



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.155 OF 2016

BENSON KIMIRI CHEGE.....APPELLANT

-VERSUS-

DANIEL MUNJUGA.....1ST RESPONDENT

JOHN WATORO.....2ND RESPONDENT

(Being an Appeal from the Judgment/Decree of Hon. F. Munyi, Senior Magistrate delivered on 1st November, 2016 in Nakuru CMCC. No.913 of 2010)

JUDGMENT

INTRODUCTION

1. The Appellant who was plaintiff in the lower court filed suit against the respondents/defendant claiming general and special damages for the injuries he sustained while travelling as a pillion passenger in motor cycle registration number KMCE 176N owned by 2nd defendant and driven by 3rd defendant which collided with 1st defendant's motor vehicle registration number KAR 812D on 16th January 2010.
2. The trial magistrate dismissed the suit on the basis that the appellant adduced contradictory evidence. Being aggrieved by the decision of the trial court, the appellant filed this appeal on the following grounds:-
 - i. That the learned trial magistrate erred in law and fact in considering the evidence before her hence arrived at a wrong conclusion that the appellant is not entitled to damages.
 - ii. That the trial magistrate erred in law and fact in not considering evidence adduced fully and the finding of court in previous proceedings particularly CMCC.331 of 2010 on liability and hence arrived at a wrong decision.
 - iii. That the learned trial magistrate erred in law and fact in not assessing damages that would have been awarded had the appellant succeeded.

APPELLANT'S SUBMISSIONS

3. The appellant's advocate submitted that the appellant in his testimony denied knowledge of any case in which he has been sued as a pillion passenger. He submitted that the motor vehicle driver admitted that the accident occurred in the middle of the road and that police who visited the scene blamed him and motor cycle rider. That he stated that one **Ayano** was riding the motor cycle and that he had known the rider before the accident.
4. Appellant submitted that the trial magistrate relied on evidence adduced in file number Nakuru CMCC No. 331 of 2010. That it was wrong for the trial magistrate to conclude that the appellant was aware of that case yet he never entered appearance or participated in the hearing. He added that the respondent who relied on evidence in file number CMCC No.331 of 2010 stated in his evidence in that file that the pick-up and the bike collided in the middle of the road and further stated that the passenger on the motor bike had helmet and they were not able to determine who was riding the bike.
5. Appellant submitted that in this file the respondent changed his testimony and said the appellant was riding the motor cycle.
6. Counsel for the appellant further submitted that the police abstract produced by the appellant indicated that he was a pillion passenger and it was erroneous for the trial magistrate to rely on medical report, which indicated he was taxi operator yet the medical report clearly indicate that he was a passenger on 16th January 2010; that he did not enter appearance in CMCC No.331 of 2010 hence there was no contradiction in

his evidence.

7. Counsel further submitted that even if one were to assume that he was a rider as indicated in CMCC No.331 of 2010 the blame, which was applied at 50:50 in that case, should have been applied in this case; the worst would have been to hold the appellant 50% liable and defendant 50% liable. However, the appellant having testified that he was a passenger the respondent should be held 100% liable.

8. On damages the appellant submitted that the trial magistrate should have assessed damages which would have been awarded if the appellant was successful. Counsel proposed a sum of kshs.1,500,000 for pain and loss of amenities.

RESPONDENT'S SUBMISSIONS

9. The respondent submitted that the appellant was found to be the rider in CMCC No.331 of 2010 and held 50% liable for the accident; that the judgment in that file has not been overturned as no appeal has been filed.

10. Further that in CMCC No 331 of 2010 judgment was entered after court being satisfied that summons were properly served on the appellant; that proceedings were brought to the attention of the appellant on 23rd July 2013 when the respondent filed and served amended defence upon the appellant and despite being served, he has not filed appeal or review of the judgment; and in the absence of appeal or review of the said judgment the trial magistrate in this court was bound by the judgment unless there were compelling reasons to deviate .

11. On assessment of damages, respondent submitted that there is no basis claim of kshs.500,000 for hip replacement as on looking at the medical report ,there is no indication that the appellant would require hip replacement; and that in cross examination he said he does not need hip replacement.

ANALYSIS AND DETERMINATION

12. The Appellant herein sued and testified herein as a pillion passenger. Record show that one **James Ndungu** filed another suit CMCC No.331 of 2010 in respect of the same accident. From the trial magistrate's judgment, the said James Ndungu also sued as a pillion passenger and the appellant herein was named as a rider of the motor cycle herein.

