



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. 21 OF 2016

MANGA ONDIEKI.....1ST APPELLANT

KENEDY MOMANYI ONDIEKI.....2ND APPELLANT

VERSUS

JULIUS OSORO ANDAMA.....1ST RESPONDENT

HEDRICK KIRUI.....2ND RESPONDENT

SHADRACK TERER.....3RD RESPONDENT

NATIONAL INDUSTRIAL CREDIT BANK LTD.....4TH RESPONDENT

WESLEY ROTICH KOECH.....5TH RESPONDENT

(Being an appeal from the Judgment in the PM's Court Sotik Civil Case No. 79 of 2011 – Hon. Barasa RM)

JUDGMENT

The 1st and 2nd appellants have raised two issues in the record of appeal thus:-

1. That the learned trial magistrate's assessment of finding 30% liability on the appellants was flawed in light of the evidence adduced in court against the 1st, 2nd, 3rd and 4th defendants.
2. That the learned trial magistrate assessment of quantum damages was high inordinately in the circumstances of the case:

A road traffic accident did occur on the 4th day of October 2010 between motor vehicle registration number KBD 974 which is registered to be owned by the 1st, 2nd, 3rd and 4th respondents and motor vehicle registration number KAW 676 U said to be owned by the 1st and 2nd appellants.

The 1st respondent was a fare paying passenger in motor vehicle registration number KAW 673 U. as a result of the accident he sustained injuries and sued for damages in the lower court.

In her Judgment the learned trial magistrate apportioned liability at 70% against the 1st, 2nd, 3rd and 4th defendants and 30% as against the 5th and 6th defendants.

It is this apportionment which has given rise to this appeal among other issues.

The contention by the appellants is that they had entered appearance and filed their amended defences in rebuttal to the averments in the plaint. They attributed liability and negligence on the 1st, 2nd, 3rd and 4th defendants.

It is further contended that a traffic police officer did testify in court to the effect that indeed a road traffic accident did occur on 4/10/2010 involving motor vehicle registration number KBD 975 Y and a matatu registration number KAW 673 U. The driver of motor vehicle registration number KBD 975 Y was from a side road entering into a main highway when he hit the matatu which was from Kisii direction. The driver of the truck was found to blame. He was charged convicted and fined. The driver of the matatu had taken evasive action to avoid being hit.

It is trite law that this court has the solemn duty to examine and re-evaluate the evidence on record so as to arrive at its own conclusion, the court has to take into consideration that it did not have the opportunity to observe the demeanor of the witnesses – **Peter –Vs- Sunday pest (1958) EA 249.**

Having done a careful evaluation of the evidence on record I am of the considered view that the learned trial magistrate did not place a lot of weight on the evidence by the investigating officer in this case and the fact that the driver of motor vehicle registration number KBD 975 Y – was indeed found guilty convicted and sentenced to a fine of Ksh.5000/= for the offence of careless driving arising from the same accident. I find her apportionment to have been flawed.

On the issue of quantum, it is the contention by the appellants that the award of damages was inordinately high.

The learned trial magistrate did award the plaintiff the sum of Ksh.100,000/= as general damages having considered the nature of the injuries, submissions by counsels, passage of time and the effects of inflation.

It is submitted that an award of Ksh.60,000/= would be fair and reasonable. Having evaluated the evidence on record I am satisfied that the award of Ksh.100000/= is not so high or so low as to attract the intervention of this court. The upshot is that the apportionment of the liability of 30% as against the two appellants is found to have been flawed and in error. The 1st, 2nd, 3rd, and 4th Respondents are 100% liable in negligence.

Judgment delivered dated and signed this 15th day of March 2015 in open court and in the presence of learned counsel for the appellants Kairu Mc Court absent, learned counsel for the Respondents Mr. Kenduiwa holding brief for Meroka present. Court assistant Mr. Rotich.

M. MUYA

JUDGE

15/3/2018

Mr. Kenduiwa – I have instructions that the money disposed in court be released to the 1st Respondent.

Court – Money disposed in court to be released to the 1st Respondent

M. MUYA

JUDGE

15/3/2018