



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 6 OF 2015

PANNIACK INVESTMENTS LIMITED.....APPELLANT

VERSUS

DAVIDSON MWANZIA KAMUTA.....RESPONDENT

(An appeal from the Judgment and decree of Hon. G.O. Kimanga in Mombasa

Chief Magistrate's Court Civil Suit No. 1150 of 2011

delivered on 28th November, 2014)

JUDGMENT

1. The plaintiff (respondent) was involved in road traffic accident on 6th February, 2011 where he sustained several injuries outlined later in this Judgment. He was awarded the sum of Kshs. 800,000/= as general damages by the Hon. Magistrate.

2. The defendant (appellant) being aggrieved by the said decision filed a memorandum of appeal on 21st January, 2015 raising the following grounds of appeal:-

(i) The Learned Trial Magistrate greatly misdirected himself in ignoring and treating the submissions of the appellant on quantum and liability very superficially thereby arriving at the wrong conclusion on both quantum and liability;

(ii) The Learned Trial Magistrate greatly misdirected himself by ignoring the medical report produced by the appellant thereby arriving at the wrong conclusion on quantum;

(iii) The Learned Trial Magistrate erred in law and in fact by considering only a part of and not all the evidence and submissions presented to him, particularly the submissions presented by the appellant consequently arriving at damages which were inordinately too high it represented an entirely erroneous award vis-a-vis the injuries sustained by the respondent;

(iv) The Learned Trial Magistrate proceeded on wrong principles when assessing liability to be apportioned to the respondent;

(v) The Learned Trial Magistrate erred in law and in fact in holding the appellant wholly liable for causing the accident when there was no evidence on record to support such a finding; and

(vi) The Learned Trial Magistrate's judgment is against the weight of evidence and law placed before him.

3. Mr. V. Otieno, Learned Counsel for the appellant disputed the evidence of PW1 and PW2 on the point of collision as in his view, their evidence was not clear on whether the motor vehicle in issue was leaving a petrol station being driven by the appellant's Driver when a motor cycle emerged and the two had a head on collision. He stated that no sketch plan was produced to show the point of collision. He relied on the case of **I.G Transporters Ltd and Another vs Moses Theuri Ndumia**, Voi High Court Civil Appeal No. 3 of 2017 where Judge Kamau cited the case of **Jotham Mugalo vs Telkom (K) Ltd**, Kisumu High Court Case No. 166 of 2001, the Hon. Judge agreed with the appellants in the **I.G. Transporters** case (supra) that in the absence of proof of where the impact was, liability could not attach on one party.

4. On consistency in the award of damages, Counsel for the appellant relied on the case of **Simon Taveta vs Mercy Mutitu Njeru** [2014] eKLR.

5. It was submitted that the Judgment of the Hon. Magistrate did not comply with the provisions of Order 21 rule 4 of the Civil Procedure Rules for failure to explain how he arrived at the award of Kshs. 800,000/=. Counsel relied on the case of **Elisha Akello Raga vs Hayanand Holdings Limited and Another**, High Court Civil Appeal No. 40 of 2014 and the case of **Lukenya Ranching and Farming Co-operative Society Ltd vs Kavoloto** [1979] EA 414, where the courts said astronomical figures should not be awarded.

6. Mr. Otieno submitted that the medical report showed that the respondent's hearing had improved and he had suffered no disability. Counsel urged the court to reconsider the award and substitute it with an award befitting the injuries suffered by the respondent. He prayed for the appeal to be allowed with costs.

7. Mr. Nyabena, Learned Counsel for the respondent opposed the appeal. He relied on his written submissions filed on 27th March, 2018. In highlighting the same, Counsel stated that the respondent was a pillion passenger aboard a motor cycle that was involved in a collision with motor vehicle registration No. KBK 933K/ZD 2722 that was being driven by the appellant's Driver. It was argued that the appellant did not tender any evidence to explain how the accident happened. Counsel indicated that the Hon. Magistrate held that the respondent was not in control of the motor cycle thus the appellant was 100% liable. He relied on the case of **Lake Flowers vs Cila Franclyn Onyango Ngonga** (suing on behalf of Florence Agwinyi and Another), C.A. No. 210 of 2006, where the court upheld liability for lack of defence evidence.

8. Mr. Nyabena submitted that the appellant's vehicle was exiting the petrol station and did not stop to give way to the motor cycle. He urged the court to resolve any discrepancy between the evidence of PW1 and PW2 in favour of the respondent.

