



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 316 OF 2014

H O (SUING THROUGH GUARDIAN

AND NEXT OF FRIEND) O J O.....APPELLANT

- V E R S U S -

DANIEL NJUGUNA1ST RESPONDENT

MASH EAST AFRICA LTD2ND RESPONDENT

(Being an appeal from the judgement of dismissal for lack of evidence on eye witness and inconsistency of evidence of the Hon. SRM Ms. Murage on the 1st day of July 2014 in CMCC No. 2794 of 2013 at Nairobi)

JUDGEMENT

1) H O, the appellant herein suing through the guardian and next of friend O J O, filed a claim for damages as a result of injuries sustained in a road traffic accident on 28th April 2012, against Daniel Njuguna and Mash East Africa Ltd, the 1st and 2nd respondents respectively. It is alleged by the appellant via the plaint dated 16th May 2013 that on 28th November 2012, he was a pedestrian walking along Accra Road, when motor vehicle registration no. KBM 880B knocked him down causing him grievous bodily harm. The motor vehicle belonged to the 2nd respondent and was being driven by the 1st respondent.

2) The respondents via the defence dated 26th June, 2013 denied liability. The suit was heard and in the end Hon. Murage, Senior Resident Magistrate dismissed the suit on the ground that the appellant had failed to prove liability on the part of the respondents on a balance of probabilities.

3) Aggrieved by the judgment, the appellant preferred this appeal and raised the following 9 grounds:

1. THAT the learned magistrate erred in law and fact in finding that the appellant was not involved in the accident with the 1st defendant while he was walking along Accra Road while there was no evidence from the defence to contravene the plaintiff's testimony.

2. THAT the learned magistrate erred in law and fact by failing to analyze the entire evidence on record before arriving at an erroneous decision.

3. THAT the learned magistrate erred in law and fact by failing to recognize that the applicant had proven negligence on the part of the respondents.

4. THAT the learned magistrate erred in law and fact by dismissing the plaintiff's case on account of lack of eyewitness without adhering to the dictates and provisions of Evidence Act on corroboration.

5. THAT the learned magistrate erred in law and fact by relying on the hearsay evidence which was adduced by the respondents stating that the appellant was in the respondent's motor vehicle axle and drunk without calling the makers of the said documents to give evidence thus leading to a serious and gross miscarriage of justice.

6. THAT the learned magistrate erred in law by disregarding the pre-trial conference that was conducted earlier on documents produced before the hearing date.

7. THAT the learned magistrate erred in law and fact by considering the defendants documents on expert opinion without calling

the said expert for cross-examination in court.

8. THAT the learned magistrate erred in law and fact by only considering the defendant's evidence and written submissions in her ruling.

9. THAT the learned magistrate erred in law and fact by entirely dismissing the plaintiff's case without considering the plaintiff's oral evidence and evaluating the entire evidence tendered in court.

4) When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions.

5) The above mentioned grounds of appeal may be summarised into one main ground which is whether or not the learned Senior Resident Magistrate decision to dismiss the suit was properly founded.

6) H O, PW1 stated that he was hit by a motor vehicle along Accra Road when he was walking on the pavement. He did not see the motor vehicle that hit him. It is his aunt that investigated the whereabouts of the said motor vehicle. O J O (PW2) stated that he was informed of PW1's accident and went to visit him at Kenyatta National Hospital and found his leg amputated. The defence did not call any witness. On the issue of liability, the defence stated that there was no proof that the respondents caused the accident.

7) The appellant testified that he did not see the registration number of the motor vehicle that hit him, but was later informed by his aunt. His aunt did not testify and that evidence remains hearsay. The police who visited the scene of the accident were not called to testify.

8) Kenyatta National Hospital discharge summary stated that the plaintiff H O, aged 14 years male was admitted on 28th April, 2012 and discharged on 29th May 2012. It is also noted that the injury occurred while the minor was hiding in the axle of a vehicle headed for Mombasa, and he sustained crush injury to the right leg. The appellant was examined by doctor Wamunge. The P3 form stated that the plaintiff was involved in a road traffic accident on 28th April 2012 at 7.00am.

9) The medical report of Doctor Wokabi states that the plaintiff sustained severe crash injury on the right leg that resulted in the amputation at the level of the thigh. The plaintiff will require to be fitted with an artificial leg at a cost of ksh.120,000/= that will require changing every 5 years. The search from Registrar of motor vehicles on vehicle no. KBM 880B showed that it is owned by Mash East Africa Limited.

10) There is proof of injuries sustained by the appellant. The issue touching on liability cannot be established by the evidence on record as against the respondents. It is therefore difficult to establish who caused the injuries the appellant suffered.

11) I am inclined to agree with the trial magistrate finding that liability was not proven on a balance of probabilities on the part of the respondents.

12) In the end and on the basis of the above dispositions this appeal is ordered dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 16th day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent