



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 96 OF 2015

SAMSON MULYUNGI KIMULI.....APPELLANT

Versus

KIBUCHI J. IREGL.....RESPONDENT

And

CIVIL APPEAL NO. 146 OF 2015

KIBUCHI J. IREGL.....APPELLANT

Versus

SAMSON MULYUNGI KIMULI.....RESPONDENT

(Both appeals arising from the judgment by Hon. Obulutsa, SPM, delivered on 6th March 2015 in NBI CMCC NO. 6561 OF 2013)

(CORAM: F. GIKONYO J.)

JUDGMENT

[1] This judgment relates to appeal number 96 of 2015 and 146 of 2015. The former appeal is only on apportionment of liability whilst the latter is on both liability and quantum. Directions were given that both appeals be heard together with Appeal number 96 of 2015 being the pilot file. Accordingly, and for good order, the Appellant and the Respondent in appeal number 96 of 2015 shall be referred to as such for purposes of the consolidated appeal and this judgment. However, arguments presented by each party shall be accordingly attributed and a decision in each appeal shall be made.

[2] The decision that aggrieved the Appellant and the Respondent was the judgment of HON. Obulutsa in which the court apportioned liability in the ratio of 60%:40% against the Respondent and the Appellant respectively for the accident which occurred on 30th July 2010. Subject to the apportionment of liability, the trial court made the following award:-

i. General damages Kshs. 2,500,000

ii. Cost of prosthesis...Kshs. 1,000,000

iii. Diminished earning capacity..Kshs. 1,000,000

Duty of court

[2] As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. What must be avoided however is mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern should be to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such is a style that insists on simplicity

in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed.

ANALYSIS OF EVIDENCE AND DETERMINATION

[3] The appellant's claim as per the Amended Plaint dated 11th September 2012 is for:

(a) General damages for:-

i. Pain, suffering and loss of amenities

ii. Diminished or lost earning capacity

iii. Cost of prosthesis

(b) Special damages of Kshs. 30,200

(c) Costs and interest

Of liability

[4] According to the Appellant, he was hit and injured in a road traffic accident involving motor vehicle registration number KBD 055W on 30th July 2010 along unnamed road within Kavwea (Kambwena) village. He claimed that motor vehicle registration number KBD 055W was so negligently driven, managed and or controlled as a result of which he was hit and injured thereby suffering loss and damage. The Respondent denied that any accident ever occurred on the stated date involving his vehicle. Parties took quite disparate positions on this accident. The question however is whether the Appellant discharged the legal burden and proved that the accident occurred involving him and motor vehicle registration number KBD 055W which was as a result of the negligence of the Respondent and or his driver or agent or servant. What does evidence portend?

[5] The evidence by the Appellant was that at about 9.00pm he was awakened from sleep by dog barks. He woke up and went out to check. As he was walking along the road, a lorry approached him at high speed, veered off the road and knocked him down. His neighbour came to his help. The police also found him at the scene.

[6] PW3, CPL Stephen Kiuna of Matuu Police Station testified and produced the police abstract, OB extract and two statements recorded by two witnesses namely Paul Muluu Ndiku and Joseph Musyoki Thiwa. None of these persons was called to give testimony in court. PW3 stated during cross-examination that the Appellant was in company of one other person. I suspect he is referring to Paul Muluu Ndiku because in his statement he stated that he was an employee of the Appellant, he was with him when they went to look out for Appellant's cows which had strayed and when the Appellant was hit by a lorry. The former witness is said to be an eye witness. He has given the description of the lorry which caused the accident to be registration number KBD, Mushiriki. Notably, the identity of the vehicle which caused the accident has become a central issue in controversy. It bears repeating that the witness was not called to testify in court and his statement was not tested. There is a problem here as such statement may carry very little probative value if at all. It is expected that in such case, robust circumstantial evidence connecting the lorry to the accident should be laid before the court. Ordinarily, such evidence is established by the investigation carried out by the police. I note that there is a side entry in the OB indicated to be dated 2nd September 2010 or 2012 by a CPL Kamau showing that the registration number is KBD 055W and that the other details remain the same. The entry is made on the right side margin of an earlier report made of the accident on 30th July 2010. The entry was not explained whatsoever. The statement by Paul Ndiku was made on 30th July 2010 and from the evidence by the defence, the lorry herein continued to ply the route even after 30th July 2010. One wonders why it took the police over one month to establish the details of the lorry whereas they even had its trade name Mushiriki or mushirika or mashirika and part registration number KBD.

[7] The foregoing is not all. The Appellant stated that he saw the registration number of the lorry that hit him and that he provided the police with the registration number of the said lorry. Again, it is baffling why the police did not record the full registration number provided by the Appellant and pursue the search for the actual lorry bearing the number provided.

[8] I am also particularly perturbed by the fact that the Appellant did not state in his testimony court or in his written statement that he was in the company of his employee one Paul Ndiku at the material time when he went out to look for his goats which had strayed. He only said in court that a neighbour helped him. These omissions and or contradictions are too loud and substantial that they seriously affect the case by the Appellant. I am not without sympathy to the Appellant who sustained very serious injuries. But, the investigators and witnesses herein let him down. Cases are won on evidence and absence of such evidence that makes it more probable than not that the vehicle in question caused the accident, leaves the court with no choice; but, albeit with a lot of trepidation, to find that the Appellant did not prove his case on a balance of probabilities that the accident in issue was caused by the lorry registration number KBD 055W. The appeal by the Respondent therefore succeeds. On the same vein, I find that the appeal by the Appellant has no merit and is hereby dismissed. As a consequence, I set aside the judgment by the trial court; the claim in the primary suit fails and is dismissed. In light of the observations I have made herein above, I order each party to bear own costs of the appeal and the primary suit.

Dated and signed at Nairobi this 19th day of September 2019

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F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 28th day of October 2019

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L. NJUGUNA

JUDGE