9. Counsel argued that the appellant did not take out Third Party proceedings against the owner of the motor cycle. It was stated that the respondent suffered injuries on his head, lost consciousness for 2 days and was in ICU for 6 days. It was submitted that the respondent was also bleeding from his ears, had a fracture of the head and subdural haematoma, as a result of which he was operated on the head. It was submitted that the respondent complained of headaches and loss of vision. The surgical scar was still visible. Counsel stated that the respondent suffered serious injuries and the award of Kshs. 800,000/= was not an attempt to enrich him.

10. Counsel cited the case of **Ali Issa Ali vs The East African Portland Cement Company** [2016] eKLR where an award of Kshs. 600,000/= was made for injuries that were almost similar. He also relied on the case of **Julius Chelule and Another vs Nathan Kinyanjui** where an award of Kshs. 600,000/= was made in the year 2013, in a case where the plaintiff suffered a fracture of the skull, head injuries and an injury on the left knee with a small cut wound and tenderness.

11. It was submitted that an award of Kshs. 1,200,000/= was made in the year 2004, in the case of **Earnest Mukoro Ondieki vs Modern Distributors**, Nakuru HCCA No. 78 of 2002, for comparable injuries.

12. In explaining how the award of general damages was arrived at in this case, Mr. Nyabena stated that the Hon. Magistrate in his Judgment indicated that he considered the authorities cited and submissions made and arrived at an award of Kshs. 800,000/= general damages. He urged the court not to interfere with the said award.

13. In response to the above submissions, Mr. Otieno argued that the reasons for granting the award of Kshs. 800,000/= should have been given. He urged the court to consider the proceedings of the lower court and allow the appeal.

ANALYSIS AND DETERMINATION

14. The duty of the first appellate court in an appeal such as this where liability and quantum is being contested is to re-evaluate the evidence tendered and arrive at its own independent conclusion. In **Peters vs Sunday Post Limited** [1985] EA 424, the court stated thus on the duty of the first appellate court:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses but the jurisdiction to review the evidence should be exercised with caution; it is not enough that the appellate court might have come to a different conclusion....”

15. The issues for determination are:-

- (i) If the Hon. Magistrate erred in finding the appellant wholly liable for the accident; and
- (ii) Whether the quantum that was awarded by the Hon. Magistrate was manifestly excessive and/or inordinately high.

16. On the issue of liability, the respondent tendered evidence through PW1, No. 66461 PC Pius Njiru of Changamwe Traffic Police about an accident that happened on 6th February, 2011 at 11:00 p.m. It involved motor vehicle registration No. KBK 933K semi-trailer registration No. ZD 2722 Mercedes Benz driven by Abdi Alim Mohamed and motor cycle registration No. KMTC 4225 that Cypria Ngui was riding. The witnesses stated that the accident happened along the Nairobi-Mombasa road as the Driver of the Truck made to turn into Petro-City Petrol Station. PW1 testified before the lower court that the truck was being driven from Jomvu heading to Changamwe direction and the motor cycle was being driven towards the airport direction.

17. The witness explained that if a vehicle was being driven from Jomvu direction, it had to cross the motor cycle lane and as a matter of traffic rules, the motor vehicle was required to give way to the motor cycle. PW1 further testified that the respondent who was a passenger was injured. A P3 form was issued which he produced as plf. exh. 1, a police abstract was also issued, showing the vehicle was insured by APA. The police abstract was produced as plf. exh. 2.

18. The respondent, Davidson Mwanzia Kamuta testified as PW2 in the lower court. He stated that on 6th February, 2011 he was a

passenger aboard the subject motor cycle that was heading from Chaani towards mainland using the Jomvu road. It was his evidence that at around Kisumu Ndogo area, a lorry was exiting the petrol station onto the main road about 5 meters away when it collided with the motor cycle. He indicated that they found themselves under the prime mover at the front tyre. The respondent gave evidence that he was injured on the head and lost consciousness which he regained after 2 days. He was admitted in ICU Agakhan (hospital). He was bleeding through the ears and his head had been operated on the left side. He produced the hospital discharge documents as plf. exh. 3.

19. He reported the accident to Changamwe Police Station. He went for medical examination where he paid Kshs. 1,500/=, he produced the medical report as plf. exh. 4 and receipts for the payment of the said examination as plf. exh. 5. The respondent in his evidence blamed the Driver of the lorry for failing to give them way as required, as the motor vehicle got onto the road fast. He stated that the injuries had affected his eyes and ears and he could not do heavy jobs due to pressure in his head. He indicated that he had scars and pain on the head and generally on the scar (sic).

