



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 77 OF 2019

UNITED MILLERS LIMITED.....APPELLANT

VERSUS

TOM MAINA SARARA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S.N. Makila (S.R.M.) delivered on 31st May 2019 at the Chief Magistrates Court at Kisii in Civil Suit No. 5 of 2018)

JUDGMENT

1. Following a road accident that occurred on 17th September 2017, along Kisii-Kilgoris Road at Menyinkwa area, the respondent sustained injuries and claimed damages from the appellant who was the registered owner of the motor vehicle registration number KCF 843Q. The trial magistrate found the appellant and respondent equally liable for the accident and awarded the respondent Kshs. 1,000,000/= as general damages and Kshs. 7,050 as special damages less the apportioned liability of 50%. The appellant now appeals against the trial court's finding on liability and assessment of quantum.
2. This court being the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Company Ltd*[1968] E.A. 123, 126).
3. When the matter came up for hearing before the trial court, the respondent stated that he was standing off the road at about 6 a.m. when the appellant, who was offloading bread, reversed and hit him. He denied that he had sustained his injuries as he was jumping on the vehicle to get a lift. He stated that the appellant took him to Kisii Referral and Teaching Hospital for treatment and added that he was also admitted at Christamarianne Hospital for about 4 months. He told the court that he had not fully recovered and still had to go to hospital for treatment.
4. The investigating officer, PC Caleb Osodo (PW3) from Kisii Central Police Station testified that on 17th September 2017 the appellant reported to the station that he had been involved in an accident while driving from Kilgoris. He stated that the appellant told him that the respondent had fallen down and sustained injuries while stealing a ride. PW3 testified that when he visited the appellant, he denied stealing a ride as alleged and told him that the driver had hit him with the vehicle. He told the court that he was unable to identify the point of impact or get an independent witness to support either version of the accident.
5. Doctor Morebu Peter Momanyi (PW1) testified that he examined the appellant about 2 months after the accident. He stated that as a result of the accident, the appellant sustained a pelvic fracture with urethral injury, blunt trauma on the lower back and bruises to the legs. He testified that the appellant had been treated at Kisii Teaching and Referral Hospital and had also been admitted at Christamarianne Hospital for 2 months. He added that the respondent had also undergone a supra pubic cystectomy. Dr. Morebu further testified that it was likely that the urethral injury would take a long time to heal and that the appellant would need to undergo urethrography to rule out post traumatic urethral strictures.
6. Doctor Sebeo Joseph (PW4) a resident medical doctor at Christamarianne Hospital testified that the hospital had the respondent's treatment records and discharge summary. He testified that the respondent had sustained injuries to the urinary system and soft tissue injuries to the lower limbs and would develop problems passing urine in the long term.
7. The appellant denied that he was reversing as alleged by the respondent and testified that the respondent got injured when he jumped onto the vehicle at the bumps in Menyinkwa. He testified that he came to know about the plaintiff's presence when he heard screams and found him stuck in the back of the vehicle.
8. This appeal was canvassed by way of written submissions which I have duly considered.

LIABILITY

9. On the issue of liability, the appellant's counsel submits that the appellant failed to prove his case to the requisite standard. He argues that the trial court's finding that there was "a remote possibility that the accident occurred as narrated by the Plaintiff," did not amount to proof of negligence on a balance of probabilities. He contends that the trial court erred in law in proceeding to find that the appellant was equally liable for the accident having found that the appellant's evidence was, "more credible and probable."

10. Counsel relied on the cases of Evans **Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR**, **William Kabogo Gitau vs George Thuo & 2 Others [2010] 1KLR 526** and **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another [2015] eKLR** in support of his argument that the respondent had not proved his case on a balance of probabilities. He also argued that if the court was inclined to find the appellant liable, it should have apportioned less liability to the appellant.

11. In support of the trial court's finding on liability, respondent's counsel submitted that in a case where the accident was not disputed but there were varying accounts of how the accident occurred, in the absence of an independent witness, liability should be apportioned equally. To support this argument, counsel cited the cases of **Kimani Muhoro v John Waiganjo Mbuthia & Another [2015] eKLR**, **Enock Sinde Obegi v Benard Sumo [2020] eKLR** and **Leonard Kamenwa Njenga v David Maina Mbugua [2019] eKLR**. It was his further submissions that the trial court's finding was proper as it had accepted the probability that the accident occurred as narrated by both parties.

12. From the evidence and the parties' submissions, it is evident that the respondent proved that the accident occurred and he sustained injuries as a result of the accident. What is in contention is how the accident happened. The appellant and the respondent gave two varying accounts of how the accident took place. On the one hand, the appellant testified that the respondent was injured in the course of jumping onto the vehicle for a lift. In his written statement, the appellant indicated that he heard screams behind his vehicle and when he went to the back of the vehicle, he found a man with his leg stuck between the cross back and the number plate. In contrast, the respondent testified that as he was walking along the road, the appellant, who was off loading loaves of bread, reversed the vehicle and hit him. He testified that he was off the road when the accident occurred.

13. In the case of **Hussein Omar Farah v Lento Agencies Civil Appeal 34 of 2005 [2006] eKLR** where there were two conflicting accounts of how the accident took place, the Court of Appeal held;

"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.

...

The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

14. The trial court held that it found the account of the appellant more credible and probable than that of the respondent. Interestingly, the court went on to hold that it could not entirely overlook the testimony of the plaintiff and that of the investigating officer and proceeded to find that both parties should bear 50% liability. The trial court did not give a reason for why it found the appellant's version more credible.

15. In as much as the appellant claimed that the respondent was the author of his own misfortune, he did not produce independent evidence to support his claim. Similarly, the respondent's account was not supported by unbiased evidence. The investigating officer testified that he was not able to find an independent witness to support either version. He also stated that he was not able to find any traces of blood and could not identify the point of impact which would have shed light on the circumstances of the accident. A court can only base its decision on evidence and the law and not on speculation. (See **Rose Nafula Wanyama v Nusra Nasambu Chibanga & Another [2020] Civil Appeal No. 104 of 2017 eKLR**).

16. Thus, in view of the fact that there was no independent evidence to shift blame one way or the other, both versions must be taken to be equally probable. Consequently, I find that the trial court's equal apportionment of liability was proper and I hereby uphold it.

QUANTUM

17. On quantum, the appellant submits that the award of Kshs. 1,000,000/= was inordinately high and disregarded the principle that like injuries ought to attract like damages. Counsel submitted that there had been no effort by the trial court to analyze the authorities placed before it and compare the injuries in those authorities to those suffered by the plaintiff. He contends that if the court had considered the authorities they cited, it would have made an award below Kshs. 1,000,000/= and slightly above Kshs. 400,000/=.

18. The respondent's counsel countered that the trial court had applied the correct principles and had properly assessed damages payable to the respondent. He contended that regard had been given to the authorities submitted by both parties to arrive at an award that was neither inordinately high or low. Counsel submitted that the authorities cited by the appellant involved fractures on different parts of the body and urethral injuries whereas the appellant in the present case suffered a urethral injury and fracture in the pelvic region. He argued that the injuries in the present case were only comparable to the injuries in the appellant's authority of **Macharia Miriam & Another v Muema Ndila [2017] eKLR** where the appellate court upheld an award of Kshs. 1,400,000/=.

19. An appellate court will only interfere with the trial court's assessment of damages in certain clear cut circumstances. In **Butt v Khan Civil Appeal No. 40 of 1977 [1978] eKLR** Madan JA set out the principles to be followed in determining whether to interfere with an award of damages thus;

“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 at a figure which was either inordinately high or low.”

20. The respondent claimed that due to the accident he was rushed to Kisii Teaching and Referral Hospital and later admitted at Christamarianne Mission Hospital for treatment of injuries he sustained as a result of the accident. He claimed that he had suffered the following injuries;

- a. Urethral injury
- b. Pelvic fracture
- c. Blunt trauma to the back
- d. Bruises on the legs

21. The nature and extent of the respondent’s injuries was confirmed by the evidence of two medical doctors. Based on his examination of the respondent’s prior medical notes and a physical examination two months after the accident, PW1 confirmed that the respondent suffered the injuries set out in the plaint. He also confirmed that the respondent would require urethrography to rule out post traumatic urethral strictures. PW4 produced a discharge summary confirming that the respondent had been admitted at Christamarianne Mission Hospital from 17th September 2017 to 13th November 2017 for the pelvic fracture and urethral injury. The evidence of the respondent and the two medical doctors, PW1 and PW4 established that the respondent had suffered excruciating pain and discomfort due to his injuries which would take a long time to heal.

