



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 18 OF 2017

AMAL HAULIERS LTD.....APPELLANT

VERSUS

ABDULNASIR ABUBAKAR HASSAN.....RESPONDENT

(Being an Appeal from the Judgement and decree of the Honourable Mr. R.K. Ondieki,

Senior Principal Magistrate delivered on 3rd March, 2017 at Kilifi)

JUDGEMENT

1. The Appellant, Amal Hauliers through the memorandum of appeal dated 21st March, 2017 seeks to partially upset the judgement entered in favour of the Respondent Abdulnasir Abubakar Hassan in Kilifi Principal Magistrate's Court Civil Case No. 237 of 2016 on the grounds that:

“1. THAT the Learned Magistrate erred in law and fact in finding the Appellant 100% liable for the road traffic accident which occurred on 22nd June 2016.

2. THAT the Learned Magistrate erred in law and fact in awarding General Damages of Kshs. 400,000/- to the Respondent when he failed to rely on the evidence on record thereby arriving at a wrong decision.

3. THAT the Learned Magistrate erred in law and in fact when he failed to consider the authorities relied on by the Appellant in the trial court vis-à-vis those of the Respondent hence arriving at a manifestly excess award of Kshs. 400,000/- in General Damages.

4. THAT the Learned Magistrate erred in law and in fact in awarding Special Damages of Kshs. 17,930/- which amount was not specifically pleaded by the Respondent.

5. THAT the Learned Magistrate erred in law and fact in failing to consider the submissions tendered by the Appellant herein vis-à-vis those of the Respondent hence arriving at the wrong decision.”

2. A perusal of the grounds of appeal discloses that the Appellant is dissatisfied by the trial court's findings on liability and quantum of damages.

3. This being a first appeal, this court has a duty to consider the evidence adduced afresh in order to arrive at its own independent decision.

4. In brief, the facts of the case are that on 22nd June, 2016 the Respondent was travelling in a public service vehicle registration number KCD 609F from Kilifi to Mombasa. On reaching Komaza area at about 7.00 p.m. the motor vehicle rammed into the Appellant's lorry registration number KAN 884L pulling trailer ZB 6263. The Respondent sustained injuries and was rushed to hospital where he was admitted for one day.

5. The evidence of DW1 Vasco Baya Changawa shows that the vehicle which had broken down on the left lane of the Kilifi-Mombasa road was hit by the matatu about ten minutes after the breakdown. This evidence was confirmed by PW3 Police Constable Bernard Maithya who stated that the lorry was stationary at the time the matatu rammed into it.

6. DW1 stated that he had displayed life savers but PW3 stated that there were no life savers at the scene of accident. DW1 stated that several other vehicles had passed the site prior to the accident. The evidence would therefore show that the drivers of the two vehicles shared the blame for the accident.

7. The question is whether the trial magistrate erred in holding the Appellant 100% liable for the accident. I have considered the submissions made by the advocates for the parties on this issue. In arriving at the decision to hold the driver of the lorry 100% liable the trial magistrate stated, *inter alia*:

“In any event, the plaintiff was a passenger in the motor vehicle and so had no control in the manner the vehicle was being driven and so, no liability can be attributed to him.”

8. In the case at hand the trial magistrate was holding the Appellant jointly and severally liable for the negligence that resulted in the Respondent suffering loss. The Respondent being a passenger did not in any way contribute to the occurrence of the accident. As stated by the trial court, he was travelling at **“the tender mercies of the driver”** of the matatu. The drivers of the lorry and the matatu and by extension their masters were jointly liable for the accident. The tortfeasors were 100% liable for the accident as the Respondent did not contribute to the occurrence of the accident in any way. The Respondent was entitled to pursue one of the tortfeasors.

9. On the issue of the quantum of damages, counsel for the Appellant submitted that an award of Kshs.400,000 was inordinately high considering the kind of injuries suffered by the Respondent.