20. The medical report by Dr. S.K. Ndegwa dated 14th March, 2011 shows that the respondent sustained serious head injuries with:-

- (i) Fracture of the left temporal-parietal bones.
- (ii) Acute epidural hematoma on the left temporal parietal lobes;
- (iii) Mass effect with midline shift;
- (iv) Effacement of the sulci and basal cisterns;
- (v) Concussion with lucid moments; and
- (vi) Bleeding from the left ear (otorrhea)

21. The medical report further shows that the respondent was admitted to hospital for 5 days. CT scans of the head confirmed the injuries sustained. A craniotomy was done to evacuate the hematoma. At the time of examination, the respondent had headaches, poor vision and had a discharging wound at the surgical site. The doctor noted a 15 cm semi-circular surgical incision on the left temporal-parietal scalp. There was a septic spot on the surgical scar. He concluded that the respondent suffered severe brain, bone and soft tissue injuries.

22. The medical report by Doctor Udayan R. Sheth was by consent produced as def. exh 1. The said Doctor examined the respondent on 13th February, 2013 and confirmed that he sustained the same injuries as enumerated in Dr. Ndegwa's medical report. He was of the opinion that the respondent had fully recovered with no deformity and no permanent incapacity.

23. I have perused the submissions and authorities relied on by Counsel in the lower court as I was urged to do. The respondent's Counsel relied on the case of **Mutinda Sammy vs Tawfiq Bus Services**, Mombasa HCC No. 834 of 1995 where Khaminwa Commissioner of Assize (as she then was) on 8th of October 1999 awarded the sum of Kshs. 650,000/= to a plaintiff who sustained compound depressed fracture base of the skull fracture right frontal parietal bone. The injuries healed with a resultant residual possible loss of intellectual capacity.

24. The appellant's Counsel in the lower court cited the case of **John Mburu Kahenya vs Leonard Kamau Kirumba and Another**, Nakuru HCC No. 408 of 1998 where Judge Ondeyo on 26th September, 2000 awarded general damages of Kshs. 120,000/= to a plaintiff who suffered a head injury with a scalp laceration on the right occipital region and soft tissue injury to the knee. The injuries fully healed without any permanent incapacity.

25. I have also considered the authorities cited by Counsel on record to support their arguments in this appeal. It is apparent that the injuries sustained by the plaintiffs in the cases cited by Counsel for the appellant fade in comparison to the injuries sustained by the respondent herein. This is for the reason that the plaintiff in the case of **John Mburu Kahenya vs Leonard Kamau Kirumba and Another** (supra) suffered a laceration on the occipital region of the head and soft tissue injury to the knee. The said injuries can in no way be comparable to the serious injuries suffered by the respondent herein as enumerated in paragraph 20 of this Judgment. The said injuries were classified in the P3 as grievous harm.

26. The record does show that the evidence of PW1 and PW2 was contradictory as to whether the appellant's Driver was driving into a petrol station or exiting the petrol station. In so far as the respondent herein is concerned, the fact remains that there was a collision between the truck registration No. KBK 933K/ZD 2722 and motor cycle registration No. KMCT 4225. The respondent was a pillion passenger aboard the motor cycle which he had no control of. He could therefore not have contributed to the accident. For the foregoing reason, I decline to resolve the contradiction in favour of the appellant. It is my finding that the Hon. Magistrate was right in holding the appellant 100% liable for the accident.

27. The respondent suffered serious injuries that led to his admission in the ICU for 2 days and admission in hospital for 5 days. He had to undergo a craniotomy to evacuate an acute epidural haematoma on the left temporal parietal lobes. He also suffered a fracture of the left temporal parietal bones among other injuries.

28. In the said circumstances, the case of **Mutinda Sammy vs Tawfiq Bus Services** (supra) was more applicable to this matter. It is the finding of this court that the award of general damages in the sum of Kshs. 800,000/= was not inordinately high to result in an erroneous estimate of general damages. In reaching the said decision, I have not only considered the submissions made and the authorities cited in the lower court but also the submissions made and authorities cited in this appeal. The accident the subject of this appeal happened on 6th February, 2011 whereas the case of **Mutinda Sammy vs Tawfiq Bus Services** (supra) which the Hon. Magistrate relied on, in reaching his decision was decided on 8th of October 1999. The award of general damages in the sum of Kshs. 800,000/= in this instance can therefore not

be considered to be inordinately high due the element of inflation.

29. The appeal is therefore without merit and it is hereby dismissed. Costs of the lower court case and this appeal are awarded to the respondent. Interest is also awarded to the respondent at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 10th day of August, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Ajigo for the appellant

Ms Sitati holding brief for Mr. Nyabena for the respondent

Mr. Oliver Musundi - Court Assistant