



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 22 OF 2018

REAL TILAK ENTERPRISES LTD.....APPELLANT

-VERSUS-

PAUL MUIA KILONZO.....RESPONDENT

(Being an Appeal from the Judgment of Hon. C.A Mayamba (SRM) in the Senior Resident Magistrate's Court at Kilungu Civil Case No. 103 of 2015, delivered on 16th February 2018)

JUDGEMENT

Introduction

1. The respondent filed a suit in the lower Court seeking general damages, special damages, costs of the suit and interest on account of injuries sustained from a road accident on 11/01/2014(*material day*) along the Kingwani-Salama road.
2. The appellant filed his statement of defence and after the preliminaries; the suit was slated for hearing. Judgment was eventually delivered and the appellant was found to be 100% liable. The respondent was awarded kshs 2,500,000/= as general damages, kshs 116,613/= as special damages, costs of the suit and interest.
3. Aggrieved by the said judgment, the appellant filed this appeal and raised 4 grounds stating that the learned trial magistrate erred in law and fact by;
 - a) *Finding the appellant 100% liable when the respondent had failed to discharge the burden of proof placed upon him as a matter of law.*
 - b) *Finding the appellant 100% liable when as per the record, the respondent's averments in his pleadings contradicted his testimony in Court.*
 - c) *Awarding a sum of kshs 2,500,000/= as general damages which amount was inordinately high taking into account the injuries sustained by the respondent and relevant case law.*
 - d) *Arriving at an award of general damages that was not founded on any outlined legal principle.*
4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties filed their respective submissions.
5. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. In this case, there is no missed benefit as there were no witnesses.
6. Having looked at the record of appeal, the grounds of appeal and the rival submissions, the following issues arise for determination.
 - a) Who was liable for the accident and to what extent?
 - b) Should the quantum of damages awarded be disturbed?.
7. I will proceed to deal with the issues under the distinct heads.

Liability

8. The respondent (**PW1**) testified that he used to work for the appellant and that on the material day; he had accompanied a fellow driver to Kavese river to collect sand. The vehicle was loaded and was being driven out of the river when the driver accelerated and ran over him. He sustained multiple fractures.

9. **PW2** was Inspector Joseph Nyasili from Salama police station. He testified that on 12/01/2014, a driver by the name Alphonse Mutuku reported that his vehicle reg, No KBX 080X, Isuzu Lorry had knocked a pedestrian while leaving Kaseve river. They later called the respondent to collect a P3 form and an abstract was filled. He produced it as exhibit 3. The degree of injury was maim.

10. The appellant did not give it's side of the story on how the accident occurred. He however submits that the respondent failed to prove his claim to the required standard and the absence of a rebuttal did not in any way lessen the burden he had. He relies inter alia on the case of **Kenya Power & Lighting Co. Ltd-vs- Nathan Karanja Gahoka & Anor (2016) eKLR** where the Court stated that;

“Uncontroverted evidence must bring out the fault and negligence of a defendant and that a Court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove it's case upon a balance of probability whether the evidence is challenged or not.”

11. The appellant submits that it was erroneous for the trial magistrate to hold the view that, in the absence of a rebuttal, judgment was to automatically be entered for the respondent.

12. The appellant also submits that the trial magistrate erroneously concluded that it had all along denied the respondent's presence at the accident scene yet it's contention was with regard to the circumstances alleged, particularly that it had been negligent as claimed.

13. It also submits that the respondent's testimony remained uncorroborated for failing to call the other people he had alleged to have been at the accident scene to verify his allegations. It contends that P.C Mbeko the investigating officer or any other independent witness would have been able to shed light as to the circumstances that led to the accident. It relies on **John Kanyungu Njogu –vs- Daniel Kimani Maingi (2000)** where the Court of Appeal stated as follows;

“The plaintiff's evidence does not shed any light on this disputed fact and the defendant preferred not to offer any evidence. If the defendant had the burden of proof, I would have unhesitatingly presumed some adverse fact against him. But he did not bear the burden of proof. It was on the plaintiff and she had to prove her case on a balance of probabilities...it is entirely probable that the accident was caused by the negligence of the defendant. And it is also equally probable that it was caused partly by the negligence of the deceased. Without the advantage of divine omniscience, I cannot know which of the probabilities herein coincides with the truth. And I cannot decide the matter by adopting one or the other probability without supporting evidence. I can only decide the case on a balance of probability if there is evidence...there is no such evidence. In the premises, I must, not without a little anguish, dismiss the plaintiff's suit on the ground that fault has not been established against the defendant.”

14. Further, the appellant contends that the respondent did not mention any of the pleaded particulars of negligence leave alone prove them. That what came out at trial was never pleaded and as such, it would be impossible to hold the appellant liable.

15. On his part, the respondent submits that the general principle extracted from **Edward Mariga –vs- Nathaniel David Schulter & Anor (1997) eKLR** is to the effect that;

“Where a defendant does not adduce any evidence, the plaintiff's evidence is to be believed as allegations by the defence is not evidence.”

