



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 187 OF 2014

P.N. MASHRU.....APPELLANT

VERSUS

PETER MONARI ONKOBA.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Nakuru Chief Magistrate's Civil Case No. 25 of 2012 by Hon. F. Kombo, S.P.M. on 14th day of April, 2014

J U D G M E N T

The Respondent herein filed civil suit no.25 of 2012 against the appellant, seeking general and special damages for the injuries he sustained on 23rd February 2011 while cycling along Nakuru –Nairobi road at Barnabas.

The trial magistrate found the appellants 100% liable for the injuries sustained by the respondent and entered judgment for the respondent against the Appellant for kshs 811,330.00 plus costs and interest.

Being aggrieved by the judgment of the lower court, the appellant filed this appeal on the following grounds:-

- i. That the trial magistrate erred in law and in fact in failing to find that the respondent did not prove his case to the standards required by law.
- ii. That the trial magistrate erred in law and in fact in finding the 1st defendant 100% liable contrary to the overwhelming evidence to the contrary and failing to consider the findings of the inquest.
- iii. That the trial magistrate erred in law and in fact in failing to consider the appellant's submissions.
- iv. That the trial magistrate erred in law and in fact in awarding Kshs.800,000 general damages and Kshs.11,300 special damages which amount was inordinately high in the circumstances.

SUBMISSIONS BY THE APPELLANT

Counsel for the appellant relied on submissions filed on 19th September 2017. On liability he submitted that the trial magistrate erred in finding the appellant 100% liable in the presence of overwhelming evidence to the contrary. He argued that Pw1, Pw2 and Pw3 contradicted each other.

Counsel submitted that witness called by plaintiff to corroborate his evidence gave different version on point of impact and that the respondent relied on people who told him that the driver of the vehicle was to blame. He added that Pw3 a police officer failed to avail Occurrence Book and sketch plan in court.

Counsel further submitted that the appellant availed a police officer who produced police Abstract and occurrence book as captured by the investigating officer. He submitted that the respondent's evidence was that he was moving towards Nairobi direction behind a pickup, which was also moving towards Nairobi direction and that the pickup stopped and at that point, he started overtaking the pickup.

Counsel submitted that the police blamed the respondent for occurrence of the accident. He urged court to find that the respondent was to blame 100%.

On quantum, he submitted that kshs 200,000 has been awarded for injuries similar to plaintiff's injury.

SUBMISSIONS BY RESPONDENT

Mr. Gekonga for the respondent submitted that the appellant has tried to create evidence in appeal, as the lengthy submissions were not adduced in the lower court hearing. He submitted that the appellant did not call any witness who was at the scene.

He submitted that this was an accident involving motor vehicle registration number KAQ 852T and motor cycle KMCF 161M along Nakuru-Nairobi road near stem hotel. That occurrence of the accident, the fact that the motor cycle was moving towards Nairobi direction, the vehicle from Nairobi and that the accident occurred at a junction is not disputed.

He further submitted that Pw2 corroborated the respondent's evidence to the effect that the lorry was making a U-turn into a feeder road. He submitted that it is not material that Pw2 did not record a statement and that he has not been summoned to make a statement with the police.

Counsel for the respondent submitted that the respondent made his case and that is why the trial magistrate made a finding of 100% liability and

further, Pw3 a police officer who was called by the respondent confirmed that the accident occurred.

He argued that it is the duty of court to blame and not the police officer. He urged court to uphold the decision on liability and quantum.

In response counsel for the respondent submitted DW1, confirm in his evidence stated that there were other vehicles in the highway but the pickup was not involved in the accident.

ANALYSIS AND DETERMINATION

This being first appeal, I am obligated to re-evaluate evidence adduced before the trial court and arrive at an independent determination. I am however minded of the fact that unlike the trial court, I have not had the opportunity of taking evidence first hand and observing the demeanour of witnesses.

In his evidence in the lower court, the respondent testified that he was cycling towards Nairobi direction when the lorry driver suddenly made a U-turn to the left. He tried to evade by moving to the right but his motor cycle was hit on its right side. Pw2 who was driving towards Nakuru direction testified that he saw a lorry, which turned to a feeder road in high speed and hit the motor cyclist at the junction. He said the lorry driver never indicated intention to turn.

Record show that the appellant never adduced evidence in the lower court.

Pw2 testified that he was few metres ahead when the accident occurred. He was at the feeder road where the lorry was turning to. His evidence corroborated the respondent's evidence. His evidence to the effect that the lorry driver indicated that he was about to do a U-turn and that he did not slow down, was not controverted by any other evidence. He said at the time police visited the scene he had already taken the victim to hospital. In the absence of evidence to the contrary, the fact that he never recorded statement with police should not be used to discredit his evidence.

In submissions counsel for the appellant explained how the accident occurred and presence of a pick-up but unfortunately that evidence is not on record. I cannot therefore consider evidence given in form of submissions. The role of this court is limited to evaluating evidence on record.

On implication of blame by police, the duty of the trial court was to take evidence adduced, evaluate and make a determination. Arriving at decision as to who is to blame is a matter of evidence. The standard of prove is not beyond reasonable doubt but on balance of probabilities. I however note that the respondent indicate that he was riding in a moderate speed and the lorry was moving in moderate speed. He further said he saw the lorry when he was 4.5 meters away. In re-examination, he said the lorry turned about 2.2 metres away. It is not clear whether it was 4.5 or 2.2 metres away but I believe the distance given was an estimation. If one was to assume distance was 4.5 metres, I do agree it is short distance but a person riding at moderate speed as said by the respondent could still have made some effort to control the motor cycle and reduce the extend of impact. My view is that the respondent had a role to play in reducing extend of impact. I am inclined to apportion liability of 10% to the respondent.

In respect of quantum, I note that the defence did not avail an independent medical report. The court relied on medical report by Doctor Wellington kiamba produced by the respondent in assessing damages.

It is also worth noting that counsel for the appellant never made submissions on quantum. The court noted that the respondent suffered 20% permanent disability and his left lower Muttered by about 3 centimetres.

The question is, is there a justification for this court to disturb the award of damages? Did the trial magistrate take into account erroneous factors in assessing damages?

In his testimony, the respondent said his leg is shorter, pains and he cannot work without support of a walking stick. Further, that he has difficulties carrying things thus affecting his usual work. This is confirmed by the doctor's report who in his opinion stated as follows:-

“...there is deformity on the left thigh and he has shortening of the left lower limb by 3cm. The function of the left lower

limb is still reduced despite having undergone physiotherapy for a long time. He cannot walk without support (using a walking stick).the pelvis is also tilted to the left.”

From the lower court judgment, the trial magistrate noted that the award in the authority cited was for serious injury and awarded a lower figure in this case. The appellant has failed to demonstrate justification for interference with the award.

From the foregoing, the appeal succeed on liability. Liability is apportioned at 10:90 in favour of Appellant. Appeal on quantum is dismissed. Kshs 811,330 less 10 %(81,133.00) comes up to kshs 730,197.

I enter judgment for plaintiff against the defendant for kshs 730,197.00.

The respondent to have costs of the lower court. Each party to bear own costs of the appeal.

Judgment Dated, signed and delivered at Nakuru this 27th day of February 2019.

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RACHEL NGETICH

JUDGE

In the Presence of:-

Schola Wangui - Court Assistant

E. M. Juma & Ombui - Counsels for Appellants

Gekonga Adv. Counsel for Respondent