



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 663 OF 2016

ANDY FORWARDERS SERVICES LIMITED.....APPELLANT

VERSUS

JULIUS NDUTI MWIKYA.....RESPONDENT

(Being an appeal from the Judgment delivered on 11th March, 2012 by Hon. Mr. A. Lorot (Principal Magistrate) Milimani Commercial Courts in CMCC No. 6133 of 2010).

JUDGMENT

1. The Appellant, Andy forwarders Services ltd was sued by the Respondent, Julius Nduti Mwikya for damages arising out of a road traffic accident. The Respondent attributed the accident to the negligent manner that he claimed the Appellant's motor vehicle registration No. KBA 778N was being driven.
2. The claim was denied. In the alternative, the Appellant contended that the accident was wholly or substantially caused by the Respondent.
3. The Respondent in a reply to the defence joined issues with the Appellant and reiterated the contents of his plaint.
4. After hearing the case, the trial magistrate found the Appellant 100% liable for the accident and awarded Ksh.600,000/= general damages, Ksh.64,310 special damages, interest and costs.
5. The Appellant was aggrieved by the said judgment and appealed to this court on grounds that can be summarized as follows:
 - (a) That the award of general damages was excessive.
 - (b) That the special damages were no supported by evidence.
 - (c) That the judgment was against the weight of the evidence.
6. The appeal was disposed of by way of written submissions. I have considered the said submissions.
7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

8. The Respondent's evidence (PW1) was that on 7th December, 2009 he was knocked down by the motor vehicle in question while walking off the road. The Respondent blamed the accident on the motor vehicle which he stated was at a high speed. During cross-examination, the Respondent denied having been crossing the road at the material time.

9. PW2 Reuben Kyalo Nduti who is the Respondent's son and was with him at the material time gave evidence that they had crossed the road when the vehicle left the road and knocked down the Respondent. The evidence of PW2 corroborates that of PW1.

10. DW1 Fredrick Wambua Muthoka testified on behalf of the Appellant. It was his evidence that the Respondent and three others crossed the road while running. That he was at the innermost lane and was at a speed of about 70 KPH. That he braked and swerved to avoid the pedestrian but hit one of them.

11. The evidence of DW1 reflects that he swerved towards "the other lane" and never left the road is inconsistent with his evidence that there were many vehicles on all the lanes. This gave credence to the Respondent's evidence that the vehicle went off the road.

12. Although one of the grounds of appeal is that the whole judgment of the lower court is against the weight of the evidence, this ground of appeal appears to have been abandoned in the written submissions.

13. I find the trial magistrate correctly held the Appellant 100% liable for the accident.

14. The Respondent produced as exhibits a discharge summary from Kenyatta National Hospital, a P3 form, Out Patient Record from Mbooni District Hospital, medical report by Dr. R.P. Shah dated 1st August, 2011 and a medical report prepared by Dr A.O. Wandugu dated 2nd September, 2010.

15. Both medical reports reflect that the Respondent sustained a fracture of the femur bone right thigh and head injuries. Both medical reports are also in agreement that the thigh bone was operated and fixed with a K-nail and required to use crutches for about 2-3 months.

16. Dr. R.P. Shah's opinion was that the Respondent recovered fully and was expected to fully resume his work after about 4 ½ months. However, according to Dr. A. O. Wandugu the complainant suffered pains and weakness of the right leg and that early onset of osteoarthritis was inevitable. The report also mentions loss of consciousness. That head injuries also required monitoring for about three years. Dr. R. P. Shah's report is the later one came about one year later than Dr. A.O. Wandugu. The Respondent may have made some progress towards further recovery.

17. The Appellant's counsel submitted for an award of Ksh.250,000/= as general damages. The case of **Yunis Malik v Eliud Muriithi & another [2005] eKLR** was relied on. In the said case, an award of Ksh.400,000/= general damages was made for a fracture femur, fractured three ribs, loss of consciousness and soft tissue injuries.

18. The Respondents in their submissions supported the award of the lower court.

19. On my part, I have also looked at the follow 2 authorities:

(a) **George Kiboi Waitaiga v Kevin Oino Simba [2011] eKLR** where an award of Ksh.500,000/= was made for a fracture of the left femur, cerebral contusion and bruises on the head.

(b) **Fred Mohinga Kipkigiya v David Agreey Zimbiru [2011] eKLR** where an award of Ksh.650,000/= was made for two fractures and soft tissue injuries.

20. I find the award of general damages to be within range of similar award. I am guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727**, where the Court of Appeal observed:-

"...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....."

21. Special damages pleaded was Ksh.64,310/=. The Respondent produced the police abstract and receipts for the rest of the claim. The special damages were therefore proved.

22. Having re-evaluated the evidence on record, I find no merits in the appeal and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 29th day of Nov., 2018

B. THURANIRA JADEN

JUDGE