



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 541 OF 2015

MAKARIM LIMITED.....APPELLANT

VERSUS

JOHN BOSCO MUMO MASILA.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. M. Chesang (Mrs.) Resident Magistrate in Milimani CMCC No. 5353 of 2013 Delivered on 2nd day of November, 2015)

J U D G M E N T

1. The Respondent herein, John Bosco Mumo Masila filed a compensatory suit against Makarim Limited, the Appellant herein and another for injuries allegedly suffered by the Respondent when he was knocked down by Motor vehicle Registration No. KBS 795K while walking off Magadi Road within Ongata Rongai Township on 7th March, 2013.
2. The Plaint and the summons were served upon the Respondent, prompting him to file a defense denying the Appellant's claim.
3. The witness statement filed by the defence was admitted in evidence by consent.
4. When the suit came up for hearing, the Respondent summoned three witnesses to testify in support of her case.
5. On 2nd November, 2015, Hon. M. Chesang, learned Resident Magistrate entered judgment in favour of the Respondent in the sum of Ksh.800,000/-.
6. Being dissatisfied, the Appellant preferred this appeal and put forward the following grounds: -

(i) The learned trial magistrate misdirected herself and erred both in law and in fact by holding that the Plaintiff had proved his case against the Defendant on a balance of probabilities.

(ii) The learned trial magistrate misdirected herself and erred both in law and in fact by holding the appellant 100% liable for the alleged accident the subject of this suit.

(iii) The learned trial magistrate misdirected herself and erred both in law and in fact by failing to apportion liability whereas evidence on record called for apportionment of liability against the Respondent.

(iv) The learned trial magistrate misdirected herself and erred in law and in fact by failing to consider that the Plaintiff wholly and/or substantially contributed to the accident and thus arrived at an erroneous finding of liability.

(v) The learned trial magistrate misdirected herself and erred in law and in fact by awarding general damages for pain and suffering that are so manifestly excessive as to be erroneous.

(vi) The learned trial magistrate misdirected herself and erred in law and in fact by awarding damages for lost earnings when no iota of evidence whatsoever was adduced to support the same.

(vii) The learned trial magistrate misdirected herself and erred in law and in fact in failing to consider the Medical Reports in record and hence arrived at an award that is so manifestly excessive as to be erroneous.

(viii) The learned trial magistrate misdirected herself and erred in law and in fact by considering facts outside the evidence adduced and hence awarded damages for lost earning not supported by any evidence and hence arrived at an erroneous award.

(ix) The learned trial magistrate misdirected herself and erred in law and in fact by failing to properly consider the Defendant's submissions on record thus arrived at an erroneous finding on both liability and quantum.

