



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 29 OF 2014

MARTIN OGUTA MIREMBE.....APPELLANT

VERSUS

JAMES IBOI KIMAMU.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Sindani (PM) in Winam SRMCC NO.9 of 2009 delivered on 18th September, 2012)

JUDGMENT

1. **Martin Oguta Mirembe** (*hereinafter referred to as appellant*) sued **James Iboi Kimamu** (*hereinafter referred to as respondent*) in the lower court claiming damages for injuries allegedly suffered on 28.11.08 when he was knocked down by motor vehicle KAT 361 which was allegedly being driven negligently as a result of which he was injured and his bicycle damaged.
2. The defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.
3. In a judgment delivered on **18th September, 2012**, the learned trial Magistrate found that the appellant did not prove his case on a balance of probability and dismissed it with costs to the respondent.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 1st April, 2014 which set out 5 grounds of appeal

SUBMISSIONS BY THE PARTIES

5. When the appeal came up for mention on 30th January, 2018, the parties' advocates agreed to canvass it by way of written submission which they dutifully filed.

Appellant's submissions

6. Appellant holds the view that the police abstract which shows that respondent was the owner of the accident motor vehicle was not challenged and that he had on that ground proved his case. Appellant faulted the trial court for not assessing the damages in any event. He placed reliance on the case of **Joel Muga Opija -Vs- East Africa Sea Food Ltd [2013] eKLR.**

Respondent's submissions

7. Respondent submitted that the copy of records clearly showed that he was not the registered owner of the accident motor vehicle when the accident occurred and urged court not to interfere with the trial court's finding.

Analysis and Determination

8. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Mbogo – Vs – Shah & Another (1968) EA 93** and **Selle & Another –Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123**). It then behooves this court to summarize the evidence that was tendered before the trial court.

The evidence

9. DW1 conceded that he hit a pothole, lost control of the accident motor vehicle as a result of which he knocked down the appellant. Undoubtedly, there is evidence that the driver was wholly to blame for the accident and its owner was vicariously liable at 100%.

10. Appellant sued respondent whom he alleged was owner of the accident motor vehicle. He placed reliance on the police abstract which listed respondent as owner. I have considered the case of Joel Muga Opija -Vs- East Africa Sea Food Ltd [2013] eKLR where the Court of Appeal held as follows:-

“We agree that the best way to prove ownership would be to produce to the court a document from the registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

11. Defendant gave evidence in his defence to challenge the plaintiff’s evidence regarding ownership of the motor vehicle in question. He successfully challenged plaintiff’s evidence contained in the police abstract and produced a copy of records which shows that the vehicle was as at the time of the accident, registered in the name Victory Construction Company.

12. From the foregoing; I have satisfied myself that the trial magistrate’s decision on liability was well founded.

13. In the case of Jameson Siika v Andrew Maranga Ongeru [2016] eKLR, it was held that it is now trite law that a trial court is under a duty to assess the general damages payable to the plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of Mordekai Mwangi Nandwa V Bhogals Garage Ltd CA No. 124 Of 1993 reported in [1993] KLR 448 where the court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment. Similarly, in the case of Matiya Byabaloma & Others V Uganda Transport Co. Ltd Uganda Supreme Court Civil Appeal No. 10 of 1993 IV KALR 138 where the court held that the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim”.

14. From the above authorities it is clear that, the trial court fell into error by not assessing the award of general damages that would have been awarded to the appellant had he been successful in proving his case.

DISPOSITION

15. In the end and for the reasons given on the assessment above, the appeal is disallowed with costs to the respondent.

DATED, DELIVERED AND SIGNED THIS 24TH DAY OF MAY 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Mr. Orieyo

Respondent - Mr. Gichaba holding brief for Mumma