



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 2 OF 2017

KIBOS SUGAR & ALLIED INDUSTRIES LIMITED.....APPELLANT

VERSUS

ELLY ODHIAMBO RABURU.....RESPONDENT

(Being an Appeal from the Ruling of Hon C.N. Njalale R.M in Winam PMCC No. 26 of 2015 delivered on 30th October 2015)

JUDGMENT

1. **ELLY ODHIAMBO RABURU** (*hereinafter referred to as respondent*) sued **KIBOS SUGAR & ALLIED INDUSTRIES LIMITED** (*hereinafter referred to as appellant*) in the lower court claiming damages for injuries allegedly suffered on 23rd August, 2014 while the respondent was a lawful pedestrian along Kondele-Kibos Road when he was knocked down by appellant's motor vehicle KBL 594D-ZE3998 which was allegedly driven negligently by the appellant's driver.

2. Defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs.

3. By a judgment delivered on 22nd November, 2016, the learned trial magistrate found the appellant liable at 100% and awarded the respondent general damages in the sum of Kshs. 500,000/- and special damages of Kshs. 400/-.

The Appeal

4. The Appellants being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 11th January, 2017 which sets out 9 grounds which I have summarized into 6 grounds that:-

- 1) The Learned trial Magistrate grossly misdirected herself in treating the evidence and submissions on liability before her superficially and consequently coming to a wrong conclusion on the same**
- 2) The Learned trial Magistrate erred in failing to hold that the respondent had failed to prove negligence on the part of the appellant or to sufficiently consider the demand for contributory negligence based on the evidence adduced and he submission filed by the appellant**
- 3) The Learned trial Magistrate misdirected herself in ignoring the principles and the relevant authorities cited in the written submissions presented and filed by the appellant**
- 4) The Learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent and failed to apply precedents and tenets of law applicable**
- 5) The Learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent**
- 6) The Learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate *vis a vis* the respondent's claim**

SUBMISSIONS BY THE PARTIES

5. When the appeal came up for hearing on 23.11.17, the parties' advocates agreed to dispose it off by way of written submission which they dutifully filed.

Appellant's submissions

6. It was submitted for the appellant that the respondent merely stated that he was involved in an accident which was denied by respondent's driver but failed to prove the particulars of negligence attributed to the appellant. In support of the proposition that the respondent did not prove its case, the appellant cited **Kenital (K) Ltd v. Charles Mutua Mulu & Others [2006] eKLR** where the court held that failure to call witness evidence diminishes the Appellant's chance to prove a case for negligence against the Defendant. It was further submitted that in all adversarial systems like ours, a party undermines his case drastically by not calling or failing to call witnesses.

7. It was further submitted that the evidence on record did not disclose who was to blame the court ought to have apportioned liability equally as was held in the case of **Lakhamshi v Attorney General, (1971) E A 118, 120** where the court stated:-

“It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame.”

8. On quantum, the appellant submitted that the injuries sustained by the respondent were different from the injuries in **Kennedy Ago Lidweye V Steel Plus Limited [2012] eKLR** that the learned trial magistrate relied on. In support of the proposition that damages for injuries suffered, must be within limits of decided cases and also within limits of the Kenyan economy, appellant also relied on **Osman Bundit Mohammed Civil Appeal No. 30 of 1997** and **Kennedy Mutinda Nzoka v Basco Product (Kenya) Limited [2013] eKLR**.

Respondent's submissions

9. It was submitted for the respondent that he witnessed the accident in which he placed blame on the appellant and further that the liability was properly apportioned and award on quantum merited considering the injuries suffered.

The evidence

10. The plaintiff in his testimony stated that on 28.3.8.04, appellant's motor vehicle KBL 594D ZE 3998 was overtaking a TukTuk on the left side instead of on the right side when it knocked him down from where he was walking off the road.

Patrick Omollo Ongoch, stated that he was driving appellant's motor vehicle KBL 594D ZE 3998 28.3.8.14 but denied that he was involved in any accident.

Analysis and Determination

11. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. (See **David Kahuruka Gitau & another v Nancy Ann Wathithi Gitau & another [2016] eKLR**)

12. I have perused the entire record of appeal and considered the submissions by counsels for both parties. I note that the appeal revolves around the issue of liability and the question of quantum. The appellant holds the view that the apportionment was erroneous and the award to the respondent inordinately high. The respondent on the other hand holds the view that the decision of the trial court both on liability and quantum are warranted.

13. In **Makube v Nyamuro (1983) KLR 403**, the Court of Appeal reiterated that

“a Court on Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion”.

14. The police abstract confirms that an accident involving the respondent and appellant's motor vehicle did occur on 23.8.14. From the evidence on record however, the scene of the accident was not confirmed and based on the decision in **Lakhamshi v Attorney General (Supra)**, I hold the view that the trial court ought to have apportioned liability at 50%0%.

15. In assessing damages as is the norm, the court will consider comparables to arrive at an opinion, bearing in mind the principles set out in making considerations in appeals of this nature. Respondent suffered fracture of 3rd and 4th fingers and multiple soft tissue injuries and was awarded Kshs. 500,000/-.

16. In **Kennedy Ago Lidweye V Steel Plus Limited [2012] eKLR** cited by the respondent before the trial court, the plaintiff suffered compound fracture of the right distal radial ulna and was awarded Kshs. 400,000/-. In **Kennedy Mutinda Nzoka v Basco Product (Kenya) Limited [2013] eKLR** cited by the appellant before the trial court, the plaintiff suffered crush injury with fracture of the middle phalanx right index finger and was awarded Kshs. 210,000/-.

17. In the case of **Stanley Maore & Geoffrey Mwenda at Nyeri Civil Appeal No. 147 of 2002** the Court of Appeal relied on the authority of **Kemfro Africa Limited t/a Meru Express Services Gathogo Kanini A. Jubia and Olive Lubia [1982 – 88] 1 KAR 727** at page 730 where Kneller J. A said:

“The principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that, it must be satisfied that either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

18. The authorities cited by the appellant and by the respondent are 6 and 5 years old respectively. The authority cited by the appellant has more or less similar injuries compared to the ones suffered by the respondent in this case while the one cited by the respondent relates to more serious injuries. Consequently; I am persuaded that the sum of Kshs. 500,000/- awarded to the respondent was inordinately high and a wholly erroneous estimate of the damage in comparable decisions.

Orders

19. From the foregoing analysis, the appeal succeeds in the following terms:

- 1) The judgment of the trial court is set aside and substituted with judgment at 50:50% on liability and Kshs. 250,000/- on quantum.**
- 2) Special damages remain as awarded by the trial court.**
- 3) Since respondent has partly succeeded, each party shall bear its own costs of this appeal.**

DATED AND DELIVERED THIS 15th DAY OF February, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Felix & Carolyne

Appellant - N/A

Respondent - N/A