



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 43 OF 2018

JESSE KIHENJO KIAMBATI.....APPELLANT

VERSUS

MOSES KABATA MWANGI.....RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Hon. Ireri D. M. Resident Magistrate delivered on the 13/07/2018 in Othaya CMCC No.15 of 2017; the appellant herein instituted legal proceedings against the respondent for damages arising out of a road traffic accident that occurred on 21st June, 2015 along Nyeri - Othaya Road near Giakanja area; the appellant stated that he was travelling as a fare paying passenger in motor vehicle registration number KAU 703E when a collision occurred with motor vehicle registration number KBJ 559F; as a result of the said collision, the appellant sustained injuries and blames the respondent for the accident; and is therefore seeking compensation from the respondent.

2. After a full hearing, the trial court found that the appellant had failed to discharge his burden of proof and proceeded to dismiss the suit with no order as to costs.

3. The appellant being dissatisfied with the trial Court's decision filed this appeal seeking to have it set aside; and listed eleven (11) grounds of appeal summarized as follows;

(i) The trial magistrate erred in dismissing the suit in its entirety;

(ii) The trial court erred in totally disregarding the testimony of the plaintiff and his witnesses on negligence; failed to appreciate that there was a third motor vehicle that the defendants' driver was trying to overtake occasioning the collision; and failed to consider the plaintiffs' submissions and authorities on liability and quantum of damages making the award inordinately low;

(iii) The trial court erred in relying on the evidence of **PW4** who did not witness the accident;

(iv) The trial court failed to acknowledge that the defendant did not call any witnesses to discredit the plaintiff's evidence;

(v) The trial court disregarded the test of balance of probabilities applied in civil cases and instead substituted it to that of beyond reasonable doubt thus occasioning a miscarriage of justice;

APPELLANTS CASE

4. According to the appellant, he was travelling in motor vehicle registration number KAU 703E on the 21st day of June 2015 when the driver of the said motor vehicle negligently drove the same causing it to encroach into the lawful lane of motor vehicle registration number KBJ 559F; and it is the appellant's contention that the accident occurred due to the respondent's driver overtaking dangerously and driving at an excessive speed.

5. At the trial of the matter, the appellant called 3 witnesses to give evidence on liability that is himself, his wife, Peris Kahiga (**PW3**) and a police officer by the name Mwanamisi Sheria (**PW4**).

6. The appellant adopted his witness statement filed with the plaint. His evidence was that together with his wife and child they were seated in the driver's cabin of motor vehicle registration number KAU 703E; it is noted that there is a contradiction as to whether the appellant was sitting in the middle seat or by the window; this is not found to be particularly relevant in the circumstances, what is of importance is that he was sitting in the driver's cabin; the appellant testified that the respondent's driver was driving too fast in the circumstances and was in the process of overtaking a motor vehicle that was ahead of them when the collision occurred; he testified that the collision occurred in the middle of the road;

7. Mwanamisi Sheria (**PW4**) a police officer from Nyeri Traffic Unit testified that the accident was blamed on motor vehicle registration number KBJ 559F; she produced a police abstract that confirmed this; it was her evidence that the driver of motor vehicle registration number KBJ 559F left his lane and encroached on that of motor vehicle registration number KAU 703E thereby causing the accident; this was why the police blamed the driver of motor vehicle registration number KBJ 559F for the occurrence of the accident.

RESPONDENTS CASE

8. The respondent did not call any witnesses at the trial in the lower court; in response to the appeal he submitted that the trial court's finding was correct and should not be disturbed as the trial magistrate did not misdirect himself in finding that the appellant never discharged his burden of proof.

ISSUES FOR DETERMINATION

9. The parties had been directed to canvass the appeal by filing and exchanging written submissions; upon reading the respective rival written submissions this court has framed the following issues for determination;

- (i) Whether the trial court erred in dismissing the appellants suit in its entirety;
- (ii) Whether the award on quantum of damages was inordinately low in light of the injuries sustained by the appellant;

ANALYSIS

10. This being a first appeal the duty of this court is to re-evaluate the evidence on record, analyze it and come up with its own findings and conclusion, bearing in mind that it didn't observe the demeanor of the witnesses during trial; **Hancox, J.A.** stated in the case of **MWANASONIK vs KENYA US SERVICES LTD. (Mombasa) Civil Appeal No. 35 of 1985 (unreported) :-**

“Although this Court of Appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary.”

11. The Court of Appeal also held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also **LAW JA, KNELLER & HANNOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403**).

Whether the trial court erred in dismissing the appellants suit in its entirety:

12. From the evidence on record and the parties' submissions in the matter, it is not disputed that a collision occurred between motor vehicles registration number KAU 703E and KBJ 559F; the bone of contention is who was to blame.

13. The appellant submitted that the trial court did not take into account the evidence of the eye witness that is **PW2** and **PW4** while making its finding; it is the appellant's submission that the evidence of **PW4** should be disregarded as the same was not corroborated.

14. The respondent has submitted that the trial court's finding was correct and should not be disturbed; it is his submission that the trial Magistrate did not misdirect himself and that the appellant never discharged his burden of proof.

15. It is clear that the evidence of **PW2** and **PW3** contradict that of **PW4**; and the court record reflects that the respondent did not give any evidence at trial; the trial magistrate at the conclusion of the trial while making a finding on liability remarked on the same as follows,

“With the above unresolved contradicting evidence between PW2 and PW4, this Court is at a loss as to whether the matatu driver was to blame for the accident in that while the plaintiff blames the matatu driver, PW4 blames motor vehicle registration number KBJ 559F. At the close of the plaintiff's case, this Court could not tell who between the two witnesses was telling the truth as to who was to blame for the accident and I say so well aware that the driver of the matatu did not testify in this case and give his side of the story....”

16. After making the foregoing remarks, the trial magistrate went on to find that the appellant had not discharged his burden of proof and therefore dismissed the suit; with respect to the trial magistrate this court's considered view is that he *acted on wrong principles in arriving at this conclusion*.

17. *In finding that there was indeed a collision and that it was not clear which driver was to blame due to the contradictory evidence of the material witnesses, the trial court ought to have then found both drivers equally to blame.*

18. In the Court of Appeal case of **Hussein Omar Farah v Lento Agencies** [2006] eKLR, the Court held as follows:-

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to

blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of BARCLAY – STEWARD LIMITED & ANOTHER VS. WAIYAKI [1982-88] 1 KAR 1118, this Court said:-

“The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it.”

19. The Court stated further that:-

“The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki and Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame.”

20. In the case of BAKER V MARKET HARBOROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LTD [1953] 1 WLR 1472 at 1476, Denning L.J. (as he then was) observed *inter alia* as follows:-

“Everyday, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them..... “

21. And in the case of WELCH V STANDARD BANK LTD [1970] EA 115 at 117 and SIMON V CARLO [1970] EA 285 it was held that;

“It cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame.....”

22. This court is satisfied that the trial court acted on wrong principles in dismissing the appellants suit; and that there is good reason to interfere with its decision on liability; this court finds that the drivers of both motor vehicles were equally to blame for the accident;

23. This ground of appeal is found to have merit and it is hereby allowed;

Whether the award on quantum of damages was inordinately low in light of the injuries sustained by the appellant;

24. This court is cognizant of the principle that for this appellate court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in various decisions. In the case of Butt vs Khan (1977) 1KAR Law JA stated that:-

“An appellate court will not disturb an award for 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 arrived at a figure which was either inordinately high or low.”

25. Similarly in the case of Kenya Breweries Ltd [1991] eKLR it was held that,

“...It is now well established that this Court can only interfere with a trial judge's assessment of damages where it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred.....”

26. As a result of the accident the appellant suffered a dislocation of the left hip joint and trauma to the head. According to the Medical Report of Dr. A.O Wandugu, the injury to his hip joint resulted in permanent weakness.

27. The trial Court held that after taking into the consideration the appellants and defendants proposal it would have awarded Kshs.750,000/= had the appellant been successful in his claim.

28. In the submissions to this appeal, the appellant prayed that the award be enhanced to Kshs.1,500,000/= while the respondent urged this court not to disturb the outcome of the case;

29. 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 Easy Coach Limited vs Emily Nyangusi (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.2,550/- is also hereby upheld;

30. This ground of appeal is found to have merit and it is hereby allowed.

FINDINGS AND DETERMINATION

26. For the forgoing reasons this court makes the following findings and determination;

(i) The appeal is found to have merit and it is hereby allowed;

(ii) The trial Court's decision on liability is hereby set aside and substituted with a judgment on;

Liability – 50:50 in favour of the appellant;

General damages for pain and suffering in the sum of Kshs.750,000/=

Special damages – Kshs.2,550/=

(iii) The appellant shall be entitled to costs in the lower court; but on the costs of the Appeal the appellant shall have 50%.

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 30th day of April 2020.

HON.A.MSHILA

JUDGE