



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 98 OF 2018.

HYGROTECH E.A.LIMITED.....1ST APPELLANT

JAMES NGUGI.....2ND APPELLANT

VERSUS

JAMES KARIUKI MWANGI.....RESPONDENT

(Being an Appeal from the judgment /decree of the senior Resident Magistrate Hon. Wakumile delivered on 19th July 2018 in Nakuru CMCC No. 1709 of 2001.)

JUDGMENT

BACKGROUND

1. This appeal arises from suit filed by the respondent seeking damages from the respondent who was the 4th defendant and three others for the injuries he sustained from an accident which occurred on 6th June 2001 along Nakuru/Naivasha road at Marura area involving the 1st defendant's vehicle registration number KAM 120Y driven by the 2nd defendant collided with 3rd defendant's motor cycle registration number KAN 755E the 3rd defendant's driven by the respondent (4th defendant). The trial magistrate found the appellant (4th defendant) 100% liable for the accident and awarded general damages of kshs 200,000 and special damages of kshs 2000.

2. The appellant being aggrieved by the trial magistrate's determination filed this appeal on the following grounds: -

- i. *The learned trial magistrate erred and misdirected herself in law and in fact by holding that the respondent had proved his case on a balance of probabilities.*
- ii. *The trial magistrate erred and misdirected herself in law and in fact by holding the appellants 100% liable in negligence*
- iii. *The learned trial magistrate erred in law and in fact by failing to hold that the plaintiff was not the particular person injured on 6th August 2001*
- iv. *The trial magistrate erred in law and in fact by attributing liability contrary to laid down principles*
- v. *The learned trial magistrate erred in law and in facts by failing to evaluate the evidence in its totality and failing to take into consideration the submissions and authorities submitted by the appellant.*
- vi. *The learned trial magistrate erred in law and in facts by applying wrong principles in assessment of damages*
- vii. *The learned trial magistrate erred in law and in facts by allowing unauthorised person to produce police abstract*
- viii. *The learned trial magistrate erred in law and in facts in assessing general damages at kshs 200,000 which is manifestly excessive and inordinately high.*

3. Parties agreed to proceed by way of written submissions.

APPELLANT'S SUBMISSIONS

4. The appellant's counsel started by submitting on the role of the appellate court which is to evaluate, re-assess and analyse evidence adduced before the trial court.

5. On ground 1, 2 and 4, the appellants submitted that the respondent did not prove his case on a balance of probabilities; that the respondent failed to prove that it is more probable that the defendants/appellants were liable for the accident than not.

6. That the respondent sued 4 defendants and it was imperative for the Court to decide on liability as between the 4 defendants and the plaintiff; that the trial court did not address itself to the issue of liability on the part of the 1st and 2nd defendant.

7. The appellants further submitted that according to the respondent's evidence, it had rained impairing the respondent's visibility and it was not possible for the driver to notice the oncoming motor cycle; that the driver was unable to control the vehicle hitting the motor cycle. Appellants further submitted that the Court held the appellants 100% liable for failing to avail a witness in Court; that it is clear that the vehicle registration number KAM 120Y was over speeding; the appellant submitted that a diligent driver was expected to avoid collision on noticing a possibility of hitting an object.

8. On ground 3 and 5, the appellants submitted that the trial magistrate failed to evaluate evidence in totality. Appellants stated that there was variance in the plaintiff's names and names in the police abstract and no evidence was adduced to show that they were one and the same person.

9. In respect to assessment of damages the appellant cited the case of **John Kipkemboi & Another Vs Morris Kedolo [2019] eKLR** where the Court laid down the principles to guide the Court in assessment of damages as hereunder: -

1. An award of damages is not meant to enrich but to compensate such victim for injuries.

2. The award should be commensurable with the injuries sustained.'

3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own fact.

4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5. The awards should not be inordinately low or high.

10. The appellants submitted that the award of kshs 200,000 as damages was inordinately high in the circumstances herein and cited the case of **Hunhu & Another Vs Vincent Barassa Wafula & Another [2014] eKLR** where the Court awarded kshs 100,000 for comparable injuries; and submitted that an award of kshs 100,000 is sufficient in this case.

RESPONDENT'S SUBMISSIONS

11. The respondent submitted that the appellants did not call any witness to controvert/challenge the respondent's evidence hence the respondent's evidence was uncontroverted and unchallenged as held in the case of **Trust Bank Limited Vs Paramount Universal Bank Limited & 2 others Nairobi Milimani HCC No.1243 of 2001**.

12. The appellants submitted that the respondent proved his case on a balance of probabilities and the Court reached its decision on merit and did not err in law and fact.

13. On ground that the plaintiff was not the particular person injured, the respondent submitted that there were two victims involved in the accident **James Kariuki Mwangi** who filed Nakuru CMCC No.1701 of 2001 and **James Mwangi Kihara** who filed Nakuru CMCC No.2323 of 2001 and that the amended plaint is attached to the supplementary record of appeal which confirm that the respondent was a victim in the accident; that the two testified and confirmed that they were two different people and the trial court had the benefit of confirming the same.

14. In respect to injuries, the respondent submitted that **Dr. Kiamba's** report confirmed the injuries sustained by the respondent and the injuries are supported by initial treatment notes, P3 form and medical reports including **Dr. Gaya's** report presented by the appellants. The appellant cited the case of **Devki Steel Mills Ltd Vs James Makau Kisuli Machakos Civil Appeal No.191 of 2008** where kshs 250,00 was awarded for similar injuries to the respondent.

15. Respondent concluded that the award of kshs 200,000 was not inordinately high and urged Court to analyse authorities cited by both parties.

ANALYSIS AND DETERMINATION

16. This being the first appellate court, my role would be to reevaluate evidence adduced before the trial court and arrive at an independent determination. This position was held in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the Court stated as follows: -

"...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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 thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

17. In view of the above I have perused and considered evidence adduced before the trial court and find the following as issues for determination: -

- a. Whether the respondent was a victim in the accident that occurred on 6th June 2001 along Nakuru/Naivasha road.
- b. Who should shoulder blame for the accident and to what extend
- c. Whether the award of kshs 200,000 as general damages is manifestly high

(a) Whether the plaintiff was a victim in the accident herein

18. I note from the proceedings that the issue of identity of respondent as victim in the accident was exhaustively dealt with by the lower court. The respondent and PW2 both testified before the trial magistrate and in his judgment he found that they were separate individuals sharing common name which he noted was not a unique feature.

(b) Who should shoulder blame for the accident and to what extend

19. The plaintiff testified that it rained heavily affecting visibility and motor cyclist came into the road suddenly.in my view the driver of KAM was expected to drive slowly in view of heavy rain and if he was driving in low speed he should have been able to control the vehicle on seeing the motor cyclist enter the road. On the other hand, the cyclist should have taken time to look and confirm if the road was clear before riding into the road.

20. Counsel for the respondent had indicated that the appellants did not adduce evidence; I also note that the Court indicated that the appellants did not call any witness and the cyclist was arraigned in Court; from the reading of the judgment, he held the appellants 100% liable on those 2 grounds. However, in my view evidence adduced by plaintiff do not point at 100% liability on part of the appellants. The 4th defendant had duty also to drive in low speed due to heavy rain as his visibility may have been impaired as per respondent’s evidence

21. From the foregoing I find that the trial magistrate failed in failing to apportion liability. Upon considering evidence adduced I find the respondent 20% for the accident and appellants 80% liable for the accident.

(c) Whether damages awarded are manifestly high

22. I have perused the medical report by **Dr. Kiamba** and compared the injuries with injuries suffered in authority cited by both the plaintiff and defendants in the lower court and in my view the damages of kshs 200,000 for injures sustained is not manifestly excessive. I therefore decline to interfere with assessment of damages by the trial court.

23. FINAL ORDERS

- a. Appeal on liability is allowed
- b. Respondent to shoulder 20% liability and appellants 80% liability
- c. Damages not interfered with but the same to be subjected to ratio of liability above.
- d. Each party to bear own costs of appeal.

Judgment dated, signed and delivered via zoom at Nakuru

This 29th day of October 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Ms. Makori h/b for Gekonga for the Respondent

No Appearance by the Appellant