authority they had relied on in the lower court was more relevant and particularly, in regard to the fracture of the right humerus arm bone and other soft injuries.

17. In the respondent's Counsel's view, the award made for general damages in the sum of Kshs. 450,000/= to the respondent in this case, was conservatively low and should not be disturbed.

ANALYSIS AND DETERMINATION

18. The duty of the 1st appellate court is to analyze and evaluate the evidence tendered in the court below and come to its own independent decision while bearing in mind that it has neither seen nor heard witnesses testify and make an allowance for the said fact. In **Peters v Sunday Post Ltd** (1958) EA 424 at p. 429 **E Sir Kenneth O'Connor P.** said as follows-

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

19. The issues for determination are-

(i) If the issue of liability was properly determined; and

(ii) If the Trial Magistrate misdirected himself in assessment of damages.

20. The gender of the respondent is not clear. The description in the plaint is for the feminine gender. When testifying, the Trial Magistrate indicated that the respondent was a male adult. I will therefore go by the latter gender.
21. The plaintiff testified as PW1. He was Steeve Mwavu Mwambebe, a resident of Jomvu. His evidence in the lower court was that on 25th January, 2017 he was traveling home and that when he reached at Mabati rolling units, he was knocked by a trailer as he was crossing the road. That he sustained serious injuries, which were a fracture on his right hand, a deep cut on his face and a blunt injury on his ribs. He stated that he was treated at Ansar Hospital. He went to Upeoni Xray Centre for an Xray. He produced several documents to support his evidence. He also stated that he was admitted to Jocham Hospital where he was treated and a metallic implant was inserted in his hand.
22. PW1 stated that he blamed the appellant's driver for the accident, for having driven at a high speed and for failing to avoid pot holes thereby causing the accident.
23. PW2 was No. 91361 PC Anami Swaleh of Changamwe Police Station Traffic department. His evidence was that on 25th January, 2018 (sic) an accident happened along the Mombasa Nairobi highway involving motor vehicle registration No. KTCB 035M Trailer Registration No. ZE 6877 New Holand Tractor which belonged to Logistics Solution Company Limited (appellant) and a pedestrian (respondent).
24. PW2's evidence was that the respondent had alighted from a matatu and was attempting to cross the road when he was knocked down by the rear of the tractor. That he fell (down) and sustained a fracture and a deep cut on the forehead.
25. PW2 also stated that on examination, the respondent was found to have suffered grievous harm as per the P3 form. In PW2's view, blame should have been apportioned at a ratio of 50:50. He stated that the respondent was hit by the rear part of the trailer as he did not wait for the tractor to fully pass before he crossed the road. He also said that there was no pedestrian crossing or foot bridge at the point where the accident happened and that the vehicle had the right of way.
26. DW1 was Samuel Mwachimu Kiti. He was driving a tractor for his employer, the appellant herein. His evidence was that on 15th August, 2016 (sic) along the Mombasa-Nairobi road near corrugated company, a matatu overtook him and dropped a passenger in front of his tractor and then it drove off.
27. He stated that when he went past the passenger, motor cycle riders followed him and told him that he had knocked down a pedestrian (respondent). He indicated that he was driving at 20kph and a part of the trailer came into contact with the respondent.
28. DW1 blamed the respondent for failing to take precaution for his own safety as he crossed the road before the trailer had fully passed. DW1 said that it was not true that the trailer knocked the respondent as he stood by the roadside. He indicated that the trailer did not leave the road.
29. On the issue of liability, the Trial Magistrate apportioned it at 40% as against the respondent and 60% as against the appellant.
30. This court notes that there was conflicting evidence between PW1 and DW1 as to the circumstances surrounding the accident. According to PW1, he was crossing the road when he was knocked down by a trailer. In cross- examination, he said that he was standing at a bus stage, after alighting from a matatu and was waiting to cross the road when the accident occurred.
31. DW2 in his evidence stated that the trailer did not knock down the respondent as he stood by the road side as it did not leave the road. In cross-examination, DW2 stated that the side mirrors on the long vehicle have blind areas on the side of the trailer.
32. Going by the above evidence, one cannot say with certainty how the accident happened as to whether PW1 was crossing the road when he was hit by the rear part of the trailer or if he was hit by the protruding part of the trailer, as he stood beside the road.
33. DW1 admitted that the trailer has protruding parts and there was a possibility that the said parts were the ones which hit the respondent. Going by the said evidence, I have no good reason for reviewing the apportionment of liability. The Trial Magistrate had the advantage of seeing and hearing the witnesses testify and the evidence of PW1 and DW1 guided him in apportionment of liability. This court notes that PW2 was not an eyewitness to the accident.
34. This court notes that the decisions cited by Counsel for the appellant to support the appeal against the award of general damages are not applicable to the circumstances in this case.
35. The respondent herein suffered a fracture of the right humerus arm bone (mid 1/3), a deep cut on the right eye, abrasion on the head and a blunt injury to the right shoulder and chest.
36. As per the medical report dated 18th July, 2017 he sustained a 9% permanent partial disability due to the fracture of the right humerus arm bone (mid 1/3). The said report also indicated that the respondent suffered right elbow and right shoulder stiffness.
37. The Doctor stated in the said report that the fracture sites remain a weak point for life even if the bones unite and can re-fracture upon impact. The report also indicated that the respondent had a metal implant insertion that would need removal thereby weakening the bone.
38. The case of **Luka Osoro v Daniel Cheruiyot** (supra), which was relied on by Counsel for the appellant whilst requesting for a review of the general damages awarded herein, was determined in the year 2008 which was 11 years before the accident in this case happened. Due to the element of inflation, the value of the Kenyan Shilling then cannot be compared to the what a shilling could have bought in the year 2017, when the accident herein occurred.

39. In the case of **Augustine Mogire Moreka v JMO** (supra), also relied on by the appellant's Counsel, the plaintiff therein sustained a fracture which was healing well with no disability anticipated. The said case is therefore not comparable with the present case where the respondent suffered 9% permanent partial disability and had a metal plate implanted on his right humerus arm bone to unite the fracture, which would require removal after 2 years.

40. The decision cited by the appellant's Counsel in **Fast Choice Company Ltd and Another v Joseph Wanyiri Mwangi** [2011] eKLR, involved a plaintiff who suffered various soft tissue injuries and broken left incisor jaw and loose incisor teeth upper jaw. The said injuries have no comparison with the ones suffered by the respondent herein and is therefore not applicable to the circumstances of this case.

41. In the decision in **Penina Waithira Kaburu v LP** [2019] eKLR, the Court stated thus on the issue of award of general damages –

“While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.”

42. In the case of **Philip Mwago v Lilian Njeri Thuo** [2019] eKLR, the High Court sitting on appeal upheld an award of Kshs. 500,000/= general damages for a claimant who had suffered a broken humerus with 8% residual functional disability. The injuries sustained by the plaintiff in the above decision including residual disability, is comparable to the injuries suffered by the respondent herein. It was worth noting that the decision in **Philip Mwago v Lilian Njeri Thuo** (supra) was made in the year 2019 and so was the decision by the Trial Magistrate in this case. I therefore see no justification as to why I should interfere with the general and special damages awarded to the respondent in this case.

43. It is the finding of this court that the appeal herein is unmeritorious. It is dismissed in its entirety. Costs of this appeal and for the lower court case are awarded to the respondent. Interest is also awarded to the respondent until payment in full.

DELIVERED, DATED and SIGNED at MOMBASA on this 29th day of January, 2021. Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Achoka holding brief for Mr. Mbago for the appellant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant