



REPUBLIC OF KENYA

IN THE HIGH AT KIAMBU

CIVIL APPEAL NO. 193 OF 2016

JOHN KINYANJUI WAWERU.....1ST APPELLANT

HENRY WAWERU MBURU.....2ND APPELLANT

VERSUS

JONATHAN KAMAU KIONGO.....RESPONDENT

(This appeal arises from the judgment of Hon. B Khaemba (Principal Magistrate delivered at Kiambu on 11th November 2016 in CMCC No. 343 of 2015)

JUDGMENT

1. On the 28th September 2013 two vehicles collided along the Kiambu-Nairobi road. Motor Vehicle Reg. No. KBU 665D was owned by the 2nd Appellant and driven by the 1st Appellant at the material time. It was said to belong to the 2nd Appellant. Motor vehicle Reg. No. KAN 930L was being driven by the respondent/plaintiff in the primary suit.

2. In their statement of Amended Defence dated 4th July 2016 while admitting the occurrence of the accident, the 1st Appellant denied having been the driver of the said vehicle Reg. No. KBU 665D at the material time.

In the alternative, the appellants pleaded contributory negligence on the part of the driver of motor vehicle Reg. No. KAN 930L.

3. Judgment was delivered on the 11th November 2016. The 1st appellant was held wholly liable for the accident, and the 2nd appellant vicariously liable in negligence and damages as follows:

- General damages for

Pain and suffering - Kshs.1,800,000/=

- Future medical costs - Kshs. 300,000/=

- Material damage - Kshs. 240,000/=

Special damages with

Costs to the Respondent - Kshs. 56,206/=

4. The Appellants challenge the trial court's judgment on three main grounds, being

- Ownership of M/V Reg. No. KAN 930L at the material time of accident.

- None apportionment of liability between owners/drivers of the two vehicles.

- Quantum of damages as being excessive in all the subheads including material damage/loss of vehicle KAN 930L.

This court has been urged to dismiss the primary suit and set aside all awards of damages granted by the trial court.

Both parties filed written submissions.

5. The principles upon which an appellate court ought to set aside a trial court's judgment are stated in numerous decisions.

In **Mwanasokoni -vs- Kenya Bus Services Ltd and Others (1982-88) I KAR 278** and **Selle -vs- Associated Motor Boat Co. Ltd & Another EA 123** the thread running across is that appellate courts will not normally interfere with trial court's findings of fact unless they are based on no evidence or on misapprehension of the evidence or it is demonstrably to have been acted on wrong principles of law in reaching the findings.

6. Likewise, in **Bashir Ahmed Butt -vs- Uwais Ahmed Khan (Butt -vs- Khan) (1982-88) I KAR 5**, an appellate court will not disturb an award of damages unless it is shown to be inordinately high or low as to represent an entirely erroneous estimate of the damage.

7. The duty of an appellate court is to re-evaluate and re-consider the whole evidence and come up with own findings, but also being aware that it neither saw or heard the parties adduce the evidence – **Selle Case (Supra)**.

I have carefully considered each parties evidence, pleadings and the trial court's judgment as well as submissions by their advocates.

8. Issues for Determination

1. *Ownership of m/v Reg. No KAN 930L as at 28th September 2013 and the driver on the material date.*

2. *Whether M/V Reg. No.KBU 665D and KAN 930L both contributed to the 28th September 2013 accident and if so, the extent of each.*

3. *Quantum of damages for personal injuries and material damage to M/V KAN 930L.*

9. ANALYSIS OF EVIDENCE AND FINDINGS

- Ownership of M/V KAN 930L

The logbook to the vehicle produced as PExt 2(a) by the Respondent (then plaintiff) bore names of Dorothy Mwajuma Salim as the registered owner. It was the Respondents evidence that he had bought the vehicle from one Ishminder Singh by a Sale Agreement between the two dated 2nd February 2010 during which time the said Ishminder Singh gave him his PIN Certificate of the original owner Dorothy Mwajuma, transfer form and the sale agreement – PExt 2, 5, 6.

He further produced a copy of the certificate of Insurance PExt 3, and also testified that he did not transfer the vehicle to his name.

10. **Section 8 Traffic Act Laws Cap 403 of Kenya** states that:

The person in whose name a vehicle is registered shall, unless the contrary is proved, to be deemed to be the owner of the vehicle.

Section 9(2) mandates the owner of a vehicle upon transfer to inform the Registrar of the Sale and Transfer within 7 days while **Section 9(1)** forbids use of a vehicle on a road for more than 14 days if change of ownership is not affected.

11. The Respondent admitted his failure to change ownership from the seller despite all documents having been given to him including the Sale Agreement. It shows that the vehicle was sold to the Respondent by Ishminder Singh on the 2nd February 2010. The Logbook shows the registered owner as Dorothy Mwajuma and explanation was tendered.

12. Is then a logbook the only proof of ownership of a vehicle?

- In the case **Samuel Mukunya Kamunge -vs- John Mwanga Kamuru C.A No. 34 of 2002**, the Court of Appeal held that

“...It is true that a certificate of search from the Registrar of motor vehicles would have shown who was the registered owner of the motor vehicle --- that however is not conclusive proof of actual ownership of the motor vehicle --- Section 8 of the Traffic Act provides that the contrary can be proved --- in recognition of the fact that often times vehicles change hands but the records are not amended.”

13. I agree with the trial magistrate that by production of other documents the Respondent proved his claim of ownership.

The Certificate of Insurance PExt 4 – stated that the Respondent was the owner and insured.

Just as observed by the trial court, it is unusual for someone to insure a vehicle in his name if it does not belong to him or at least not having beneficial interest in the vehicle.

14. This position has been re-iterated in numerous decisions, **Superfoam Ltd -vs- Gladys Nchororo Mbero (2014) e KLR Mary Njeri Murigi -vs- Peter Macharia & Another (2016) e KLR Cannan Agricultural Contractors Kenya Ltd -vs- Rosemary Nanjala Oyula &**

2 Others (2013) e KLR.

The thread running across all the decisions is that a logbook is *prima facie* proof of motor vehicle ownership but is not the only way to prove. I am satisfied that the Respondent did prove his claim of ownership. I find no fault in the trial court's findings in that respect.

15. Driver of motor vehicle Reg. No. KAN 930L on material date

Evidence on record is plain and clear that the Respondent was the driver of the vehicle, that he was charged for an offence of careless driving and convicted upon his plea of guilt in Kiambu Traffic Case No.957/2013 and fined Kshs.20,000/= See police abstract.

The trial magistrate's finding that the Respondent was the driver was based on the evidence on record. I have no reason to interfere with the finding.

16. Who was to blame for the accident?

Each of the two drivers gave evidence to implicate the other. **PW1** testimony was that he saw the oncoming vehicle flashing lights towards him, then it came towards his direction and knocked his vehicle, and that the driver was charged and convicted for careless driving. He produced the charge-sheet and proceeding – PExt. 10 12 (a) and (b), and blamed the appellants for consequential damages.

17. The Appellants did not testify, having produced the Traffic Court proceedings and ruling where the Respondent was convicted on his own plea of guilt.

Their submissions before the trial court were that conviction in a traffic case is not final and conclusive evidence of negligence and cited the case **Robinson -vs- Oluoch (1975) EA 376 and cited in Joseph Kahinda Maina -vs- Elius Kamau Mwaura (2014) e KLR** where the court held that:

“It was proper for a person who has been convicted of offence involving negligence in relation to a particular accident plead in subsequent accident that the plaintiff or any other person was also guilty of negligence which caused or contributed to the accident.”

18. It is however noted that the appellants never controverted the Respondents evidence by adducing their own evidence on how the accident occurred in line with the above holding.

The Respondents evidence having been uncontroverted, the trial court citing **Section 47A Traffic Act** found the 1st Appellant wholly liable.

19. I fully agree with the appellants submission that a conviction under the Traffic Act does not wholly absorb a party from civil negligence – **Kajiado HCCA No. 42 of 2015 Mbugua David & Another -vs- Joyce Gathoni Waithera & Another (2016) e KLR.**

The Respondent's evidence is clear that he did not take any evasive action to avoid the accident after seeing the appellants vehicle coming towards his, he simply waited to be hit. He did not swerve, slow down or do anything consistent with an act to avoid or minimize the impact.

20. To that extent the trial court failed to apply the law and principles correctly thus arrived at an erroneous finding.

I am persuaded to set aside the finding of 100% liability against the 1st Appellant and find that the Respondent too contributed to the accident to the extent of 30%, guided by the following case

Baker -vs- Market Mark Industrial Cooperative Society Ltd (1953) IWLRL 1497 where Lord Denning observed that

“Everyday proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame and sometimes both.”

21. The above findings can only be reached upon credible evidence. Upon the evidence on record it is evident that the Respondent contributed to the accident, and the consequential loss and damages at the ratio 30% while the Appellant shoulders 70%.

22.. Quantum of damages

(1) Damages for pain and suffering.

The Respondent sustained serious injuries as stated in the Medical Report as well as in the plaint being

- Fracture to the right femur, midshaft
- Fracture to the midshaft left femur
- Compound fracture left tibia and fibula

- Fracture on the femur
- Torn right patellar ligament on its superior pole.

Complaints at date of examination were stated as

- Inability to walk
- Inability to extend knee voluntarily
- Shortened left leg(4 cm)
- Metal implants *in situ*

23. The doctor recommended removal of the implants at Kenyatta National Hospital (KNH) at a cost of Kshs.120,000/= and a total hip replacement at a cost of Kshs.180,000/= at KNH. He assessed degree of permanent incapacitation at 18%.

The trial court awarded the respondent Kshs.1,800,000/= damages for pain and suffering as well as future medical expenses at Kshs.300,000/=.

I note that the Respondent had proposed Kshs. 1,000,000/= while the appellants proposed Kshs.150,000-600,000/=.

24. I have considered the cited authorities and the submissions - **Kemfro Africa Ltd –vs- Lubia & Another (No.2) (1987) e KLR 30.**

While assessing damages, the court ought to be minded that such damages ought not be a misery or extravagant but realistic, satisfactory and comparable to similar awards – **Mohamed Juma –vs- Kenya Glass Works Ltd C.A No. 1 of 1986, Butt- vs- Khan (Supra).**

25. In **Rwaken Investments Ltd -vs- Isaac Kiprop Chelunyei HCCA No.600 of 2012 (2016) e KLR** the injuries are comparable, and an award of Kshs.1.8 Million granted in 2016.

In **HCA No. 54 of 2013 Embu P.W. –vs- Peter Muriithi Ngari (2017) e KLR** an award of Kshs.1.6Million was substituted for Kshs.600,000/= awarded by the trial court for multiple fractures.

In **Polyline W. Kirura alias Roselyine Muthui Katee -vs- Ocharo Kibira & 3 Others Nakuru HCCC No. 237/2002**, an award of **Kshs.1,500,000/=** was granted in 2009.

I find the trial magistrates award to be within the acceptable limits and comparable to similar awards. I do not find the award of Kshs.1.8 Million to be excessive. It is within acceptable limits. It is upheld.

26. Damages for Future Medical Expenses

I have stated above that Dr. Wambugu recommended removal of implants and replacement of hip at a total cost of Kshs.300,000/= at a public hospital.

A claim under this sub-head is a special claim subject to pleading and proof – **Kenya Bus Services Ltd –vs- Gituma 2004.**

As a future medical expense the court held that it must be pleaded and evidence led and if satisfactory it ought to be granted. Such evidence was led by Dr. Wambugu who demonstrated the need of the future treatment, and proceeded to give estimated costs in a public hospital.

That need in my view cannot be ignored in view of the serious injuries. I find the award warranted and merited.

I proceed to uphold the same as reasonable and fair.

27. **Special Damages** were pleaded at Kshs.386,139/= including material loss in respect of the Respondent's motor vehicle.

Medical expenses are pleaded at Kshs.136,139/= and fees for medical report at Kshs.5,000/= total being Kshs.141,139/=.

I am satisfied that the award of special damages at Kshs.56,206/= was strictly proved. I uphold the same. This includes Kshs.5,000/= for motor vehicle assessment charges.

28. Material Damage Claim

This loss arose from the direct damage of the Respondents vehicle in the accident. It is a special damage and ought to be strictly proved. A sum of Kshs.240,000/= was awarded by the trial court.

The only issue raised by the Appellants is that the damage ought not to have been awarded for the only reason that the Respondent in its opinion had not proved ownership.

Now that I have rendered that the Respondent has proved ownership to himself then that issue becomes a non-issue.

The said amount of KShs.240,000/= represents

- Pre accident value - KShs.280,000/=
- Less salvage value - KShs. 40,000/=

KShs.240,000/=

29. In its totality, I find that the trial court was well guided in law and facts and arrived at fair and reasonable awards save for the matter of liability where I found the Respondent to have contributed to the accident to the extent of 30%.

30. The appeal therefore succeeds partially in respect of liability.

Consequently the final findings are as hereunder.

- (1) Liability - 70% against the Appellants
- 30% against the Respondent.

(2) General Damages for

Pain and suffering - KShs.1,800,000/=

(3) Future medical expenses - KShs. 300,000/=

(4) Special damages - KShs. 141,139/=

(5) Material damage to

Motor vehicle - KShs. 240,000/=

KShs.2,481,139/=

Less 30% - KShs. 744,341/=

70% **KShs.1,736,797/=**

31. As the appeal succeeds partially, each party shall bear its own costs.

Dated and signed at Nakuru this 27th day of March 2019.

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J.N. MULWA

JUDGE

Dated, signed and delivered at Kiambu this 10th Day of April 2019.

C. MEOLI

JUDGE