13. The trial magistrate herein noted that the medical report indicated that the appellant herein was a motor cycle taxi operator while the police abstract indicate he was a pillion passenger and on that basis and proceedings in CMCC No.331 of 2010, the trial magistrate dismissed the suit.

14. This being the first appellate court, I am obligated to reevaluate evidence adduced before the trial court and arrive at an independent determination. This I do while minded of the fact that unlike the trial court I never got opportunity to take evidence first hand and observe demeanor of witnesses. I will therefore give due allowance.

15. From evidence adduced, there is no dispute that on 16th January 2016 an accident occurred involving the motor cycle registration number KMCE 176N and motor vehicle registration number KAR812D along Nakuru/Dondori road.

16. On perusal of court record, I note that the 1st respondent admitted that the road was in a bad condition and there were potholes. He also admitted that it is the vehicle, which hit the motor cycle and pushed it under the vehicle. He further confirmed that after the collision, the vehicle stopped at a distance of 8 to 10 meters.

17. I however note that contrary to the trial magistrates finding that the medical report indicated that the appellant was a pillion passenger, I note that the medical report indicate that the appellant was a motor cycle operator and go further to state that he was riding as a passenger. Police abstract indicate that James Ndungu was a rider and the appellant herein was a passenger. However much I may interpret it to mean the appellant was a passenger on looking at the discharge summary for Nakuru provincial Hospital, the history recorded indicate that the appellant was riding a motorcycle. This is initial report recorded immediately after the accident. I do agree with the trial magistrate that he was not truthful in stating whether he was a rider or pillion passenger.

18. Further, on perusal of the judgment in CMCC No.331 of 2010, I note that it is true the appellant never participated in the trial but even if the appellant was not served with court summons as alleged, the existence of that suit and findings were brought during the hearing of this matter. There is no indication as to what action the appellant took after learning of that suit. From respondent's evidence it was not clear who was the rider as both had helmets. However, upon learning of findings in the other file, it was upon the appellant to move the court either to set aside the judgment of appeal. The evidence in the lower court therefore remain untested to establish who was the rider.

19. Having found that the appellant never challenged judgment in CMCC No 331 of 2010 and also having noted that initial document indicate he was a rider of the motor cycle I find that the evidence point at him being a motor cycle rider and he should be treated as such.

20. I however find that the suit should not have been dismissed on the above finding. The respondent never denied occurrence of the accident and the appellant being involved in the accident.

21. On liability evidence adduced indicate that the accident occurred in the middle of the road. Both the rider and the driver had the responsibility of caring for other road users. Apportioning liability at 50:50 is appropriate

22. In respect to quantum, the trial magistrate should have assessed costs that he would have awarded if the suit were not dismissed. The trial court having failed to do so, I will proceed to assess costs based on evidence on record.

23. **Doctor Malik** in the medical report dated 25th April 2012 found the following injuries

a. Dislocation of the right hip joint with comminuted fracture of acetabulum and undisplaced fracture of left inferior public ramus; the fracture had been reduced into good position and there were early signs of healing

b. Cut on eye brow and serious fracture/dislocation of right hip

24. The doctor indicated that the dislocated hip returned to anatomical position and the fracture of acetabular cup had started healing; that the appellant walked with crutches but at the time of examination, he was walking normally. He concluded that the appellant was likely to develop post-traumatic osteo-arthritis of the right hip joint. He indicated that he suffered temporary incapacity for a period of 3 months and partial incapacity for two months; that there are no signs of permanent incapacity.

25. I have considered the above injuries, the period of temporary incapacity and compared with injuries suffered in cited case and find that an award of kshs.800,000 as sufficient to compensate the appellant for pain and loss of amenities. Less 50% net is kshs.400,000.

26. Appellant prayed for special damages of kshs 12,460. He availed receipts for kshs 8,266, kshs 500, Kshs 5000, kshs 3000 making a total of kshs 12,266. I therefore award special damages of kshs.12,266.

27. FINAL ORDERS

1. Judgment delivered on 22nd January 2018 is set aside
2. Liability is apportioned at 50:50 between appellant and respondent
3. Quantum assessed at kshs 400,000 + 12,266.
4. Judgment entered for Appellant/plaintiff against the defendant/Respondent for kshs 412,266.
5. Costs of the appeal and lower court to be paid by respondent to the appellant.
6. Interest on 4 above at court's rate from the date of this judgment.

Judgment dated, signed and delivered at Nakuru this 31st day of July 2019.

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Maiyo holding brief for Mboga Counsel for Appellant

Wairimu holding brief Mr. Shabana Counsel for Respondent