REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 12 OF 2020

MOMBASA MAIZE MILLERS......1ST AP PELLANT

ABBAS ATHMAN..............................2ND APPELLANT

VERSUS

ELIUS KINYUA GICOVI......................RESPONDENT

(Being an appeal against the Judgment of the Chief Magistrate's Court at Malindi by Hon. Dr. J. Oseko (CM) delivered 19th November, 2020)

Coram: Hon. Justice R. Nyakundi

Machuka advocate for the appellants

Wambua Kilonzo advocates for respondent

J U D G M E N T

1. The appeal hereof arises from the Judgment of the trial Court where after a full hearing, the appellants were held 90% liable for the accident and general damages assessed in the sum of Kshs.700,000/= for pain and suffering and Kshs.3,250/= in special damages.

2. The appellants faulted the trial Court both in its findings on liability and quantum of damages.

3. The respondent case was that on or about the 7th March, 2016 along Malindi – Mombasa road in motor vehicle registration number KAZ 325 J, the 2nd appellant so negligently drove, managed and or controlled motor vehicle registration number KBQ 549T that the same veered off its lane and collided with motor vehicle registration number KAZ 325 J which overturned and as a result whereof the respondent was seriously injured, as a consequence thereof of the said accident the respondent sustained severe injuries, loss and damages for which he held the appellants jointly and severally 100% liable. The respondent called a total of two witnesses and all of them blamed the driver of motor vehicle KBQ 325 for negligence and causing the accident.

4. The appellants version of the accident is very different. The appellants blamed the driver of motor vehicle registration number KAZ 325J for causing the said accident.

5. The appellants herein being dissatisfied by the decision of the trial Court filed this appeal raising the following grounds:

> ***(a). That the Honourable trial Magistrate erred in Law and fact in disregarding vital evidence adduced by the defendants/applicants in arriving at her decision and as such arriving at a wrong finding particularly, the Honourable trial Magistrate disregarded the inconsistences in the plaintiff's testimony.***
>
> ***(b). That the Honourable trial Magistrate erred in law and fact in failing to correctly evaluate the testimony of the defence witnesses as weighed against the plaintiff's testimony thereby arriving at a wrong finding by awarding inordinately/astronomically very high award to the plaintiff/respondent while ignoring the appellants doctor's medical report.***
>
> ***(c). That the Honourable trial Magistrate erred in law and fact by disregarding that a third party was enjoined in the proceedings and failed to apportion any liability against him.***

(d). That the Honourable trial Magistrate erred in law and fact by disregarding and or failing to evaluate the evidence adduced by the defendants bearing in mind the entirety of the circumstances when she should have apportioned the liability at 50:50 between the plaintiff and the defendant.

(e). That the Honourable Magistrate erred both in law and fact as she failed to consider the entirety of the circumstances of the case and in only relying on the plaintiff's account of the accident.

(f). That the Honourable trial Magistrate delivered Judgment based on wrong principled of law and fact.

Issues for Determination

6. This Court being the first appellate Court is under a duty to re-evaluate the evidence adduced before the trial Court and come up with its findings and conclusions.

7. In **Gitobu Imanyara & 2 others v Attorney General {2016} eKLR**, the Court of Appeal stated:

> ***"[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of Law, or that the amount awarded was so extremely high or so very low as to make it, in the Judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

8. The Court has evaluated the evidence of the two drivers and the investigating officer's evidence. It is not in dispute that an accident occurred on 7.3.2016 along Mombasa-Malindi road involving motor vehicles registered as KAZ 325 J and KBQ 549T. Two versions of the manner of the occurrence of the accident present themselves. Each driver blames the other. From evidence on record, it is clear that both vehicles collided with each other. It is also evident from the testimony of **(PW1)** and **(DW1)** that they were both unable to avoid the accident.

9. Faced with these rival theories about how the accident occurred, the Learned trial Magistrate found that both the 2nd appellant and the respondent contributed to the occurrence of the accident. The Learned trial Magistrate however did not justify her basis of finding that the 2nd appellant shall bear 90% of liability whereas the respondent shall bear 10% of liability.

10. The appellants are adamant that the Learned trial Magistrate disregarded vital evidence produced by the defence and that the plaintiff failed to prove his case on a balance of probabilities and convince the Court that the appellants were totally to blame for the accident.

11. The respondent on the other hand argues that there is no error committed by the trial Court as the decision was arrived at after considering all the required laws and principles hence the appeal should be dismissed with costs.

12. The respondent in support of the Learned trial Magistrate submitted that, the 2nd appellant was driving an overloaded motor vehicle at a high speed regardless of the excess tonnes of sand he was carrying and as a result of which the said motor vehicle lost controlled, overturned and skidded into the lane of the plaintiff's motor vehicle, hitting the said motor vehicle and occasioning serious injuries to the plaintiff.

13. ***There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct.*** **(See Moore v Maxwells {1968} 2 ALL ER 779).**

14. In the case of **Mac Dougall, App v Central Railroad Co. Resp. 63 Cal. 431**, the rule, as stated in the marginal note:

> ***"In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defense, and it is error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence."*** is supported by Court's decisions in the cases of **Robinson v W. P. R. R. Co., 48 Cal. 476 Nehrbas v C. P. R. R. Co., 62 Cal. 320.**

15. As stated by the **Learned Authors Clerk and Lindsell on Torts**, the requirements which the respondent had the burden to prove to establish negligence on the part of the appellant constituted the following elements:

(1). The existence in law of a duty of care situation;

(2). Careless behavior by the defendant;

(3). A casual connection between the defendant's careless conduct and the damage;

(4). Foreseeability that such conduct would have inflicted on the particular claimant the particular damage of which he complains; (Once (a) to (d) are satisfied, the defendant is liable in negligence and only then the next two factors arise).

