



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 656 OF 2012

CALISTUS ANTONY AKELLO.....APPELLANT

VERSUS

JOHN GITAU NGINYA.....1ST RESPONDENT

MARY NYERI NGINYA.....2ND RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. T W C Wamae (Mrs.)

Chief Magistrate, Milimani CMCC No. 7931 of 2005

delivered on 23rd day of November, 2012.

J U D G M E N T

1. On 17th February, 1996, Motor Vehicle registration No. KAG 475H collided with another motor vehicle Registration No. KAB 999D along Jomo Kenyatta Highway (Kisumu) and as a result one, Paul Nginya Tity Kimani got fatally injured.
2. John Gitau Nginya and Mary Njeri Nginya the Respondents herein and the legal representatives of the Estate of Paul Nginya Tity Kimani, deceased, filed a compensatory suit against Calistus Anthony Akello, the Appellant herein before the Chief Magistrate's Court, Milimani Commercial Courts'.
3. The Appellant filed a defence with a counter-claim to deny the Respondent's claim.
4. Hon. T. C Wamae, learned Chief Magistrate heard the suit and on 23rd November, 2012 she gave judgment in favour of the Respondents and against the Appellant.
5. In her judgment, the learned Chief Magistrate apportioned liability at the ratio of 50:50 and also found the Appellant's counter-claim partially successful.
6. The Appellant was aggrieved by the decision and he preferred this appeal. On appeal, the Appellant put forward the following grounds: -
 - i) The learned magistrate erred in law in entering judgment in favour of the Respondents against the Appellant without having due regard to the pleadings and the evidence before the court.*
 - ii) The learned magistrate erred in law in failing to consider the evidence offered on behalf of the Appellant during the trial.*
 - iii) The Learned Magistrate erred in law in failing to take into consideration that had been charged and acquitted in Traffic Case No. 5097 of 1996 at Kisumu Law Courts.*
 - iv) The learned magistrate erred in law in finding that the Plaintiffs had discharged their burden of proof.*
 - v) There was a complete misapprehension of the law in the award of liability against the Appellant at 50:50 in favour of the Respondents.*

vi) The learned magistrate erred in law in using the wrong principles in the determination of the quantum of damages.

vii) The learned magistrate erred in law and in fact in failing to consider the evidence tendered on the Appellant's behalf in proving the special damages in the counter-claim.

viii) The learned magistrate erred in law in failing to award costs in respect of the Appellant's successful counter-claim.

ix) The learned magistrate erred in law in awarding costs to the Respondent

x) Consequently, the learned magistrate's decision occasioned a miscarriage of justice.

7. The Appellant sought for the decision of the Chief Magistrate to be set aside and for the counter-claim to be allowed with costs.

8. When this appeal came up for hearing this court gave directions to have the appeal disposed of by written submissions.

9. I have re-evaluated the case that was before the Chief Magistrate's court. I have further considered the rival written submissions filed by both sides.

10. Though the Appellant put forward a total of 10 grounds of appeal, those grounds basically revolve around the twin issues touching on liability and quantum.

11. In respect of the question on liability, it is the submission of the Appellant that the trial court erred in finding that the parties were equally to blame for the accident without according any reason.

12. The Appellant further argued that the trial magistrate ignored the Appellant's witness testimonies, thus erroneously apportioning liability. The Appellant further pointed out that there were two conflicting versions of what caused the accident, therefore, the finding on liability was erroneously.

13. The Respondents are of the submission that the learned Chief Magistrate arrived at the correct decision after carefully and adequately addressing her mind to the evidence that was presented before the court. Consequently, they urged this court not to disturb the trial court's decision on liability.

14. It is also apparent from the Appellant's submission that he has taken issue with the fact that the learned Chief Magistrate did not take into consideration the fact that the Appellant had been tried and subsequently acquitted for a traffic offence.

15. I have carefully perused the judgment of the learned Chief Magistrate and it is apparent that she determined the question of liability and apportioned it at 50:50.

16. It is also apparent that it did not assign any reasons for her decision to apportion liability. She did not refer at all to the evidence tendered before her save for that of Mary Njeri Nginya (PW 1) before determining liability.

17. This court, being the first appellate court in this matter is bound to re-evaluate the evidence and arrive at its own conclusion over the issue. The records show that three witnesses testified in support of the Respondents' case namely: Mary Njeri Nginya (PW 1), Jane Wambugu (PW 2), John Gitau Kimani (PW 3) and Peter Kinyi Muindi (PW4).

