



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CIVIL APPEAL NO. 107 OF 2012

BETWEEN

CHEMELIL SUGAR COMPANY LIMITED.....1ST APPELLANT

SILAS OMONDI.....2ND APPELLANT

AND

SAMSON ODHIAMBO ONYAKA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C.O.

Owiye, SRM at the Senior Principal Magistrates Court

at Nyando in Civil Case No. 246 of 2000

dated 2nd August 2012)

JUDGMENT

1. The subordinate court found the appellants fully liable for causing a road traffic accident which took place on 11th June 2000 along the Chemelil – Nandi Hills Road. The respondent's case was that on the material day he was a passenger on the 1st appellant's tractor registration number KAE 513F trailer ZB 4441 being driven by its employee, the 2nd appellant, when it collided another tractor. The respondent was injured and was awarded Kshs. 80,000/- and Kshs. 2,000/- as general and special damages respectively.

2. The thrust of this appeal, contained in the Memorandum of Appeal dated 30th August 2012, is that the respondent's claim was fraudulent. The appellants contended that the respondent was neither involved nor injured in the accident. They faulted the trial magistrate for failing to appreciate and evaluate the evidence and consequently came to the wrong conclusion. The appellants submitted that the trial magistrate disregarded all the documentation that proved that the respondent was not involved in the accident.

3. The respondent supported the decision of the trial magistrate. He argued that the fact that the accident took place and that people were injured was not disputed and that the appellants failed to discharge the burden to show that the respondent was not involved in the accident.

4. As this is a first appeal, this court is required to re-evaluate the evidence adduced before the trial magistrate before reaching its own independent determination whether or not to uphold the decision of the trial magistrate. The court should bear in mind that it neither saw nor heard the witnesses testify (see ***Peters v Sunday Post Ltd [1958] E.A 424***).

5. At the trial, the respondent (PW 1), Dr Omuyoma (PW 2), a clinical officer and Dominic Bosire (PW 3) testified on the respondent's side. The parties adopted the testimony of the 2nd appellant (DW 1), who was the driver and George Omondi Omieno (DW 2), who was the Security Supervisor. recorded in a related filed ***Nyando SPMCC No. 225 of 2000***.

6. From the testimony of the parties, it is not in dispute that the accident took place as alleged. PW 1 recalled that he was riding on the 1st appellant's tractor on the way to harvest cane when it collided with another tractor. He was injured on the neck, chest and had a nose bleed. He proceeded to Nyangoma Health Centre where he was treated and issued with a treatment chit. PW 3 testified that the treatment book produced by the respondent confirmed that he was treated by at the Health Centre on the material day and that he sustained soft tissue injuries. In cross-examination he told the court that he did not have the treatment register. PW 2 examined the respondent and confirmed that he had sustained soft tissue injuries.

7. The evidence of DW 1 was that on the material day, he was carrying 30 people on the tractor and after the accident only 3 people were injured. DW 2 arrived after the accident and confirmed that only 3 people were injured and went for treatment to the 1st appellant's health facility. He told the court that the others continued working.

8. The key issue in this case is whether the respondent was involved in the accident and whether he was injured as alleged. The resolution of this appeal depends largely on the issue of the burden and standard of proof. Under **section 107** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. **Sections 108** and **109** of the ***Act*** further provide that the evidential burden is cast upon any party with the burden of proving a particular fact which he desires the court to believe in its existence. It is also well established that the standard of proof in civil claims is on the balance of *probabilities*. This means that the Court will assess all the evidence advanced by each party and decide which case is more probable (see ***Palace Investments Ltd v Geoffrey Kariuki Mwenda and Another NRB CA Civil Appeal No. 127 of 2007 [2007]eKLR***).

9. Although the appellants lay much emphasis on fraud in the memorandum of appeal, the issue of fraud was not pleaded in their defence as required by the law. Their defence was that accident did not happen or if it did, the respondent was not injured. In the alternative, the appellants alleged that if the accident did take place then the plaintiff was guilty of contributory negligence.

10. I have considered the testimony of the witnesses, I am satisfied that plaintiff proved that he was involved in the accident and that he was injured. Apart from his testimony, he confirmed that he was treated at Nyangoma Health Centre after the accident. The appellants did not disprove the fact that he was not involved. They could have called for the Health Centre treatment register which was suggested in cross-examination. The fact that the respondent did not obtain a P3 form does not, of itself, undermine the respondent's case bearing in mind the totality of the evidence. DW 1 could not recall all the people in the tractor and DW 2 arrived at the scene after the accident. The documents to prove employment, which were within the 1st appellant's knowledge, were not produced by the appellants to support their case. The totality of the evidence is that the respondent proved his case on a balance of probabilities. I affirm the finding on liability.

11. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see ***Butt v Khan [1981] KLR 349***).

12. According to the treatment notes from the health centre, the only complaint by the respondent was that he had chest pains, swollen hand and stiffness of the neck. He did not suffer any disability. In my view, the injuries were very minor and the proposed sum of Kshs. 180,000/- proposed by the respondent was way out of proportion to the injuries sustained. Before the subordinate court the appellants submitted that a sum of between Kshs. 20,000/- to Kshs. 80,000/- was sufficient to compensate the respondent. They cited *Loise Nyambeki Oyugi v Omar Haji Hassan NRB HCCC No. 4150 of 1991 (UR)* where the plaintiff was awarded Kshs. 20,000/- in 2001 where she suffered a minor injury on one elbow. In *Amalgamated Saw Mills Ltd v Daniel Waire Gikaruri NKU HCCA No. 249 of 2004 [2006]eKLR* where the plaintiff sustained soft tissue injuries without any disability, the initial award of Kshs. 100,000/- was reduced to Kshs. 50,000/- in 2006.

13. Taking into account that the injuries sustained were very minor and the fact that the decisions cited, I think the award of Kshs. 80,000/- was inordinately high. I reduce the same to Kshs. 40,000/-.

14. Consequently, the appeal is allowed only to the extent that the award of Kshs. 80,000/- as general damages is set aside and substituted with an award of Kshs. 40,000/-. Interest thereon shall run from the date of judgment in the subordinate court.

15. Since the appellants have succeeded in part, I award them costs which I assess at Kshs. 15,000/-.

DATED and DELIVERED at KISUMU this 29th day of January 2018.

D.S. MAJANJA

JUDGE

Ms Aron instructed by Okong'o Wandago and Company Advocates for the appellants.

Ms Kiberenge instructed by Gekonga and Company Advocates for the respondent.