16. He also relies on **Embu Public Road Services Ltd –vs- Riimi (1968) EA 22** where the Court of Appeal stated that;

“Where the circumstances of the accident give rise to the inference of negligence, then the defendant, in order to escape liability has to show that there was probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with the absence of negligence.”

17. The respondent's position is that his evidence was uncontroverted and the trial magistrate did not err by observing as much and giving judgment in his favour.

18. The occurrence of the accident between the respondent and appellant's motor vehicle is not disputed. The appellant agrees that indeed, the respondent's evidence was not rebutted. So, does the respondent's evidence establish negligence on the part of the appellant?

19. The respondent said that the driver accelerated and knocked him. On cross examination, he said that he ran away but the vehicle followed him. So, why did the driver allow the vehicle to follow him instead of breaking? Were the breaks functional? If at all the vehicle was in good condition as indicated by PW2, it was imperative that an explanation be given as to why it could not break because road worthy vehicles do not go running down people.

20. The circumstances of the accident gave rise to an inference of negligence and the absence of an explanation from the appellant meant that the respondent had discharged his burden. I agree with the finding of the trial magistrate on liability.

Quantum

21. The Medical Report of Dr. Kimuyu produced as Exhibit 6 shows that the respondent sustained the following injuries;

- a) Blunt injury, right leg
- b) Fracture right tibia fibula
- c) Blunt injury right thigh
- d) Fracture right femur
- e) Cut wound left leg
- f) Blunt injury left foot
- g) Fracture of left 2nd, 3rd, 4th and 5th metatarsals
- h) Floating knee of right lower limb

22. The doctor testified as PW3 and stated that the respondent suffered serious bone and soft tissue injuries. He gave him 40% permanent incapacity. At the time of testifying (03/10/2017), implants were still in situ and would be removed at a cost of kshs 300,000/=. It was his evidence that recovery was impossible.

23. The appellant proposed an award of kshs 700,000/= and relied on **Razi Amin Kulate –vs- Clau Kruger & Anor HCCC 61 of 2003** where kshs 600,000/= was awarded to a party who sustained fracture of tibia/fibula, fracture of patella on right leg, potts fracture of left ankle, fracture of metatarsal bone and severe strain with rapture cruciate ligaments of the knee.

24. The authorities relied on by the respondent in the trial Court were not attached and the respondent did not give their summaries hence this Court did not benefit from them. In his submissions before this Court, he cited two authorities and the first one was with regard to a fatal claim hence not comparable. The other one was **P.N Mashru Ltd-vs- Omar Mwakoro Makenge (2018) eKLR** where an award of kshs 1,200,000/= was upheld.

25. The plaintiff in that case had suffered loss of consciousness at the time of the accident, fracture of the femur distal third, fracture of the temporal bone with hematoma, head injury to the right frontal bone with brain oedema and left sub-dural hematoma. He also suffered memory loss and 5% incapacity on the limbs.

26. There were other authorities cited in the P.N Mashru case (*supra*) e.g **Edward Mzamili Katana –vs- CMC Motors Ltd (2006) eKLR** where the plaintiff was awarded kshs 2,000,000/= for a head injury leading to concussion, cut wound and bruise on the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, chest injuries with multiple fractures of left 5th, 6th and 7th ribs and fracture of the left femur.

27. The principles that can make an appellate Court interfere with an award are well known and it is in that regard that I took the liberty to sample other cases.

28. In **Zachary Kariithi –v- Jashon Ochola, Kisumu High Court, Civil Appeal 153 of 2012 [2016] eKLR**, the plaintiff had compound fractures to the right tibia/fibula and, femur bone mid shaft. There were fractures to the right femur bone; 3rd, 4th, 5th ribs and multiple soft tissue injuries. An award of Kshs 1,500,000 was upheld for pain and suffering.

29. In **Nakuru HCCC No. 9 of 2008; Samuel Makumi Githambo -vs- South Firms Ltd. & others the injuries** were fracture distal end of the right femur, fracture distal end of the left femur, fracture inferior pubic remus of the right pelvis, fracture right scapular, multiple cut wounds on the face, closed fracture medial malleolus of the leg, dislocation of the right shoulder, loss of one upper incisor tooth, loss of lower incisor and a 40% degree of disability. An award of kshs 1,500,000/= was made.

30. I appreciate that no two cases can be similar and the decided ones merely act as a guide. It is noteworthy that in the present case, the respondent has no chances of recovery. I find proper guidance in the **Samuel Makumi Githambo case (supra)** but note that it was decided about 10 years ago. It is therefore my considered view that the award of kshs 2,500,000/= was not inordinately high in the circumstances of this case.

Conclusion

The court thus arrives at a conclusion that, the appeal has no merit and makes the following orders;

- i. -The appeal is dismissed.
- ii. -costs to the respondent.

SIGNED, DATED AND DELIVERED THIS 31ST DAY OF MAY, 2019 IN OPEN COURT.

.....

HON. C. KARIUKI

JUDGE