18. The only eyewitness of the accident is Peter Kinyi Muindi (PW 4). He told the trial court that on 17th February, 1996 at midnight he was on board motor vehicle registration No.KAG 475H, a red Nissan Sunny driven by the late Paul Nginya Tity Kimani. PW 4 said that the vehicle had a head on collision with an oncoming motor vehicle along Jomo Kenyatta Highway in Kisumu and that the deceased died on the spot.

19. PW 4 did not explain how the accident occurred but he merely reported the occurrence of the same. He did not also lay blame on anyone.

20. Calistus Antony Akello (DW 1) the Appellant testified in support of his defense. He told the trial court that on the material night he drove motor vehicle registration No. KAB 999A along Jomo Kenyatta Highway and upon reaching Faraley Hospital, he saw an oncoming motor vehicle driving on his lane.

21. DW 1 stated that he warned the driver to dim his light but before doing so, the motor vehicle collided onto his motor vehicle. He said he was driving at 40 km/h while the other motor vehicle was being driven at a high speed while on full lights.

22. DW 1 produced in evidence as an exhibit, the proceedings of Kisumu CMC Traffic Case No. 592 of 1996 which showed that DW 1 was tried and acquitted for the Traffic Offence of causing death by dangerous driving under Section 215 of the Criminal Procedure Code.

23. In his evidence in cross-examination, DW 1 stated that the oncoming motor vehicle was being driven at high speed and the same drove on his lane.

24. Pamela Akello (DW2), the wife of DW 1 gave near similar account of how the accident occurred like DW 1.

25. It is curious to note that the learned Chief Magistrate did not deem it fit to consider the evidence of PW 4, DW 1 and DW 2. It is also clear that the learned Chief Magistrate did not assign any reason for her decision to apportion liability at 50:50.

26. Had she considered the crucial evidence of the eye witnesses, she would have arrived at a different conclusion on the apportionment of liability.

27. It is clear to me that the three witnesses namely, PW 4, DW 1 and DW 2 gave a true account of what happened. PW 4 did not lay any blame on any of the drivers but basically gave an account showing that the accident occurred. However, DW 1 and DW 2 squarely blamed the driver of motor vehicle registration No. KAG 475H. They stated that the driver of the aforesaid motor vehicle drove on the wrong lane and was driving at high speed with lights full.

28. Considering the evidence objectively, I am persuaded to agree with the evidence of DW 1 and DW 2. However, the Appellant cannot also escape blame. If indeed DW 1 noticed that the other driver was driving on his lane with its full lights on and at high speed, he should have swerved to avoid a head on collision.

29. In her evidence in re-examination, DW 2 states that the Defendant (Appellant) did not swerve to the right. In the circumstances, I am convinced that the Appellant should shoulder 40% blame while the deceased should shoulder 60%.

30. Consequently, the order apportioning liability at 50:50 is hereby set aside and is substituted with an order apportioning liability at 60:40.

31. On quantum, the learned Chief Magistrate awarded the Respondent **Ksh.1,101,478/-** calculated as follows: -

a) Pain and suffering	Kshs. 20,000.00
Loss of dependency	Kshs.2,193,536.00
Loss of Expectation of Life	<u>Kshs. 60,000.00</u>
Gross Awarded	Kshs.2,273,536.00
Less 50%	<u>(Kshs.1,136,768.00)</u>
	Kshs.1,136,768.00
Less 50% (of 70,580)	Kshs. 35,290.00
Net sum Awarded	Kshs.1,101,478.00

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32. The Appellant pointed out that he had a counter-claim, therefore, the apportionment of liability automatically had an impact on it. It was pointed out that the question of the counter-claim was not tackled with by the trial court despite apportioning liability.

33. The Appellant stated that, the trial court ought to have considered the particulars of injuries as outlined in the counter-claim to arrive at quantum. The Appellant also attacked the award of Kshs.20,000/- for pain and suffering yet there was evidence showing that the deceased died on the spot, therefore the award was erroneous.

34. The Respondents on the other hand, were of the view that the learned Chief Magistrate made the correct findings based on the evidence tendered.

35. The Respondents argued that the Appellant had failed to provide an alternative as to the calculations of quantum of damages, therefore their calculations remained unchallenged.

