REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 10 OF 2018

MOMBASA MAIZE MILLERS LTD.....1ST APPELLANT

ABASS ATHMAN .....2ND APPELLANT

VERSUS

IBRAHIM NGUMBAO GONA ..... RESPONDENT

(An Appeal from the Judgment of Hon. S. Wewa, Principal Magistrate made on 29.1.18 in Malindi CMCC NO. 177 of 2016)

JUDGMENT

1. The Appeal herein arises from the judgment of Hon. S. Wewa, Principal Magistrate, delivered on 29.1.18 in Malindi CMCC NO. 177 of 2016, Ibrahim Ngumbao Gona v Mombasa Maize Millers Ltd & Abass Athman. The Respondent, Ibrahim Ngumbao Gona instituted the suit in the trial Court against the Appellants, Mombasa Maize Millers Ltd and Abass Athman claiming both general and special damages arising from a road traffic accident. The Respondent was travelling as a passenger in motor vehicle registration number KAZ 325J from Malindi to Kilifi which collided with motor vehicle registration number KBQ 549T driven by the 2nd Appellant from Mombasa to Malindi. The latter motor vehicle is owned by the 1st Appellant. Following a hearing, the trial Magistrate entered judgment in favour of the Respondent for the sum of Kshs. 152,000/= in general damages less 10% contribution. The Respondent was also awarded special damages of Kshs. 2,000/=, costs and interest.

2. Being aggrieved by the said judgment, the Appellant preferred the Appeal herein. The summarized grounds of appeal are that the Honourable Magistrate erred in fact and in law in that she:

1. disregarded vital evidence adduced by the Appellants thereby arriving at a wrong finding.

2. failed to correctly evaluate the testimony of the defence witnesses thereby making an inordinately/astronomically high award to the Respondent.

3. disregarded and or failed to evaluate the evidence adduced by both the plaintiff and the Defendants in apportionment of liability putting in mind the entirety of the circumstances.

4. failed to consider the entirety of the circumstances of the case.

5. having found that the driver of motor vehicle registration number KAZ 325 J contributed and or led to the occurrence of the accident proceeded to make a wrong finding by punishing the defendant.

6. delivered judgment based on wrong principles of law and fact.

3. The Appellants prayed for the following orders:

i) The appeal be allowed.

ii) The judgment in favour of the Respondent be set aside and the suit against the Appellants be dismissed.

iii) The Appellants be awarded the costs of this Appeal and costs in the lower Court be shared between the parties.

4. It is to be noted that the accident gave rise to claims in Civil Cases Nos. CMCC No. 177/2016; CMCC No. 176/2016; CMCC No. 178/2016 and CMCC No. 170/2016. These cases were consolidated for the purpose of determining liability. CMCC No. 177/2016 became

the lead file. The cases generated Civil Appeals Nos. 7/2018; 8/2018; 9/2018 and 10/2018. The issue of liability will be determined in the Appeal herein.

5. I have given due consideration to the record of appeal, the grounds of appeal as well as the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

> ***An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this 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 though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –v- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).***

6. Although the Appellant raised 6 grounds of appeal, my view is that this Appeal turns on the following 2 issues which fall for determination:

i) Whether the learned Magistrate erred on the issue of liability.

ii) Whether the learned Magistrate erred on the issue of quantum.

Whether the learned Magistrate erred on the issue of liability.

