



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 493 OF 2016

REUBEN GIKONYO.....1ST APPELLANT

ABDULLAHI MOHAMMED.....2ND APPELLANT

- V E R S U S -

ANTHONY MUTUA MUSYOKA.....RESPONDENT

(Being an appeal from the judgement of Senior Principle Magistrate Hon. L. P. Kassan given on the 24th June, 2016 in Milimani CMCC No. 707 of 2014 and delivered by Hon. Peter Muholi)

JUDGEMENT

1) Anthony Mutua Musyoka, the respondent herein filed a compensatory suit against Reuben Gikonyo and Abdullahi Mohammed, the 1st and 2nd appellants respectively for damages for the injuries the respondent sustained in a road traffic accident. It is alleged by the respondent vide the plaint dated 17th February, 2014 that on 11th December 2013 while walking along Haile Sailasie Avenue he was knocked down by motor vehicle registration no. KBM 307L, belonging to 2nd appellant and was being driven by the 1st appellant causing him severe bodily injuries. The appellants in their defence dated 18/3/14 denied the respondent's claim. The plaintiff case called 2 witnesses to testify in support of his case. The defence did not call any witness.

2) Hon. L. Kassan, the learned Senior Principal Magistrate heard the suit and in the end entered judgment in favour of the respondent and against the appellant in the following terms:

i. *Liability at 90%:10% in favour of the respondent*

ii. *General damages ksh.280,000/=*

Being dissatisfied, the appellant preferred this appeal

3) On appeal, the appellant put forward the following grounds in its memorandum of appeal:

1. THAT the learned magistrate erred in law and in fact and arrived at a decision against the weight of evidence before him.

2. THAT the learned magistrate erred in law and in fact by failing to consider the appellant's case especially its submissions both written and oral.

3. THAT the learned magistrate erred in law and in fact by finding and apportioning liability 90:10 in favour of the plaintiffs.

4. THAT the learned magistrate erred in law and in fact by misdirecting himself on the assessment of quantum on damages and awarding an inordinately high sum in light of the evidence before him.

5. THAT the learned magistrate erred in law by failing to have due regard and to take into account the various issues of fact raised by the appellant.

6. THAT the learned magistrate erred in law and in fact in by failing to appreciate the burden of proof lay squarely on the plaintiff.

7. THAT the learned magistrate erred in law and in fact by failing to consider and find the appellant's written submissions meritorious.

4) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

5) I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. Though the appellant put forward seven grounds of appeal, the same revolve around two broad issues namely; they challenge as against liability and quantum.

6) On the issue of liability, the appellants submitted that the respondent failed to prove who caused the accident as alleged. PW1 confirmed being the claimant having been hit along Haile Salasie road. PW2, the police officer who testified on the occurrence of the accident was neither the investigating officer nor was he the booking officer. The police abstract did not state who was to blame for the accident. Thus the apportionment of liability at 90%:10% is irregular as there was no sufficient evidence tendered to prove who caused the accident. That a mere fact that an accident occurred is no proof of liability on the appellants. The burden of proof is on the person who alleges, in this case the respondent who in turn failed to discharge this burden.

7) The respondent on the issue of liability submitted that the trial magistrate exercised his judicial discretion in apportioning liability at 90:10 as against the appellant on the basis of the evidence before him. Therefore this discretion should not be interfered with unless it is shown that it was exercised on the wrong principle. The respondent cited the case of **Makario Makonye Monyancha –vs- Hellen Nyangena, Kisii Civil Appeal No. 113** of 2011 where it was observed that where the defence does not call any evidence to controvert that of the plaintiff, the plaintiff's evidence before the trial court shall remain un rebutted.

8) PW1 Anthony Mutua, stated how the accident occurred. He was hit by the side mirror of the appellant's motor vehicle, while walking along Haile Salasie Avenue and awaiting to cross the road.

9) PW2, a police constable, Benjamin Ego, stated that he did not investigate the case and neither did he visit the scene. He did not know the point of accident and therefore cannot tell how the accident happened. That it was police constable Sisiwukwa that booked the report and police constable Mwandikwo that investigated the accident. He didn't have the police file and did not know where the file was.

10) From the statement of the plaintiff's case witnesses, PW2 who was meant to PW1's statement did not discharge that burden. It's clear that the respondent did not prove on a balance of probabilities who was to blame for the accident. I find merit in this ground of appeal and thus the trial magistrate's order on apportionment of liability has to be faulted. The evidence presented did not establish who was to blame for the accident.

11) On the issue of quantum, the appellants submit that the amount awarded by the trial court was

excessively high as compared to the nature of injuries sustained by the respondent. The appellant's cited the Court of Appeal case of **Rahima Tayab and another –vs- Anna Mary Kinaru (1982-88)** KAR where it was held inter alia that;

“..... awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable award.”

12) The appellant proposed an award of ksh.100,000/= to be in line and reasonable with the injuries sustained by the respondent.

13) The respondent on the issue of quantum submitted that the award was not high nor excessive in the circumstance and the trial magistrate exercised her discretion judiciously in arriving at the award on quantum and cited the case of **Mbogo –vs- Shah (1968) EALR 93** which reiterated that an appellate court should not interfere with the exercise of discretion unless it is satisfied that the judge misdirected himself and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretions and that as a result there has been injustice.

14) The respondent sustained the following injuries:

i. Deep cut wound to the left temple of the head

ii. Head concussion

iii. Deep cut to the left thumb

iv. Deep cut to the left big toe and loss of nail

v. Blunt chest injury

15) These were captured in the medical reports of both Dr. G. K. Mwaura and Dr. Ashwin Madhiwalla. In summary they were soft tissue injuries. The head injury did not injure the brain and there was no neurological defect, but just a concussion.

16) The respondent did not make any proposal. The appellants cited a 1993 case that awarded kshs.60,000/= for general damages for pain and suffering but proposed an amount of ksh.100,000/=.

17) The issue of liability not having been established then quantum if awarded bears no impact on the appeal. However if I was to award damages I would find ksh.200,000/= reasonable and in line with the respondent's injuries which is also in line with this courts awards on general damages for injuries similar in nature with those of the respondent. The awards in recent decisions ranged between Kshs.100,000 and ksh.250,000/=. The appeal on this ground is found to be with merit and consequently allowed.

18) In the end, the appeal is allowed, the lower court judgment is set aside and is substituted with an order dismissing the suit. The appellant is awarded costs of the appeal and the suit.

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