



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL NO. 33 OF 2018

AAA GROWERS LTD.....APPELLANT

-VERSUS-

ERICK MUKHABI JUMA.....RESPONDENT

JUDGMENT

AAA Growers Ltd (the appellant), the defendant in Nyahururu CMCC 268/2016 is dissatisfied with the judgment of Hon. Momanyi SRM, which was delivered on 30/05/2018.

The Respondent, Erick Mukhabi Juma, the plaintiff in the CM's court, by a plaint dated 03/11/2016, sought general and special damages from the appellant for injuries sustained on 31/08/2016 when motor vehicle Reg. KBP 469E in which the respondent was travelling in as a lawful passenger along Siron – Rumuruti road at Kianugu was driven carelessly; that it lost control, hit a gate at high speed and caused an accident that resulted in the respondent suffering injuries.

The appellant was the registered owner of the subject vehicle and the vehicle was driven by its authorized driver. The particulars of negligence were pleaded at paragraph 5 of the plaint which were *inter alia*, that the vehicle KBP 469E was driven carelessly at an excessive speed, failed to stop or swerve to avoid the accident, failed to keep a proper look out and failed to have regard to other road users.

The appellant filed a defence on 08/12/2016 denying being the owner of the vehicle or that the respondent was a lawful passenger in the said vehicle, or that it was negligently driven. In the alternative, it was pleaded that if the accident occurred, it was wholly caused or substantially contributed to by the respondent by failing to buckle, failing to sit while the vehicle was in motion, attempting to walk when the vehicle was in motion and all the particulars of negligence attributed to the appellant were denied.

The respondent testified in evidence and the appellant called one witness. The court entered judgment on liability at 100% as against the appellant, and awarded general/special damages of Kshs.227,000/-. The appellant raised four grounds of appeal which are as follows;

- 1) *That the learned trial Magistrate erred in making a finding and arriving at an award of damages which is inordinately too high as to represent an erroneous estimate of damages payable;*
- 2) *That the learned trial Magistrate erred in law and in fact in finding the appellants 100% liable against the overwhelming evidence on record against the respondent;*
- 3) *That the learned trial Magistrate erred in applying wrong principles and failing to take into account relevant facts in arriving at an erroneous award of Kshs.220,000/- being general and special damages of Kshs.7,000/=;*
- 4) *That the learned trial Magistrate erred in law and in fact in disregarding the Appellant's submissions.*

This being the first appeal, the court has a duty to exhaustively examine the evidence tendered in the trial court, analyze it and make its own determinations. The court is guided by the principles laid down in Selle & Another vrs Associated Motor Boat Co. Ltd 1968 IEA 123 where Sir Clement De Lestang stated

“An appeal to this court from a trial from the High Court is by way of retrial and the principles upon which this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so, it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed in 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.”

At the hearing, only the respondent Erick Juma(PW1) testified to the effect that he was employed by Triple A Company(the appellant) from 2015 to August 2017; that on 31/08/2015 about 6.00am, he boarded the bus KBP 469E and as they approached the company, the bus knocked the barrier and hit a bump as a result of which he was injured on the head and back. He blamed the accident on the appellant company because the bus was driven at a high speed, and it had no safety belt. He produced treatment notes, employment card, demand letter, medical report from Dr. Omuyoma and receipts as P-Exhibit 1 – 4a & b.

The appellant called one witness, Evans Ondieki who testified in CMCC 266/2018 as DW1; (the lead case). DW1 was the transport coordinator for the appellant, who directs how people take buses to go to work from their homes. He recalled that on 31/08/2016, about 5.20am, an accident occurred when they were going to work from Nyahururu to Simba Farm where the company offices are located. He was also aboard the bus KBP 469E; that as they approached the barrier and a bump, the driver tried to brake but the brakes failed and hit the bump and flew forward and that the passengers who were seated at the back were injured; that there were about 50 passengers aboard the vehicle but only six got injured; He said that it is required that every passenger wears a seat belt. He said that the brakes of the vehicle failed.

Appellant’s Submissions:

The firm of E.M. Juma Advocates, counsel for the appellant filed submissions on 07/10/2019 together with authorities in which the trial court’s finding on liability was challenged; Counsel submitted that negligence was not proved on the part of the appellant as defined in Blyth vrs Birmingham in Waterworks Co. (1856), 11 EX 781:25 and quoted in Birmingham Motor Claims Case 5th Edition J.A. Taylor London – Butterworths 1964 pg. 2; that there was no evidence that the vehicle was in high speed and further that the respondent did not have his seat belt on. Counsel also relied on the decision of Peter Muraguri vrs James Njogo Mwangi (2002) eKLR where the court held that speed alone is not proof of negligence.

Counsel also submitted that the respondent did not produce police abstract as proof of the accident involving the said motor vehicle or evidence of ownership of the subject motor vehicle and that was fatal to his case; that the respondent had the duty to prove as was held in Statpack Industries vrs James Mbithi Munyao HCCA No. 152 of 2003, Counsel argued that if the court did not agree with their submissions then the court should apportion liability between the appellant and the respondent equally.

