



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 142 OF 2017

(FORMERLY MACHAKOS HCCA NO. 142 OF 2011)

MUTUA KIIO.....PLAINTIFF/APPELLANT

-VERSUS-

BENSON KYANDA KYUMWA.....DEFENDANT/RESPONDENT

(Being an Appeal from the Judgment of Hon. J.W. Gichimu (RM) in the Resident Magistrate's Court at Tawa Civil Case No.179 of 2010, delivered on 24th August 2011).

JUDGEMENT

INTRODUCTION

1. The Appellant filed a suit in the lower Court seeking general damages, special damages, cost of the suit and interest for injuries sustained from a road traffic accident on 22/02/2009 at Kikima market.
2. The Respondent neither entered appearance nor filed his defence within the prescribed period. Consequently, an interlocutory judgment was entered and the matter proceeded for formal proof.
3. Judgment was eventually delivered and the trial magistrate dismissed the case. According to him, the Appellant did not prove his case on a balance of probabilities.
4. Aggrieved by the entire judgment, the Appellant filed this appeal and listed 5 grounds as follows;
 - a) *That the learned trial magistrate erred in law and fact and misdirected himself by finding that the Appellant had not proved his case against the Respondent.*
 - b) *That the learned trial magistrate erred in law and fact and misdirected himself by overlooking the documentary evidence tendered.*
 - c) *That the learned trial magistrate erred in law and fact and misdirected himself by overlooking the oral evidence tendered by the Appellant.*
 - d) *That the learned trial magistrate erred in law and fact and misdirected himself by overlooking the Appellant's written submissions.*
 - e) *That the learned trial magistrate erred in law and fact by dismissing the Appellant's suit.*
5. The appeal was canvassed by way of written submissions.

THE SUBMISSIONS

6. The Appellant submits that failure to tell how an accident occurred is not a ground of disentitling one to relief and that the Respondent had a duty to care and pay attention to other road users.
7. Further, the Appellant submits that in order to escape liability, the Respondent should have shown a probable cause of the accident which does not connote negligence.

8. Having looked at the Appellant's submissions, I must say that some parts were not comprehensible. In paragraph 3, he talks about the defence yet it is a fact that no defence was ever filed and that is why the matter proceeded for formal proof. Paragraph 5 seems to have been lifted from some judgment.

9. Parties, especially when they are represented, must endeavor to prosecute their cases diligently and in a manner that is helpful to the Court. Be that as it may, this Court will still discharge its duty as required.

DUTY OF COURT

10. It is now settled that the duty of a first Appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

11. I have looked at the record of appeal, the grounds of appeal as well as the Appellant's submissions and it is my view that the following two issues arise for determination;

a) Whether the Appellant proved his case on a balance of probabilities.

b) What is the quantum of damages, if any, payable to the Appellant.

WHETHER THE APPELLANT PROVED HIS CASE ON A BALANCE OF PROBABILITY

12. PW1 was the Appellant. He testified that on 22/02/2009, he was knocked down by a motor vehicle while crossing the road. He had not checked both sides to confirm whether there were motor vehicles approaching. He had not seen any motor vehicle before crossing the road. The subject motor vehicle was at the stage. His right leg was fractured. He was taken to the hospital by the vehicle which hit him.

13. He reported the matter to the police and was issued with a police abstract. He paid Kshs 200/=. He produced the abstract as exhibit 1(a) and the receipt as exhibit 1(b). Further, he produced a copy of records as exhibit 2(a) and a receipt of Kshs 500/= as exhibit 2(b). His treatment notes and a bundle of receipts were produced as exhibits 3 & 6 respectively. The P3 form and medical report were marked as MFI 4 and 5.

14. PW2 was Doctor Mutuku Pius. He testified that the Appellant had a history of road traffic accident on 22/02/2009 within Kikima market where he sustained a blunt injury to the right leg, fracture of the right fibula and segmented fractures of the right tibia. He was admitted for one day and referred to Mbooni hospital where he was treated. He was put on plaster of paris and drugs.

15. He complained of a painful right leg and was walking with the aid of a stick. The plaintiff had not recovered and requested physiotherapy. According to PW2, the injuries would have a residual effect as they were serious. They were classified as maim. He produced the medical report as exhibit 5 and the P3 as exhibit 4.

16. The Appellant closed his case at that juncture.

17. The police abstract shows that on 22/02/2009 at 3.05 p.m. within Kikima market, an accident involving motor vehicle registration number KAS O69C was reported at Mbooni police station. It also indicates that the person injured in the accident was Mutua Kiiro (*the Appellant*) and the nature of injury was classified as harm. Further, it gives the name of driver as Benson Kyanda Kyuma (*the Respondent*).

18. The Respondent's failure to participate in the proceedings means that the details in the abstract are uncontroverted. However, I am alive to the fact that the Appellant's claim was based on negligence and as such, he had the burden of proving that the accident occurred due to the negligence of the Respondent.

19. One of the particulars of negligence pleaded was that the Respondent was driving the motor vehicle at an excessive speed in the circumstances. From the evidence on record, it is clear that the accident occurred within Kikima market.

20. Ordinarily, there is a large population of people in a market and a higher duty of care is expected from motorists. The Appellant sustained a fracture in the accident and that alone indicates that the speed was excessive in the circumstances. Further, the fact that the Appellant was a pedestrian shows that the Respondent was driving the motor vehicle without due care and attention for other road users.