7. When the appeal came up for hearing, learned counsels recorded a consent order to have this appeal disposed of by written submission.
8. Though the Appellant put forward a total of seven grounds the appeal may be determined on two grounds touching on liability and quantum.
9. On Liability, it is the submission of the Appellant that the Respondent failed to prove liability to the required standard and therefore, it was not entitled to the order on liability.
10. The Respondent is of the submission that he tendered credible evidence, which was sufficient to hold the Appellant liable for the accident.
11. Having carefully re-evaluated the case that was before the trial court, it is clear that the Respondent presented oral evidence before the trial court showing how the accident occurred. He also summoned two witnesses to buttress his case.
12. The Respondent (PW 3) told the trial court that on 7th March, 2013 he was knocked down by motor vehicle Registration No. KBS 795K while he was walking besides the road on the left hand side.
13. PW 3 said he fell down on a verandah and suffered fractures on the lower tibia and fibula.
14. PW 1 further stated that the aforesaid motor vehicle veered off the road on to the pedestrian walk and knocked him,
15. PC Isaac Kimeyi (PW 2), the Investigating Officer told the trial court that the accident was reported to Ongata Rongai Police Station which issued the police abstract form showing an accident occurred on 7th March, 2013.
16. PW 2 stated that the investigation of the accident was not concluded because the parties initially indicated that they wanted to negotiate for a compromise. PW 2 was categorical that the accident was on the road.
17. The Appellant filed witness statements of Nasser Ahmed and Samuel Mwazaghai Mbele which statements were produced by consent without calling for the makers as evidence in support of the Appellant's defense.
18. In his statement, Nasser Ahmed stated that his motor vehicle registration No. KBS 795K was never involved in an accident on 7th March, 2013 and that he has never had a driver called Kenford Kimaita.
19. Samuel Mwazaghai Mbele stated in his statement that he was employed by the Appellant to driver motor vehicle registration No. KBU 469F. He stated that he did not know the person named as Kenford Kimaita who was alleged drove motor vehicle registration KBS 795K.
20. He stated that the aforesaid motor vehicle was assigned to one Lamis Mnjala Ngoma to drive but was sacked when he got involved in an accident.
21. The learned Resident Magistrate formed the opinion that the written statements presented by the Appellant were irrelevant and useless since they were not adopted on oath nor tested by cross-examination.
22. With respect, I agree with the holding of the trial Resident magistrate. The statements were of no evidential value and therefore it did not controvert the evidence of the Respondent.
23. I am, therefore, convinced that the Respondent presented evidence which established his case on a balance of probabilities. I am also satisfied that the Appellant was properly found to be liable. The appeal therefore, against liability must fail.
24. On Quantum, the Appellant has complained that the award given to the Respondent is inordinately high. It is not in dispute that the Learned Resident Magistrate awarded the Respondent Ksh.800,000/- for general damages and Ksh.163,470/- for special damages.
25. The Respondent urged this court to find that the award he was given was reasonable and commensurate with the injuries he suffered and was within the range of comparable awards.
26. It is not in dispute that the Respondent sustained compound fractures of the tibia and fibula. It is also not in dispute that the Respondent was on plaster for six months during which period he could not work.
27. The record shows that the learned Resident Magistrate took into account past awards in respect of similar injuries which indicated the court's made awards between Ksh.600,000/- and Ksh.700,000/-.
28. On appeal, the appellant urged this court to adjust the award of Ksh.800,000/- downwards to Kshs.400,000/-.With respect, I am persuaded by the Appellant that the award of Ksh.800,000/- and general damages as inordinately high.

29. Consequently, I am entitled to interfere with award. I hereby set aside the award of Ksh.800,000/- and instead substitute it with an award of Ksh.600,000/-.

30. On special damages, the trial Resident Magistrate made an award of Ksh.163,470/- as prayed in the Plaint and proved. On his head, the Respondent gave the particulars of special damage in paragraph 4 of the plaint. In summary, he sought Ksh.153,600/- for lost earning for eight months and Ksh.11,870/- as medical costs and report.

31. The learned Resident magistrate did not analyze the evidence before making the award on special damages.

32. It is not in dispute that the Respondent pleaded special damages. The question is whether the claim for special damages was proved. The record shows that the Respondent submitted evidence showing he incurred Ksh.11,870/- on medical reports and costs.

33. I am convinced the Respondent discharged the burden of proof on this claim. The Respondent was emphatic that he did not work for eight (8) months and that in normal circumstances he used to earn a sum of Ksh.800/- per day. This claim was not seriously contested by the Appellant save for at the submission stage.

34. The Respondent was a mason. In such works, one does not expect that receipts are issued. In most cases masons are self employed and rarely keep documentation.

35. I find the figure of Ksh.800/- per day to be reasonable. The Respondent's evidence was controverted, therefore, I am convinced the claim as proved on a balance of probabilities.

36. In the end, I find no merit in the appeal against the order on liability and the award of special damages. However, the appeal against the award on general damages is allowed.

37. For avoidance of doubt, the decision on appeal gives rise to issuance of the following orders: -

i) The appeal against liability is dismissed.

ii) The appeal as against quantum is dismissed save that the appeal as against the award of Ksh.800,000/- as general damages is allowed. Consequently, the aforesaid award is set aside and is substituted with an award of Ksh.600,000/-

iii) Each party to bear its own costs on appeal.

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

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J K SERGON

JUDGE