(5). The extent of the responsibility for the damage to be apportioned to the defendant where others are also held responsible;

(6). The monetary estimate of that extent of damage.

16. The issue at the hearing of this appeal was whether both drivers were default. According to the Learned trial Magistrate she held the following view as deduced from her Judgment in the following passage: ***"PW2 confirmed that the point of impact was on the lane of the matatu and as a result of the said accident the plaintiff suffered severe injuries. He blamed the driver of motor vehicle registration no. KBQ 549T for the accident. The 2nd defendant on the other hand said he was driving from Mombasa direction towards Malindi and he saw a GK lorry which was coming from Malindi direction and behind it was the matatu that was overtaking the GK lorry. He told the Court that the matatu veered to his lane and that the accident occurred on his lawful lane.***

17. As indicated in the case of **Ephantus Mwangi & Another v Duncan Mwangi, Civil Appeal Number 77 of 1982 {1982-1988} 1 KAR 278 (Potter, Kneller and Hancox, JJA on 5th July 1983):**

> ***"It is with great reluctance that the Court of Appeal contradicts a finding of fact by the trial Judge, who has seen and heard and observed the witnesses."*** In addition, in ***a first appeal the Court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering that it has not seen or heard the witnesses and making due allowances for this. (See Selle v Associated Motor Boat Company Ltd {1968} EA 123, 126; Williamson Diamonds Ltd v Brown {1970} EA 1, 12, 16).***

18. While distilling the record on contributory negligence, the question is not whether the plaintiff or the defendant was negligent but it is on the circumstances of the case who bears the greatest responsibility. They shared responsibility for the damage is clearly set out in the Judgment of the Learned trial Magistrate. There is no prima facie evidence that there was want of care on the part of the motor vehicle in which the respondent was on board as a fare paying passenger. In **Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan,** the Court held as follows:

> ***"In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:***
>
> ***"......When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove … that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."***

19. After analyzing the trial record and all the evidence tendered in the case. It would appear, from the circumstances of the accident, when all is considered, the fair outcome would be that the appellant had a duty of care towards the respondent. the basic principle underlying the defence of contributory negligence is that people should take reasonable care for their own safety as well as for that of others. Contributory negligence is an objective canon proven by credible and cogent evidence. It is important to note that the evidence in the instant appeal comes out very clearly that the appellant motor vehicle skidded and trespassed into the lane of that other vehicle. The appellant was in a better position to avoid the accident. The possibility of injustice would be increased were this Court to hold that both drivers were equally to blame for the accident. This is the trajectory advanced by the appellant counsel but it lacks evidential foundation. As circumstances of accidents differ from case to case it is not possible for this Court to buy in into the tactical evidence by the appellant witnesses. Perhaps that may be the reason why the Learned trial Magistrate thought it prudent to apportion a large percentage of negligence making it easier for the appellant. There was no assumption of risk by the respondent. The appellant actually had an opportunity of taking evasive steps to avoid the harm. In exercising the discretion as a whole its my view that no such irrelevant factors or principles were taken into account by the Learned trial Magistrate to err in the decision making process. The risk in this accident was obvious and the respondent proved it on the balance of probabilities that indeed he did contribute to the occurrence of the accident. The Court finds that the respondent discharged the burden of proof adequately.

20. On the issue of quantum of damages, the trial Court assessed general damages awardable to the respondent in the sum of Kshs.700,000/= for pain and suffering and Kshs.3,250/= in special damages. The fact of the matter assessment of damages is purely at the discretion of the trial of facts. The idea that an appellate Court would fundamentally differ with the trial Court is neither here nor there. That is the attention of the principle in **Loice Kagunda v Julius Gachau Mwangi CA 142 OF 2003 the Court of Appeal** held that:-

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate Court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons make a wholly erroneous estimate of the damages suffered. The question is not what the appellate Court would award but whether the lower Court acted on the wrong principles."*** **(See Mariga v Musila {1984} KLR 257).**

Perhaps at this point I should rest with the core principles in **Gitobu Imanyara & 2 others v Attorney General {2016} eKLR**,

> ***"… it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 ALL ER 297. It was echoed with approval by this Court in***

> ***Butt v Khan {1981} KLR 349 when it held as per law. J. A. that: "An appellate Court will not disturb an award of damage 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 at a figure which was either inordinately high or low."***

21. This Court finds no reason to disturb the trial Court's award on damages as it was supported by a comparative award made in the case of **Eliud Njenga Mugesha v Ndavi Nziu aka Jeremiah Ndavi Nziu HCCA No. 126 of {2017} eKLR**; and the award made is hereby upheld; as for special damages the trial Court's finding on the sum proved in the sum of Kshs.3,250/= is also hereby upheld;

22. In the result I have not found any merit in the appellant's complaints against the Learned Judge's findings and awards of special and general damages. Accordingly, this appeal fails and I order it to be dismissed with costs.

DATED, SIGNED DISPATCHED AT MALINDI ON THIS 17TH DAY OF DECEMBER 2021

....

R. NYAKUNDI

JUDGE

(matini@gmail.com wambuakilonzoadvocates@gmail.com)

In the presence of:

1. Mr. Wambua for the respondent