7. In his testimony at the trial, the Respondent stated that he was travelling in the front seat of motor vehicle KAZ 325J along Malindi/Mombasa road. It was about 5pm and there was no rain. At Kazingo area, the 2nd Appellant drove motor vehicle KBQ 549T at such a high speed and in a reckless and zig zag manner that the left tyres of the said vehicle left the road. As the 2nd Appellant tried to return the vehicle back on the road, he lost control and the vehicle overturned, skidded and collided with motor vehicle KAZ 325J on their side of the road. Their driver tried to control his vehicle but was unable to do so, as the road had a slope. The Respondent stated that he could see ahead well. The road was straight and there was no corner. Nor were there any other vehicles. The Respondent sustained serious injuries as a result of the accident. Kasichana Safari Rachel, the Respondent in Appeal No. 9/2018 also testified. She adopted the evidence of the Respondent. She was seated behind the driver of motor vehicle KAZ 325J. She too blamed the 2nd Appellant whose vehicle overturned as he tried to get it back on the road. Francis Wayne who was also seated in the front seat of motor vehicle KAZ 325J stated that the left tyres motor vehicle KBQ 549T left the road after which it overturned and hit their vehicle which was on the left lane. All 3 witnesses denied that their driver was speeding and that he was trying to overtake another vehicle.

8. The 2nd Appellant, the driver of motor vehicle KBQ 549T denied that he was speeding. He stated that the driver of motor vehicle KAZ 325J was trying to overtake a military truck and came on to his lane. It was too sudden that he could not evade the vehicle. His vehicle overturned on impact. He blamed the driver of motor vehicle KAZ 325J. Although a statement by Francis Kanyara, a turnboy in motor vehicle KBQ 549T had been recorded, he was not called to testify in support of the Appellant's case.

9. In the impugned judgment, the learned Magistrate found that neither of the drivers demonstrated to the Court the precautionary measures each put in place to avoid the collision. The trial Magistrate stated:

> ***"The question is what precautionary measures were put in place by both drivers to stop the occurrence of the accident. As the matatu driver said the lorry came to its lane what did he do to avoid? As the lorry driver saw the matatu driver try to overtake what precautionary measures did he apply now that he knew it was unsafe.***
>
> ***There was none demonstrated to the court whatsoever. I do find that blame be apportioned…The apportioned (sic) which is at 90% and 10% as the lorry driver's testimony was collaborated (sic) by statement of turn boy whose evidence was not challenged."***

10. Did the learned Magistrate err in the apportionment of liability at the ratio of 90:10? When the accident, the subject of these proceedings occurred, the road was straight, clear and dry. The Respondent blames the 2nd Appellant for the accident. He called 2 witnesses who corroborated his testimony. The Appellants on the other hand blame the driver of motor vehicle KAZ 325J. It is not clear why Francis Kanyara, the turnboy who was travelling with the 2nd Appellant failed to testify in Court. His statement is of no value to the Appellants' case. The evidence of the 2nd Appellant thus remains uncorroborated.

11. The standard of proof in civil cases is on the balance of probability. In John Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR, Ringera, JA (as he then was) stated:

> ***"On the undisputed fact, it is entirely probable that the accident was caused by the negligence of the second defendant. It is equally probable that it was caused by the negligence of the defendant. And it is also equally probable that it was caused partly by the negligence of the deceased. Without the advantage of divine omniscience, I cannot know which of the probabilities herein coincides with the truth. And I cannot decide the matter by adopting one or the other probability without supporting evidence. I can only decide the case on a balance of probability if there is evidence to enable me to say that it was more probable than not that the second defendant wholly or partly contributed to the accident."***

12. In the present case, as in the John Kanyungu Njogu case (supra) it is entirely probable that the accident was caused by the negligence of the 2nd Appellant. It is equally probable that it was caused by the negligence of the driver of motor vehicle KAZ 325J. It is only supporting evidence that can assist this Court decide the matter. The evidence of the Respondent which was corroborated by that of his 2 witnesses is more persuasive than that of the 2nd Appellant which was not corroborated. My conclusion therefore is that on a balance of probability, it was more probable than not that the 2nd Appellant caused the accident.