21. In a nut shell, the circumstances of the accident give rise to an inference of negligence which was never rebutted by the Respondent. Consequently, the Appellant's burden was discharged. In **NANDWA -VS- KENYA KAZI LTD (1988) KLR 488**, the Court of Appeal observed that:-

“.....In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant's evidence provides some answer adequate to displace that inference...”

22. The entire judgment does not make reference to the police abstract and it is clear that the learned trial magistrate arrived at his findings based only on the oral evidence of the Appellant.

23. It was erroneous for him to look at the evidence selectively.

24. With regard to apportionment of liability, the evidence on record shows that the Appellant had not checked both sides to confirm whether there were motor vehicles approaching. I looked at the hand written notes of the learned trial magistrate and they state the same thing.

25. However, the Appellant's submissions before the trial Court paint a different picture. I will reproduce the relevant paragraph;

“The plaintiff, PW1 testified that on the material day, he was at Kikima market to get relief food. After his business, he intended to go to a hotel for some tea. The hotel was across the road. When he started crossing the road, the road was clear on both sides but while on the road, the motor vehicle herein KAS 069C abruptly appeared at high speed and knocked him down.”

26. The record should of course be superior but it should never be lost on us that judicial officers are human and may sometimes make errors. As the old adage goes, ‘to err is human’. In the circumstances, I will apportion liability at 60:40 in favour of the Appellant.

QUANTUM

27. The medical report shows that the Appellant sustained the following injuries;

- a) Blunt injury to the right leg.
- b) Bruises on the right leg, right lateral aspect.
- c) Compound fracture on the right fibula.
- d) Segmental fractures on the right tibia.

28. The Appellant proposed an award of Kshs 500,000/= and relied on **NAIROBI HCCC NO. 1152 OF 2002; KORNELIUS KWEYA EBICHET –VS- C & P SHOE LTD & ANOR (2008) EKLR** where the plaintiff was awarded Kshs 1,000,000/= for pain, suffering & loss of amenities, 120,000/= for future medical expenses and Kshs 900,000/= for lost earnings. The plaintiff sustained a blunt trauma of the forehead and fractures of the tibia bone of the left leg.

29. The plaintiff was seen by Dr. Shah and Dr. Wambugu. In Dr. Shah's opinion, the injury would leave a scar and the plaintiff would have to undergo another operation to clear osteomyelitis and for plating and bone grafting of the fracture at an estimated cost of Kshs 120,000/=.

30. On the other hand, Dr. Wambugu agreed with the estimated cost and further opined that there was non-union and progressive chronic osteomyelitis of the left tibia bone and that the plaintiff would remain permanently disabled.

31. Evidently, the injuries therein were more serious hence not comparable with our case.

32. The following authorities are comparable in my view;

a. Nairobi HCCA No. 522 of 2012; Clement Gitau –Vs- G.K.K (2016)eKLR; the plaintiff sustained bruises on the neck, fracture of the tibia and fibula. An award of Kshs. 600,000/= was upheld on appeal.

b. Nyeri HCCA No.9 of 2012; Zacharia Mwangi Njeru –Vs-Joseph Wachira Karoga (2014) eKLR. The plaintiff sustained fractures of the left tibia and fibula. An award of Kshs. 800,000/= was reduced to Kshs. 400,000/= on appeal.

c. Kisii HCCC No. 50 of 2007; Esther Dorca Bochere Onyancha –Vs- Zacharia Okemwa Manono (Seven Star Impex); the plaintiff sustained blunt injuries and multiple rib fractures on the left side and was awarded Kshs. 600,000/= as general damages.

33. The Trial Magistrate would have awarded Kshs. 350,000/= as general damages for pain, suffering and loss of amenities.

34. I have considered the cited authorities, the inflationary trends and the fact that an award of damages is not meant to enrich a claimant and arrived at the conclusion that the proposal made by the Appellant (Kshs 500,000/=) is reasonable in the circumstances.

35. With regard to special damages, the amount pleaded was Kshs. 2,200/=. The Trial Magistrate disallowed the claim for contravening the stamp duty Act. From the bundle of receipts, expenses were incurred for lunch, transport, dinner but a keen look at them reveals so many deficiencies.

36. Some do not show who incurred the expenses or where the expenses were incurred. Others show that the expenses were incurred by persons other than the Appellant.

37. Interestingly, most of those expenses were incurred in the year 2009 before the suit was filed. There is absolutely no reason as to why those amounts were never pleaded. If they had been forgotten, they could still have been included by amending the plaint. That was never done.

38. Further, the Appellant did not even address the issue in his submissions. The only amounts pleaded and proved as required were Kshs 200/= for the police abstract and Kshs 500/= for the motor vehicle search. Accordingly, Kshs 700/= will be allowed as special damages.

39. The total award will therefore work out as follows;

General damages:	500,000/=
Special damages:	<u>700/=</u>
Total	500,700/=
Less 40% contribution:	<u>200280/=</u>
Grand total	<u>300,420/=</u>

CONCLUSION

40. The court thus makes a finding that the appeal has merit and is hereby allowed on the following terms;

i. Liability is apportioned 60% ; 40% in favour of the Appellant

ii. The court makes the following award on quantum;

General damages:	500,000/=
Special damages:	700/=
Total	500,700/=
Less 40% contribution:	<u>200280/=</u>
Grand total	<u>300,420/=</u>

iii. No orders as to costs as appeal was not contested.

SIGNED DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER, 2018 IN OPEN COURT.

.....

C. KARIUKI

JUDGE