



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.79 OF 2014

MOHAMED IQBAL.....1ST APPELLANT

STEPHEN KIPRUTO NGETICH.....2ND APPELLANT

VERSUS.

GOW(deceased suing through

legal representatives MW & MWW).....RESPONDENT

[An appeal from the judgment and decree of SRM's Court at Bungoma in CMCC No. 261/2011 delivered on 20th August 2014 by Hon S.O Mogute - PM]

JUDGMENT.

By way of plaint dated 12th April 2011, the Respondent in this appeal sued the appellant for orders for general damages and special damages arising from a road traffic accident that occurred on or about 11th October 2010 along Mumias-Matungu-Nasianda road involving motor vehicle registration number KBC 282G ZA 2638 New Holland owned by the 1st Defendant and 1st defendant's was its driver, servant and/or authorized agent who was acting in the course of his employment. The plaintiff averred that 1st defendant so negligently controlled the said motor vehicle that it lost control veered off the road and violently hit the deceased from behind and as a result the deceased suffered severe bodily injuries which resulted to his death.

The particulars of negligence on part of the 1st defendant his driver, servant and/or agents and/or 2nd defendant were set out in paragraph 3 of the plaint as follows;

- a) Being utterly reckless and careless in his manner of driving***
- b) Failing to take any adequate precautions***
- c) Failing to have proper maintain and control of the said motor vehicle***
- d) Failing to have any sufficient regard to other road users***
- e) Driving without care and attention and failing to have regard to other road users***
- f) Driving in a zig zag manner***
- g) Driving under influence of alcohol and failing to adhere to High Way Code of Traffic Act.***

The Defendant entered appearance and subsequently filed his statement of defence dated 11th July 2011 denying the Plaintiff's claim and setting out particulars of contributory negligence on part of the plaintiff under paragraph 6 of statement of defence. The particulars of contributing negligence on the part of 1st defendant was that;

- (i) Carelessly, negligently and/or recklessly walking in the path of Motor Vehicle registration No. KBC 282G ZA 2638 New Holland.***
- (ii) Playing in the middle of the road.***

(iii) *Walking on the wrong side of the road without due care and attention.*

(iv) *Failing to have due regard to his own safety.*

(v) *Hanging dangerously on the trailer attached to the tractor*

(vi) *Voluntarily assuming the risk injury.*

The matter to full hearing. Pw1, Gaudencia Wanjira testified that deceased was her son and he died on 11/10/2010 as a result of road traffic accident and that she was not at the scene of the accident.

Pw2, Joel Kweyu Wasase testified that on 11/10/2010 at 8am while he was heading to Malungu he saw tractor hitting a child and child died. He testified that the child was standing off the road on the left side waiting for a bicycle to take her home and he was heading home from school. He testified that Administrative Police Officers arrived at the scene then followed by police officers from Mumias Police station. He testified that he blamed the driver of the tractor who left the main road to avoid hitting pot holes and came out of the road and hit the child.

The defence called Dw1 Stephen Kipruto Ngetich who testified that he was the driver of 1st Defendant and he was driving the suit motor vehicle. He had gone to carry Sugarcane. He testified that an accident occurred at Matungu and Nasianda when he learnt that the left tyre of the trailer had jammed and when he stopped to go and check what was happening he found a child held in the left tyre.

He testified that he removed him and reported the accident at Namulongo AP's camp and thereafter reported the accident at Mumias Police Station. On cross examination he testified that there is a school nearby the scene and when he stopped, he learnt that a child had been injured. He stopped and the child fell down on the road and he was already dead.

After close of hearing the parties filed their respective written submissions. After consideration the trial magistrate entered judgement for the plaintiff against the Defendant for General Damages at Kshs.600,000/= and special damages of Kshs.60,400/=

The appellant being dissatisfied with the Judgment filed this appeal on the following grounds:

i. That the learned trial magistrate erred in law and fact in pronouncing judgement in favour of the respondent and liability was not proved on balance of probability

ii. That the learned trial magistrate erred in law and in fact by failing to take in account all material and relevant facts as to the causation of the accident and holding the appellant's 100% liable.

iii. That the trial magistrate erred in law and in fact by taking into account irrelevant factors and failing to take into account relevant factors.

iv. That the trial magistrate erred in law and in fact by failing to take proper and exhaustively evidence on record hence arriving at a wrong conclusion.

v. That the learned trial magistrate erred in law and fact in awarding general damages which were so inordinately high.

vi. That the learned trial magistrate erred in law and fact by pronouncing judgement in favour of the respondent in total disregard of the appellant's submissions.

