



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. 76 OF 2019

BETWEEN

ROSELYNE NYATUKA KENYANYA.....1ST APPELLANT

RAS HOLDINGS COMPANY2ND APPELLANT

VERSUS

MICHAEL MASENO ONYANGO.....RESPONDENT

(Being an Appeal from the judgment in Homa Bay Chief Magistrate's CMCC No. 48 of 2018 by Hon. L. Simiyu –Senior Principal Magistrate).

JUDGMENT

1. Roselyne Nyatuka Kenyanya and Ras Holdings Company, the appellants herein, were the defendants in Homa Bay Magistrate's CMCC No. 48 of 2018. This was a claim that arose from a road traffic accident where the respondent sustained injuries. The learned trial magistrate delivered judgment dated 26th July 2019. He held the appellants 100% liable. An award of Kshs. 10,450/= special damages, Kshs. 1,200,000/= general damages and costs were made in favour of the respondent.

2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Nyairo & Company Advocates. They raised eight grounds of appeal as follows:

- a) That the learned trial magistrate erred in law and fact in holding the appellants herein 100% liable in negligence without considering the evidence and the legal concept of negligence.
- b) That the learned trial magistrate erred in law and in fact in holding that the respondent had established a case against the appellant contrary to the evidence on record.
- c) That the learned trial magistrate erred in law and in fact in failing to make a finding as to whether or not the issue of liability was adequately proved considering the evidence on record which revealed that there was a motorcyclist involved in the accident who fled the accident scene and who the police indicates in the police abstract as being at large.
- d) That the learned trial magistrate erred in law and in fact in failing to evaluate consider and determine all the issues raised in the pleadings and in the evidence especially as to how the accident occurred hence and erroneous judgment.
- e) That the learned trial magistrate erred in law and in fact in failing to dismiss the respondent's claim with costs for want of proof.
- f) That the learned trial magistrate erred in law and in fact in failing to hold the respondent wholly liable and or substantially liable for the accident.
- g) That the learned trial magistrate erred in law and in fact in awarding damages to the Respondent without any basis and which damages were inordinately high as to amount to a gross overstatement of the loss suffered.
- h) That the learned trial magistrate failed to consider the submissions and authorities filed by the appellants hence an erroneous judgment.
- i) That the learned trial magistrate erred in law and in fact in failing to consider the provisions of Order 21 Rule 4 of the Civil Procedure Rules and other provisions as required by law.

3. The respondent was represented by the firm of Nyatundo & Company, Advocates. He opposed the appeal and urged the court to dismiss it.
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. The appellants in their pleading contended that there was no accident that had involved motor KCL 734N on 2nd December, 2017. They also denied ownership of the said motor vehicle. The same pleadings pleaded in the alternative on the issue of the accident.
6. Jared Seresere Oichoe (DW1) in his evidence conceded that indeed the complained of accident occurred.
7. It is trite law that parties are bound by their pleadings. This was emphasized by the Court of Appeal in the case of **Global Vehicles Kenya Limited vs. Lenana Road Motors [2015] eKLR** where it stated:

Pleadings serve several fundamental purposes. Firstly, they define the nature and contours of the dispute that the parties have submitted to the court for resolution. Secondly it is through pleadings that the fair hearing that is promised by Article 50(1) of the Constitution is actualized. That provision guarantees every person who has a dispute that can be resolved by the application of the law, the right to have it decided in a fair and public hearing by a court or independent and impartial tribunal or body. That right to a fair hearing comes alive in pleadings, which make known to each party the exact case it has to prove or rebut.

Thirdly, pleadings contribute immensely to speedy resolution of dispute and cost-efficient delivery of justice. Because pleadings ensure that the dispute is focused and precisely defined, they not only eliminate ambushes and surprises, but also wastage of time and unnecessary expenses involved in calling witnesses to prove or disprove matters that are not in dispute before the court. It can therefore be argued that pleadings also contribute immensely to the realization of the cardinal constitutional principle that justice shall not be delayed.

Jessel M. R. articulated this view very well in *THORP V. HOLDSWORTH, (1876) 3 Ch. D, 637 at 639*, as follows:

The whole object of pleadings is to bring the parties to an issue and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing.

Pleading in the alternative is really saying naught. Mathematically speaking, a negative added to a positive of the same equals to zero.

8. According Jared Seresere Oichoe (DW1) the accident occurred when motor cyclist lost control and swerved into his lane colliding with the motor vehicle he was driving. In their written statement of defence, the appellants attributed the accident to the motor cyclist who allegedly entered into the main road without giving any sign. This contradicted their driver's evidence. The learned trial magistrate was therefore justified to hold the appellants 100% liable for the accident.
9. It is settled law that an appellate court will only interfere with an award of the trial court 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.

10. The appellant contends that the award of Kshs. 1,200,000/= was inordinately high. The respondent sustained the following injuries:
 - a) Chest contusion.
 - b) Left tibia fracture.
 - c) Left fibula fracture.

At the time of examination, he was using clutches. According to the doctor, recovery was going to take a very long time and required to undergo physiotherapy and occupational therapy. Permanent disability was anticipated.

11. In the trial court, the appellants submitted that the respondent suffered soft tissue injuries, contrary to the medical evidence adduced. They therefore proposed general damages of kshs.50,000/=. The respondent had proposed general damages of Kshs.2,000,000/=. The appellants proceeded on the wrong classification on the nature of injuries suffered. The proposal they made was inordinately low. I have looked at the authorities cited by the respondent and my opinion is that the award cannot be said to be inordinately high. I have no basis therefore to interfere with the award.

12. From the foregoing analysis of the evidence on record, I find that the appeal lacks merit. The same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE