



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.770 OF 2016

DIBESH SHAH t/a

DIPLOY FESTIVE BAKERY.....1ST APPELLANT

KUNJ BAKERY.....2ND APPELLANT

IMPERIAL BANK.....3RD APPELLANT

PAUL MUCHU MBAI.....4TH APPELLANT

VERSUS

JACKSON KIMANI NGUGI.....RESPONDENT

JUDGMENT

The Respondent herein who was the Respondent in CMCC No. 6745/2007, filed a plaint dated 3rd August, 2007 and amended on 15th September, 2015 against the Appellants in which he claimed both general and special damages arising out of a traffic road accident that occurred on 29th December, 2006 when the Respondent was alleged to have been walking along the pedestrian path along Thika Road near Githurai Shopping Centre.

The Respondent pleaded that on the said date, the 4th Appellant negligently drove and/or managed motor vehicle registration number KAS 025S that it was involved in an accident thereby occasioning severe bodily injuries to the Respondent. The particulars of negligence, injuries and special damages, are set out in paragraph 6 of the plaint.

The appellants filed a statement of defence on the 11th September, 2007 denying the occurrence of the accident and ownership of the subject motor vehicle.

In the alternative and without prejudice, they pleaded that if an accident occurred as the Respondent may prove, the same was solely caused and/or substantially contributed to, by negligence on the part of the driver of motor vehicle KAR 593T and that of the Respondent. The particulars of contributory negligence are set out in paragraph 5 of the plaint. The particulars of loss and damage are denied and the Respondent is put to strict proof.

On 8th June, 2007, the Appellants filed a Third Party Notice in which, they claimed indemnity and/or contribution against Road Runner Transporters, (Third Party) alleging that the accident was solely caused and/or substantially contributed to, by the negligence of the driver of motor vehicle KAR 593T registered in the name of the Third Party. The particulars of negligence of the driver of the aforesaid motor vehicle are set out in paragraph 2 of the Third Party notice dated the 4th day of June, 2007.

The Third party filed a statement of defence on the 4th May 2009 in which it denied the occurrence of the accident as alleged in the plaint, in the defence and/or in the Third Party Notice and put the Respondent and the Appellants to strict proof thereof. It also averred that the Appellants have not established any reasonable cause of action against it and prayed for dismissal of the Appellant's claim against it. Further, the Third Party averred that the accident was substantially contributed to, by the Respondent's negligence and fully adopted the particulars of negligence attributed to the Respondent by the Appellants in paragraph 5 of the plaint. It denied the alleged injuries and damages suffered by the Respondent and put it to strict proof.

The Respondent filed a reply to defence on 20th November 2015 in which he joined issues with the Appellants on all the allegations made in their joint defence. He denied the particulars of negligence attributed to him by both the Appellants and the Third party and reiterated the particulars of negligence against the Appellants.

The matter proceeded on the 23rd May 2016 when the Respondent testified as the only witness in support of his case. There was no appearance on the part of the Appellants and the Third party. The record shows that the firm of Mereka & Co. Advocates for the Appellants was absent but it is silent on the position with regard to the Third Party but the learned magistrate noted that there was an affidavit of service. A perusal of the said affidavit of service sworn by Philip Kaingu Advocate, on the 19th day of May, 2016 and filed in court on 20th May 2016 shows that both the Appellants and the Third parties were served with the hearing notices, indicating that the matter was coming up for hearing on the 23rd day of May 2016. Both firm of Advocates representing the Appellants and the Third party, Messrs. Mereka & Co. and B. Mbai & Associates respectively were served on 30th May 2016 and they duly acknowledged receipt of the hearing notice by stamping the same and therefore the learned magistrate was in order to proceed with the matter in their absence having satisfied herself that they had been duly served.

On the hearing date, the Respondent testified that he was walking on the road side along Thika road near Githurai Shopping Center, when he was involved in an accident with motor vehicle KAS 025S as a consequence of which, he got injured. He stated that he heard a bang and people screaming and suddenly, motor vehicle registration KAS 025S overturned and fell on his left leg crushing it. He blamed the motor vehicle KAS 025S (Canter) which injured his leg as he was not on the wrong because he was outside the road.

He was taken to hospital at Githurai by a good Samaritan for first aid after which he was rushed to Kenyatta Hospital where he was admitted for 2½ months and after the discharge he continued with review for 3 years at the same hospital. He produced the treatment cards and the medical reports as some of the exhibits in the case.

According to the medical reports by doctors Wokabi and Jacinta Maina produced in the Lower Court as exhibits 6 and 7, they both confirm that he sustained a cut wound on the left leg and multiple fractures of the left tibia and fibula. Surgical toilet was done and external clamps were applied to facilitate dressing of the wound. After the wound became clean, he was operated on and a skin graft was applied. The wound healed after many months. Both doctors are in agreement that the Respondent sustained severe injuries which caused him pain, suffering and blood loss. Many major surgical procedures were carried out. The leg will never revert to old vitality and residual permanent disability of 10% will persist. The extensive scars he has on the left leg and on the back will persist permanently.

The learned magistrate upon hearing the Respondent in the absence of the Appellants and the Third party, delivered a judgment dated the 19th day of August 2016, in which she entered judgment against the Appellants jointly and severally for a total of Kshs.1,106,971/-being Kshs.1million general damages for pain and suffering and special damages of Kshs.106,971 she also awarded the Respondent the costs of the suit.

The Appellants being dissatisfied with the said judgment have appealed to this court and have listed five (5) grounds of Appeal in their memorandum of Appeal dated the 16th day of December, 2016 as follows:-

- 1. That the learned trial magistrate erred in law and in fact in finding as she did, that the Appellants were entirely to blame for the accident and consequently the respondent's injuries.**
- 2. The learned trial magistrate acted in error when she failed, as she did, to properly evaluate evidence on record thus reaching erroneous decision on the issue of liability.**
- 3. The learned trial magistrate acted in error when she failed, as she did, to properly evaluate the expert evidence on record thus reaching erroneous decision on the issue of quantum of damages payable to the Respondent and thereby arriving at an excessive award.**
- 4. The learned trial magistrate erred in law and in fact by basing her decision on irrelevant matters and failing to base her said decision on the facts and evidence on record.**
- 5. The entire proceedings leading up to the judgment appealed against were a nullity by reason of having proceeded contrary to an order of Moratorium staying all court proceedings involving Ms. Blue Shield Insurance Limited and/or its insured clients.**

The Appeal was disposed off by way of written submissions which the court has duly considered. In their submissions the Appellants have set out 3 issues for determination by this Honourable Court as follows:-

- (a) Whether the Appellants were entirely to blame for the accident and consequently the Respondent's injuries
- (b) Whether the quantum of damages awarded to the Respondent was excessive in the circumstances.
- (c) Whether the effect of the moratorium was to stay all the proceedings involving motor vehicles insured by Blue Shield Insurance Co. Limited and as such the hearing of the case proceeded irregularly.

I now proceed to consider the issues as set out hereinabove. The first two issues can be considered under two broad categories being that of liability and quantum of damages.

On whether the Appellants were entirely to blame for the accident, it is noted that though the suit was filed against the Appellants, a third party was enjoined in the proceedings and it entered appearance and defence. As noted earlier in this judgment, the Appellants and the third party did not appear at the hearing of the suit and it thus proceeded exparte with the Respondent testifying as the only witness. The Appellants submitted that there was no material evidence adduced to prove that the 4th Appellant was actually negligent as claimed in the

plaint and that there was no eye witness who saw how the accident occurred. They relied on a portion of the evidence adduced by the Respondent in which he stated that, “as I was walking, I heard a loud bang behind me but I did not know what was happening. That, I immediately heard being sat on by a motor vehicle. When people were screaming I was not bothered because I was outside the road”

The Appellants contended that the learned magistrate heavily relied on this evidence in her judgment yet in their view, the Respondent did not assist the court in determining how exactly the accident occurred and that the statement did not show fault on the part of the Appellants at all. They submitted that there can be no liability without fault and a plaintiff must prove some negligence on the part of the Defendant where the claim is based on negligence. They relied on the case of **Brian Muchiri Waihenya Vs. Jubilee Hauliers Limited & 2 others (017) eKLR**. The Appellants averred that the learned magistrate erred in law and in fact in apportioning 100% liability against the Appellants since the Respondent had not discharged his duty of proving negligence on the part of Appellants.

The Appellants further submitted that in his own evidence, the Respondent told the court that the accident occurred when the trailer belonging to the third party hit the canter which overturned and fell on his leg and crushed it. They argued that even the Respondent himself faulted the driver of the third party vehicle for the occurrence of the accident and therefore, the learned magistrate ought to have apportioned liability against the third party as well. They argued that the Third party has not been mentioned in the judgment and that the third party has effectively been exonerated from blame without any reasons being offered and being a party to the suit, the learned magistrate ought to have made a pronouncement as regards its liability for the accident. The case of **Phyllis Kawinzi Kithuka Vs. Grace Wayua Mwanza (2017) eKLR** was relied on in this regard. They submitted that had the trailer not hit the Canter, the Canter would not have fallen on the Respondent and he would not have sustained any injuries and consequential loss.

On the other hand, the Respondents contended that the learned magistrate was right and that the evidence by the Respondent speaks for itself and urged the court to dismiss the Appeal.

The court has perused through the evidence of the Respondent as adduced before the lower court.

I wish to note that though the Respondent filed a witness statement on 16th September 2015, the same was not adopted as his evidence and he did not make any reference to it. In his evidence under oath, he stated that he was walking on the road side facing the direction of Nairobi at Githurai, when he heard a bang behind him but he did not know what was happening. He heard people screaming but he did not get bothered because he was outside the road and immediately thereafter, a motor vehicle lay on him as a consequence of which, he sustained injuries on the left leg. He blamed the Canter i.e. motor vehicle registration number KAS 025S for the accident. He further stated that he was not on the wrong because he was walking outside the road.

The court has perused the amended plaint that was filed in the Lower Court. In it, the Respondent blames the 4th Appellant, the driver of motor vehicle registration number KAS 025S for the accident. He did not mention the involvement of any other motor vehicle in the said accident. The Appellants took out third party proceedings against the Third Party (Road Runner Transporters), the owners of motor vehicle registration number KAR 593T and in the third party notice filed on 8th June 2007, they attributed negligence to the driver of the aforesaid motor vehicle for the occurrence of the accident. They sought indemnity and/or contribution in full to such an extent as the court may decide in respect of all the plaintiff's claim.

The third party filed a defence denying the Appellants' claim against it and attributing negligence against the Respondent and the 4th Appellant though no particulars of negligence were set out.

In their submissions, the Appellants submitted that no negligence was proved against them and that the evidence of the Respondent did not assist the court in determining how the accident occurred and it did not show fault on the part of the Appellants.

Further, in their submissions, the Appellants contended that in his own evidence, the Respondent faulted the driver of the third party motor vehicle for the occurrence of the accident and in so submitting, they relied on what they said was the evidence of the Respondent where he stated that:

“the trailer belonging to the third party hit the Canter which overturned and fell on his leg and crushed it”

The court has carefully perused through the record of the proceedings and it is noted that there is no such evidence on record but it is contained in the Respondent's witness statement. As I had noted earlier on, the Respondent did not apply to have his statement adopted as part of his evidence and he did not refer to it in his evidence in chief and therefore the court can only go by the evidence tendered and recorded by the learned magistrate. His evidence was not tested by cross-examination as the Appellants and the third party did not attend court during the hearing.

The evidence on record shows that the Respondent was walking off the road when he had a loud bang and immediately thereafter he saw motor vehicle KAS 025S laying on his leg. Though in his evidence he did not give details of how the accident occurred, at least the evidence shows that motor vehicle KAS 025S injured him while he was off the road. In his plaint, he pleaded the doctrine of *Res Ipsa Loquitur*. Having pleaded that and with the evidence on record that he was off the road, the Appellants were under duty to explain how the driver of motor vehicle KAS 025S left the road and hit the Respondent. This was not done and therefore, in my view, the Respondent succeeded in proving his case on a balance of probability against the Appellants at 100%.

With regard to the Third Party, no evidence was adduced against them as the Appellants did not attend court to offer evidence. They were enjoined in the proceedings by the Appellants who attributed negligence to them in their defence. In the absence of the Appellants the case against the Third party was not proven and therefore no liability can attach on them. The court however, notes that the learned magistrate did not make any finding on liability against the Third party and did not even mention them in the judgment which was erroneous because they are parties to the suit.

On whether the quantum of damages awarded to the Respondent was excessive, the Appellants have relied on the case of **P.N. Mashru Limited Vs. Omar Mwakoro Makenge (2018) eKLR** In which the learned Judge cited the case of **Daniel Kosgei Ngelechi Vs. Catholic Trustee Registered Diocese of Eldoret & Another (2013) eKLR** and the case of **Kigaragari Vs. Aya (1982-88) IKAR 768** in which the court stated that damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. The Appellants further submitted that the authorities cited by the Respondent in the lower court reflect more severe injuries which are not comparable to those sustained by the Respondent in this case. They have suggested the sum of Kshs.500,000/- having being guided by the case of **Akamba Public Road Services Vs. Abdikadir Adan Galalo (2016) eKLR** wherein the Respondent sustained a fracture of the right tibia leg bone malleolus and right fibula bone and a blunt injury to the right ankle.

On the part of the Respondent, the court was urged not to interfere with the award of damages made by the trial court. The Respondent cited the case of **Mwaura Muiruri Vs. Suera Flowers Limited & Another (2014) eKLR** in which the Respondent suffered multiple soft tissue injuries, comminuted fractures of the right humerus, upper compound fractures of the right upper leg. The court awarded Kshs.1,900,000 as general damages. In addition the Respondent relied on the case of **Cosmas Mutiso Mwema Vs. Kenya Road Transporters Limited & Another** in which the Respondent suffered a crushed left leg leading to amputation below the knee, fracture to the cervical spine, fracture to the skull, fractures to the ribs, dislocation of the right knee and vertebrae among other injuries. The court awarded Kshs.2million.

The court has considered those cases cited by the Respondent among others and it's true that the injuries sustained by the Respondents in those cases were more severe than those suffered by the Respondent in this case. Considering the injuries sustained by the Respondent herein, they are almost similar to those suffered by the Respondent in this case of Akamba Bus Services (supra) where the court awarded Kshs.500,000/-. Due to inflation, I am of a considered view that a sum of Kshs.700,000 is reasonable.

On whether the effect of moratorium is to stay all the proceedings involving Blue Shield & Co. Limited, my take on that is that; on 20th September 2012 the court was informed that there was a moratorium and that the third party was insured by Blue Shield Insurance Company Limited, the court adjourned the matter and ordered that, in view of the moratorium, fresh dates be taken at the registry. This court notes that, the details of the moratorium were not disclosed to the court. When the matter proceeded on 23rd May 2016, neither the Appellants nor the Third party were in court. At that point, the learned magistrate would not have been expected to know whether the moratorium was still in force or not. It was the duty of the Appellants or the third party to inform the court the position with regard to the moratorium which was not done. The existence of a moratorium is not a matter that the learned magistrate would be expected to take judicial notice of, and therefore, it would have been necessary for the third party to have done so. That ground of Appeal therefore fails and in any event, even if there was a moratorium the same relates to the insurers of the third party and not the Appellants. The third parties are not Appellants in this Appeal.

On special damages, a total of Kshs.113,571 has been claimed in the amended plaint. The receipts produced in court amounts to a total of Kshs.112,712 which the court hereby substitute with the sum of Kshs.106,971 awarded by the learned magistrate.

In the end, the Appeal partially succeeds. The judgment of the Lower Court is confirmed with regard to liability but general damages are reduced as stated above.

The Respondent is awarded half of the costs of the Appeal.

Dated, Signed and Delivered at Nairobi this 31st day of **January, 2019**

.....

L. NJUGUNA

JUDGE

In the presence of:-

.....**For the Appellants**

.....**For the Respondent**