13. While the Appellants blame the driver of motor vehicle KAZ 325J for the accident, they did not take out 3rd party proceedings against him. They ought to have invoked the provisions of Order 1 Rule 15 of the Civil Procedure Rules to apply for leave to issue a third party notice to the driver of motor vehicle KAZ 325J. It is not clear why they did not do so and cannot now evade responsibility for the accident. In this regard I associate myself with Okwany, J who in James Gikonyo Mwangi v D M (Minor Suing through his Mother and next Friend, I M O) [2016] eKLR, stated:

> ***It is the appellant who had a contract with 3rd party vehicles on the road in respect to safe-driving and if the third party acted to his detriment, then I reiterated that the appellant should have called him to account through the third party proceedings…***
>
> ***The appellant failed to pursue the third party proceedings and cannot be allowed to evade his responsibilities towards his passengers. I therefore find that the trial court was justified to hold that the appellant was 100% to blame for the accident.***

14. In the impugned judgment, the learned Magistrate noted that it had not been demonstrated by evidence, what evasive action either of the drivers took to avoid the collision. She then, in exercise of her discretion, proceeded to apportion 90% liability upon the Appellants. In Mbogo & Another versus Shah [1968] E.A. 93, the Court of Appeal stated:

> ***"An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice"***

15. In the present case, I find nothing to show that the learned Magistrate, in exercise of her discretion on apportionment of liability, misdirected herself or was clearly wrong. Accordingly, I find the trial Court's apportionment of liability justifiable and find no reason to interfere with the same.

Whether the learned Magistrate erred on the issue of quantum.

16. The learned Magistrate gave an award of Kshs. 150,000/= in general damages. While considering whether the learned Magistrate erred in arriving at this award, this Court is guided by the holding in Butt v. Khan [1981] KLR 349 per Law, J.A that:

> ***"An appellate court will not disturb an award of damages unless it is 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."***

17. The Court is also guided by the decision in Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia(1982 –88) 1 KAR 727 at p. 730 where Kneller J.A. said:-

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

18. The record shows that the injuries suffered by the Respondent as enumerated in the medical report by Gama Medical Clinic are blunt object injury on the forehead and right shoulder, blunt object injury on the right middle finger and blunt object injury on the back. The report further indicates that the injuries are soft tissue in nature with no permanent disability.

19. In arriving at the quantum for award of general damages, the learned Magistrate stated:

> ***"The injuries are soft tissue in nature and no permanent disability noted. I do award Kshs. 150,000/= less 10% contribution in general damages. Kshs. 2,000/= as special damages, costs and interest thereof."***

20. It is the Appellants' case that the award of damages is excessive given the nature of the injuries. Citing the case of Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR, the Appellants contended that the trial Magistrate erred by relying on wrong principles to arrive at the award. I have looked at that case and note that Ngugi, J. found that an award of Kshs. 300,000/= for soft tissue injuries to the lower right leg and to the back was manifestly excessive and proceeded to reduce it to Kshs. 100,000/=.

21. On his part, the Respondent submitted that the amount was on the lower side and further contended that for the Court to interfere with the award, it must be shown that the same was excessive and represented an erroneous estimate. To buttress his case, the Respondent cited the cases of Geoffery Githiri Kamau v The Hon Attorney General HCCA No. 378 of 2010 Nairobi where Kshs. 200,000/= was awarded for soft tissue injuries and Kimenju Charles v Gideon Muia Mutisya HCCA 130 of 2011 where Kshs. 170,000/= was awarded for minor injuries on right shoulder and right thumb.

22. As I consider the request for review of the award of general damages, I am guided by the following principle set out by Law J.A., in the case of Butt v Khan (1977) KAR 1:

> ***"An Appellate Court will not disturb an award of damages unless it is 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 as either inordinately high or low."***

23. The learned Magistrate noted that the Respondent sustained soft tissue injuries. I note that all 3 authorities cited relate to soft tissue injuries that are comparable to those sustained by the Respondent herein. I do not therefore find the award so inordinately high as to warrant interference with the same.

24. In the end, my finding is that the Appeal is devoid of merit and is hereby dismissed with costs to the Respondent.

DATED this 24th day of February 2020

_____

M. THANDE

JUDGE

SIGNED and DELIVERED in MALINDI this 28th day of February 2020

_____

NJOKI MWANGI

JUDGE

In the presence of: -

…… for the Appellants

…… for the Respondent

…….…… Court Assistant