By consent of the parties and court directions, this appeal was canvassed by way of written submissions. Mr.Kamau for the appellants submitted that on liability that there is no liability without fault relying on case law of ***Kiema Mutuku Vs. Kenya Cargo Hauling Services Limited Okong[1991]2 KAR 258.***

He submitted that PW1 in his testimony admitted that he did not witness the accident and what he was stating was hearsay therefore the court should not rely evidence Pw1.

He submitted DwI testified that he was driving when suddenly the trailer jammed and when he stopped to check he found deceased trapped, he submitted that the only logical explanation is that the deceased attempted to board the trailer while motion and he fell and got rolled up. He submitted that they urge this court to apportion liability if the respondent proved his case on balance of probability.

He submitted on quantum that the trial magistrate erred in law and fact in awarding Kshs.500,000/= for lost years which was unreasonable in the circumstance, he submitted that into consideration the time factor this court award a sum of Kshs.350,000/=.

He submitted on funeral expenses that no receipts were produced and the amount awarded for special damages was excessive in nature and no award should be given under this head.

The respondent herein submitted through Advocate on record Mr. Alwanga that the trial magistrate did not error in any way by holding the defendants 100% liable and the respondent herein proved the particulars of negligence as set out in the plaint against the appellant. He submitted that that Pw2 testified and proved that the driver of suit tractor drifted to the left side to avoid hitting pot holes hence causing the

accident. He submitted that the appellant did not have evidence as to the circumstances of the accident. He submitted that the trial court did not consider irrelevant facts and this court should not disturb that finding.

He submitted on quantum of damages awarded that indeed PW1 testified that the deceased was a pupil at Kadima ACK and was in class 8 and as a result of the said accident, the court awarded **Kshs.600,000/=** was sufficient and the same should not be disturbed.

He relied on case law authority in Machakos **HCCA No. 188 of 2009: COSMAS MUENDO MAWEU Vs HENRY MULI MUSILA & ANOTHER.**

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal are?

i. Whether the trial court finding of 100% liability to the appellant was proper.

ii. whether the quantum of damages awarded by trial court properly assessed.

On issue in order to determine liability it is imperative that we revised how the accident occurred on the fateful date. It was testimony of Pw2 who was key witness in the said accident that on 11/10/2010 at 8am while he was heading to Malungu when he saw tractor hitting a child and child died. He testified that the child was standing off the road on the left side waiting for a bicycle to take her home and he was heading home from school. He testified that Administrative Police arrived at the scene then followed by police officers from Mumias Police station. He testified that he blamed the driver of the tractor who left the main road to avoid hitting pot holes and came out of the road and hit the deceased.

Dw1 testified he informed the court that he did not know how the accident occurred and did not know how the child got injured, but admits that when he stopped the tractor he found deceased trapped in the wheel. It is clear from the evidence on record that particulars of negligence were set out in the plaint by the plaintiff and the respondent adduced evidence in support of his allegation and I find the same was proved on balance of probability by the Respondent.

The defendants on the other hand set out the particulars of contributory negligence but failed to prove the same for reasons that he could not explain to the trial court how the accident occurred. It is thereof my finding the trial court’s finding that the appellants were 100% liable was proper and I find no reason to interfere with the same.

On issue number two on quantum of damages awarded, it is trite law that a court of law sitting on Appeal can only interfere with an award for damages if the award is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages.

In order to justify reversing the trial Court on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so high or so low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in **Rook v Rairrie [1941] 1 ALL E.R. 297**. It was echoed with approval in **Butt v. Khan [1981] KLR 349** when it held as per Law, J.A that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

I have reviewed the entire record at trial and the judgment passed regarding assessment of damages. I find that from evidence on record by Pw1 is that the deceased was a standard 8 pupil at [Particulars Withheld] ACK Primary School and PW1 expected the deceased to be a teacher in future. I find that the damages of Kshs.600,000/= were sufficient to compensate the respondent for lost years in the circumstances.

On special damages the receipts of mortuary expenses, acquisition of limited grant and funeral expenses were produced to prove the special damages pleaded and find no reason to interfere with the same.

The complaint that the award was inordinately too high is not merited and I dismiss it. I find no reason to interfere with the award and therefore I uphold the award by the trial magistrate.

The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed.

No order as to costs.

It is so decided.

Dated and Delivered at BUNGOMA this 27th day of Nov, 2019.

S.N. RIECH

JUDGE