10. Counsel for the Appellant accused the trial magistrate of failing to consider its submission that an award of Kshs. 200,000 was adequate in the circumstances of the case. Counsel pointed out that they had referred the trial court to the decisions in **Kiwanjani Hardware Ltd & another v Nicholas Mule Mutinda [2008] eKLR** and **Channan Agricultural Contractors Ltd v Fred Barasa Mutanyi [2013] eKLR** where claimants who had suffered injuries similar to those suffered by the Respondent were awarded Kshs. 150,000 as general damages for pain and suffering. It was the submission of counsel that it was erroneous for the trial court to rely on the case of **Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi [2005] eKLR** in awarding Kshs. 400,000 as general damages as the injuries suffered by the plaintiffs therein were not similar to the injuries suffered by the Respondent herein.

11. Opposing the appeal on the issue of quantum of damages, counsel for the Respondent asserted that no material had been placed before this court to warrant disturbance of the award made to the Respondent. According to counsel for the Respondent, the trial court arrived on the award after considering the nature of the injuries sustained, the authorities cited, inflationary trends and the figures proposed by the parties.

12. Should the court interfere with the award made by the trial court? In **Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] eKLR**, Nyarangi, JA stated that:

“This court will not interfere with the question of damages awarded by the trial court unless it is satisfied that the award was based on some wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred.”

13. Dr. S.K. Ndegwa testified as PW1 and told the trial court that the Respondent suffered concussion, blunt injury to the chest, cut wound on the left foot and blunt abdominal trauma. The doctor concluded that the Respondent suffered a 2% disability due to chronic pains and known risks of head injury like mental illness or epilepsy.

14. In his judgement the trial magistrate stated that he had considered the submissions made by the advocates for the parties. He had also looked at the authorities cited by them before making the award.

15. In **Kiwanjani Hardware Ltd** (supra), the plaintiff had suffered a blunt injury to the head without loss of consciousness; blunt injury to the neck; a cut to the throat; blunt injury to the left shoulder and back; blunt injury to the chest; blunt injury to the right forearm; and deep penetrating wound on the left leg with cuts and bruises on the same leg. An award of Kshs. 150,000 was found reasonable by the appellate court. It is noted that those injuries were slightly more serious than those suffered by the Respondent herein. However the award was made in 2008.

16. In **Channan Agricultural Contractors Ltd** (supra), the injuries suffered by the plaintiff were blunt injury to the chest and head and cut wound to the left leg. The respondent complained of chest pain and frequent headache. These injuries are close to those suffered by the Respondent herein. An award of Kshs. 250,000 as general damages for pain and suffering was, on appeal, reduced to Kshs. 150,000. That was in 2013.

17. **Catherine Wanjiru Kingori** (supra) was decided in 2005. The 1st plaintiff was awarded Kshs. 300,000 whereas the 2nd plaintiff was awarded Kshs. 100,000. The 3rd plaintiff received Kshs. 350,000 and the 4th plaintiff was awarded Kshs. 100,000. The 1st plaintiff suffered injury to the left ankle, injuries on the legs and injuries on the chest. The 2nd plaintiff suffered injury on the back. The 3rd plaintiff suffered multiple soft tissue injuries, injury on the left elbow joint and injuries on both ankles. The 4th plaintiff suffered injury on the neck and hand headache.

18. Looking at the authorities cited, taking into account inflation and considering the injuries sustained by the Respondent herein I find that an award of Kshs. 400,000 was on the higher side in the circumstances. There was no justification for awarding Kshs. 400,000 as general damages for pain and suffering. I find the award was inordinately high in the circumstances of the case. The appeal on quantum therefore succeeds and the award of Kshs. 400,000 is set aside and substituted with an award of Kshs.250,000 as general damages for pain and suffering.

19. Owing to the partial success by the Appellant, I direct each party to meet own costs of this appeal. The Respondent shall however have the costs for the trial in the subordinate court.

Dated, signed and delivered at Malindi this 18th day of October, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT