



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.17 OF 2016

[consolidated with civil App.No.18/16]

BETWEEN

ST. JAMES MODEL ACADEMY.....1ST APPELLANT

JAMES JETI2ND APPELLANT

FARAH MUHAMMED.....3RD APPELLANT

AND

SYLVESTER OSOU (suing through next of kin)

BENEDICTO OLIWA NYONGESARESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No.163 of 2011 by HON.C. I Agutu- Resident Magistrate).

JUDGMENT

1. **St. James Model Academy, James Jeti and Farah Muhammed**, the appellants herein, were the defendants in the Busia Chief Magistrate's Court Civil Case Number 163 of 2011. They were sued for special and general damages following an accident that involved motor vehicle registration number KBG 117E and the minor. As a result of the accident the minor sustained injuries.

2. The second appellant was the driver of motor vehicle registration number KBG 117E while the third appellant was the driver of registration number KBB 323M.

3. After the hearing of the case the learned trial magistrate awarded Kshs. 200,000/= general damages and Kshs.2,500/=special damages.

4. The appellants were aggrieved by the judgment which was delivered on 6th June 2016 and filed this appeal. The first appellant was represented by the firm of Bogonko, Otanga & Company advocates while the second and the third appellants were represented by Nishi Pandit & Company Advocates. When the two appeals were consolidated, the second and the third appellants opted to rely on the record of appeal filed by the first appellant. In the Memorandum of Appeal, the first appellant set out four grounds of appeals as follows: -

a) The learned trial magistrate erred in law and in fact in making a finding that the respondent had proved hi case on a balance of probabilities.

b) The learned trial magistrate erred in law and in fact in failing to find that the second and the third appellants were liable for the accident.

c) The learned trial magistrate erred in law and in fact by awarding damages that were inordinately high.

d) The learned trial magistrate erred in law and in fact in failing to give a reasonable judgment.

5. The respondent was represented by the firm of Gabriel Fwaya & company Advocates. He opposed the appeal and contended that the award was not high in view of the injuries sustained.

6. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

7. There are only two issues for determination in this appeal. One, is whether the first appellant was liable and if so, to what extent and two, whether the quantum of damages awarded was too high.

8. Sylvester Osou, the respondent testified as PW4 in the trial court. According to his evidence, the motor vehicle KBG 117E veered off the road as the driver was trying to avoid a child who was crossing the road. This is when he was hit off the road. The St. James Model School Bus was on the side of the road. This witness had testified to the same effect in Busia Chief Magistrate's Court Traffic case number 286 of 2010. The accused was James Malata Seti. The evidence of the respondent exonerated the driver of St. James Model School Bus.

9. The learned trial magistrate apparently relied on Traffic case judgment where the trial court made a finding that it was the owner of motor vehicle registration number KBB 323M who obstructed motor vehicle KBG 117E. The evidence on record did not support the finding by the trial magistrate in the Traffic case. All evidence pointed at the driver of motor vehicle KBG 117E as the offender. It was erroneous therefore for the trial court in Busia Chief Magistrate's Court Civil Case Number 163 of 2011 to rely on the judgment in the Traffic case without analyzing the same. Apportioning of liability to the first appellant had no basis.

10. According to the respondent, he sustained injuries on the head and the right leg. The doctor who examined him, Dr. Charles Andai (PW5), confirmed the same. He informed the court that he sustained blunt injuries on the head and on the back of the right foot. At the time he examined him, the only positive finding was minimal tenderness on the lower back. He classified the injuries as moderate. I therefore agree with the appellants that the award on general damages was excessive.

11. The Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] KAR 5** stated as follows;

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 of that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

In the instant case I am persuaded to interfere with the award of the learned trial magistrate for it is inordinately high.

12. In their submissions the appellants had proposed a quantum of Kshs.1000/= as adequate compensation. They cited the case of **Igel Chege Matu Mathai & Others vs. The HON. Attorney General**. An award of Kshs.2,000/= was given for pain and suffering on 3rd October 1989. This case was of no help to the court for it did not indicate the injuries sustained. The respondent relied on **Kakamega HCCA No.112 of 2011** and **Nyeri HCCA 37, 38 and 39 of 2009**. Had the trial magistrate paid closer attention to these authorities, she ought to have noted that the Nyeri cases were more persuasive on the quantum, for the injuries sustained therein were more severe than what the respondent suffered in this case. The Nyeri cases were a series arising from the same transaction and the average award was Kshs.80,000/= and as noted, the injuries were severe than what the respondent herein sustained. Doing the best, I can I am of the opinion that an award of Kshs.50,000/= will be adequate compensation. I therefore substitute the award of Kshs.200, 000/= general damages with that of Kshs.50,000/=.

13. The appeal in respect of the first appellant is allowed with costs in this court and in the lower court. The second and the third appellants are jointly and severally liable. Since their appeal has partly succeeded, they will be entitled to half the costs of appeal.

DELIVERED and SIGNED at BUSIA this 30th day of January, 2019

KIARIE WAWERU KIARIE

JUDGE