22. Before the trial court, the appellant proposed an award of Kshs. 400,000/= to compensate the respondent for his injuries. He relied on the case of **Muthamiah Isaac vs Leah Wangui Kanyin [2016] eKLR** where an award of Kshs. 500,000/= was reduced to Kshs. 400,000/=. In that case, the respondent had sustained a fracture of the right superior pubic ramus, fracture of the right inferior pubic ramus and blunt injury to the left leg.

23. The appellant also relied on the case of **Were Rodah and Another vs MMM [2018] eKLR** where the court reduced an award of Kshs. 1,300,000/= to an award of Kshs. 600,000/=. The respondent in that case had sustained a fracture of the right tibia shaft, tear of the bladder and multiple soft tissue injuries.

24. He also cited the case of **Macharia Miriam & Another vs Muema Ndila [2017] eKLR** where the appellate court upheld an award of Kshs. 1,400,000/=. In that case, the respondent had sustained an unstable pelvic fracture, injuries to the bladder and urethra, deep cut wound to the perineum region, cut wound to the abdomen, urethral stricture and bruises to the right hand.

25. The respondent submitted that an award of Kshs. 6,000,000/= would sufficiently compensate him for the injuries suffered. He based his proposal on the case of **SLB v Ali Ramadhani & Another [2016] eKLR** where the plaintiff sustained fractures of the pelvic bones and urethral injuries. In that case, the court awarded the plaintiff Kshs. 6,000,000/= as compensation for the injuries sustained. The respondent also relied on the case of **Alfas Ochieng Were vs Joseph Maina & Another [1997] eKLR** where the court awarded the plaintiff a sum of Kshs. 1,000,000/=. The plaintiff in that case had been hospitalized for two months following a fracture of his pelvis which tore into his bladder and urethra. He also sustained injuries to parts of his intestine.

26. Although the trial court mentioned the authorities cited by the parties in passing, it did not compare and contrast those authorities. It is not clear from the decision how the court arrived at an award of Kshs. 1,000,000/=. In assessing damages comparable injuries should as far as possible be compensated by comparable awards. This principle was set out as follows in the case of in **Simon Taveta v Mercy Mutitu Njeru Civil Appeal No. 26 of 2013 [2014] eKLR**;

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

27. I have considered the authorities cited by the parties to guide the court in reaching its decision. In my view, the authorities cited by the respondent in support of its proposed award were not beneficial to the court. He based his proposal on the case of **SLB v Ali Ramadhani (supra)** where the injuries suffered by the plaintiff were more severe as compared to those he sustained. The plaintiff in that case lost ability to pass urine normally via urethra and would have to catheterize himself for 2 to 4 hours for the rest of his life. His chances of getting children were slim to none and his sexual function had been interfered with due to his injuries.

28. The injuries in case of **Alfas Ochieng Were vs Joseph (supra)** were also more serious. The plaintiff in that case had urine leaking to the scrotum, undersurface of the penile shaft, right groin and right side of the anus from a scar in the pubic area due to surgical mishap. He also had pus oozing from the same sites. The doctors also noted a tight and complete stricture near the urinary bladder and a subsequent examination also revealed kidney damage, fistular and hypertension. It is also noteworthy that that decision was decided more than two decades prior to the decision of the trial court.

29. The case of **Were Rodah and Another vMMM [2018] eKLR** which was relied upon by the appellant was equally not helpful as the injuries in that case were not comparable to those suffered by the respondent in the instant case.

30. That leaves the cases of **Muthamiah Isaac vs Leah (supra)** and **Macharia Miriam & Another vs Muema (supra)** which are more relevant. In the case of **Muthamiah Isaac vs Leah (supra)** the injuries are comparable to those suffered by the respondent but it must be