36. The Respondents' also dismissed the Appellants' argument that he should have been awarded costs on the counter-claim stating that the argument was baseless since the trial magistrate was clear that the counter-claim partially succeeded and, therefore costs cannot be awarded.

37. After a careful consideration of the rivals arguments over quantum it is clear in mind that the Appellant did not contest the figures awarded to the Respondents save for Ksh.20,000/- made in respect of pain and suffering. The Appellant was more concerned with the counter-claim which was left in a limbo by the trial magistrate.

38. It is apparent from the record that the learned Chief Magistrate did not make any determination on the Appellant's counter-claim. I have looked at the submissions of the parties made before the chief Magistrate. Respondents were categorical that the counter-claim was time-barred having been introduced eleven (11) years after the accident. The learned Chief Magistrate did not determine the issue.

39. Appellant on his part made submissions claiming for Ksh.1,000,000/- as general damages. The Appellant also asked to be paid special damages of Ksh.536,620/- calculated as follows: -

a) Medical treatment at Aga Khan Hospital. Kshs.46,620.00

b) Costs of repairs of motor vehicle Kshs.490,000.00

40. The Respondents' did not specifically submit on quantum in respect of the counterclaim.

41. This court being the first appellate court, this court is enjoined to re-evaluate the matter that was before the trial court.

42. The Appellant (DW 1) stated that he was injured on the leg, hand and above the eye. He also stated that he spent a sum of Ksh.450,000/- to repair his car at Marshalls. He produced receipts to prove that. He also stated that he paid Ksh.46,620/- for medical treatment.

43. It is also clear from the evidence the Appellant tendered that he proved that he spent Kshs.46,620/- on medical treatment and Ksh.450,000/- on the repair of his motor vehicle.

44. In my determination, I am convinced that the Appellant proved his counter-claim against the Respondents on a balance of probabilities.

45. The objection stating that the counter-claim was time-barred cannot stand because the Respondents failed to oppose the application for amendment vide the Chamber Summons dated 26th September, 2007 which introduced the counter-claim. The moment the counter-claim was introduced, the date of filing will be deemed to be the date when the main defense was filed.

46. With respect, I agree with the submissions of the Appellant that the trial magistrate erred when she failed to make a determination on the counter-claim.

47. The other issue which the Appellant raised is the award of Ksh.20,000/- for pain and suffering. According to the Appellants, the award was not justified since the deceased died on the spot.

48. In my humble view, it cannot be said that since the deceased died on the spot, he did not suffer any pain. I am entitled in the circumstances of this case to infer that the deceased must have suffered terrible pain due to the injuries he sustained before he passed on. The award of Ksh.20,000/- in my view cannot be said to be unjustified. I find no merit in the appeal against the award on this head.

49. In the end, the appeal is found to be substantially meritorious. It is allowed giving rise to the following orders: -

i) The appeal as against the order on liability is allowed. Consequently, the order apportioning liability at 50:50 is set aside and is substituted with an order apportioning liability in the ratio of 40:60.

ii) The appeal as against quantum made in favour of the Respondents is dismissed.

iii) Consequently, the award of Ksh.2,344,116 made in favour of the Respondents' is subjected to 60% apportionment of liability on the part of the deceased. Thus net total the Respondents are entitled is Kshs.867,067/-.

iv) On the counter-claim, the Appellant is given judgment in the sum of Ksh.496,620 less 40% liability apportionment on the part of the Appellant. Therefore, the net total on the counter-claim which I awarded to the Appellant is Ksh.297,972/-.

v) In the circumstances of this appeal, a fair order on costs on the appeal is to order which I hereby do, that each party meets its own costs.

vi) The Appellant has beseeched this court to subject the award given to the Respondent to set off equal to the amount awarded on the counter-claim.

vii) I find the proposal to be reasonable. Consequently, the judgment sum of Ksh.867,067/- awarded to Respondents is adjusted downwards by of judgment sum on the Counter-Claim Ksh.297,972/-

viii) Consequently, the Respondents are entitled to (i.e. 867,067 -297,972 =569,095/-) Ksh.569,095/-

ix) The Respondents are awarded to costs of the suit based on the judgment sum on appeal.

Dated, signed and delivered at Nairobi this 21st day of September, 2018.

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J K SERGON

JUDGE

In the presence of

Limo for the Appellant

Ndungu holding brief for Muhoro for the 1st & 2nd Respondents