On quantum, Counsel submitted that the law is that the court does not generally interfere with an award of damages which is an exercise of the court’s discretion unless it is demonstrated that the court applied wrong principles in making the award such that the award is inordinately high or too low. For that principle, the appellant relied on the case of Robert Musyoki Kitavi vrs Coastal Bottlers Ltd (1985) 1 KAR 891.

It was Counsel’s submission that an award of Kshs.220,000/- for blunt injury to the head, leading to severe soft tissue injuries and soft tissue injuries to the chest and back was too high and not comparable to awards where similar injuries were sustained; that the court ignored the appellant’s submissions where they had suggested an award of Kshs.120,000/- on quantum.

RESPONDENT’S SUBMISSIONS:

Achieng Awour Advocate, counsel for the respondent submitted that though the appellant has submitted on the issue of liability, the same was settled in CMCC 266/2016 where it was agreed that the judgment would bind all the files relating to the same accident; that the appellant has not challenged the judgment of the court in the said case and since the consent on liability binds all files, the appellants are estopped from appealing on the same issue; That proceedings in this file were only in respect of assessment of damages and the court should therefore look at the lead file ie. CMCC 266/2016.

On quantum, counsel urged that based on the decision of Bashir Ahmed Butt vrs Uwais Ahmed Khan (1982 – 88) KAR, the appellants had not demonstrated that the Magistrate applied the wrong principles or misapprehended the law and arrived at an inordinately high award.

LIABILITY:

The appellant has challenged the trial court’s judgment on liability. However, I have read the proceedings in CMCC 266/2016 as addressed by the respondent. On 22/11/2017, the Counsel agreed to have CMCC 266/2016 to be the lead file and liability to be determined therein. The record reads;

“11.30am

Owour Advocate

We have agreed we take this as a lead file. Liability will be determined in the file.”

After both witnesses for the respondent and appellant testified, the counsel addressed the court as follows;

“Ombui: *That marks the close of the defence case. I pray that this orders apply in the other files 268/2016, 271/2016 and*

Owour: *That is the position. We pray for mention for submissions. Mention on 15/02/2018.*”

The respondent’s Counsel submitted that there has been no appeal against the court’s decision in CMCC 266/2016 where the court entered judgment on liability at 100% as against the appellant. From the extract I have quoted above, both Counsel agreed on having CMCC 266/2016 as the lead file and the decision therein binds all the other files on liability. The judgment in CMCC 266/2016 has not been challenged on appeal and therefore the issue of liability cannot be challenged in this case. Liability remains at 100% as against the appellant.

QUANTUM:

The only issue that this court will deal with is quantum. The principles that guide an appellate court in a challenge to damages awarded by the trial court are well settled.

The said principles have been applied in many cases – see *Ahmed Butt (Supra)*. In *Loice Wanjiku Kagunda vrs Julius Gachau Mwangi CA 142/200*, the court held “.....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 or other reasons made 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 vrs Musila (1984) KLR 257*).”

See also *Robert Musyoki Kitavi vrs Coastal Bottlers Ltd (1985) 1 KAR 891* where similar principles were espoused. It is therefore the duty of the appellant to demonstrate that the trial court applied its discretion wrongly that it awarded an inordinately high award.

The respondent suffered the following injuries; Blunt injury to the head leading to severe soft tissue injuries, blunt injury to the chest leading to soft tissue injuries and severe soft tissue injuries to the back. The doctor classified the injuries as harm. The treatment notes revealed the same. In the trial court, the appellant had relied on two decisions of *Eastern Produce K. Ltd vrs Edwin Abdalla Wasike (2012) eKLR*. In that case, the trial court had awarded Kshs.160,000/- which the High Court reduced to Kshs.100,000/- where the plaintiff had sustained chemical burns to the hands and legs. The respondent also relied on the decision of *Kiwanjani Hardware Ltd & Another vrs Nicholas Mule Mutinda HCCA 16/2008* where the High Court awarded Kshs.150,000/- for blunt injury to the chest, right forearm, deep penetrating wound on the leg, cuts and bruises on the same leg. Considering the decisions relied upon, it is my view that the plaintiffs in those cases sustained more serious injuries than the respondent herein. I also take note of the fact that the said awards were made in 2008 and 2012 which is over 8 years ago. Even if I make allowance for incidence of inflation I think that the award was on the higher side and I hereby set it aside. Instead, I make an award of Kshs.120,000/- as general damages for pain and suffering. The special damages of ksh.7,000/= were not in dispute. The appeal therefore succeeds to the extent that the respondent will have judgement against the appellant as follows;

General damages ksh120,000/=

Special damages 7,000/=

The appeal having succeeded in part, the appellant will have quarter (1/4) of the costs of appeal.

Dated, Signed and Delivered at NYAHURURU this 30th day of September, 2020.

R.P.V. Wendoh

JUDGE

PRESENT:

Ms Obura holding brief Mr Juma for Appellant

Henry - Court Assistant