



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 68 OF 2014

WILFRED WANJALA.....APPELLANT

VERSUS

SAMWEL GUDU.....RESPONDENT

(Appeal against the judgement and decree by Hon. S. Mokuu (SPM) delivered in Eldoret CMCC No. 781 of 2010 on 22nd April, 2014)

JUDGEMENT

1. The appellant filed this appeal on grounds that:

- a. That the magistrate erred in law and fact in holding that the appellant had failed to prove his case against the respondent on a balance of probability.
- b. That the learned magistrate made a fundamental error of law and fact in finding that the appellant did not demonstrate how the accident occurred despite there being on record clear and coherent evidence by two witnesses in support of the appellant's claims.
- c. That the magistrate misdirected himself in accepting the respondent's assertions that the cause of the accident was the motor cycle rider who was carrying the appellant as well as firewood thereby overloading it in which statement was not corroborated with independent evidence neither was it brought out during cross-examination of the appellant's witnesses.
- d. That the magistrate erred in law and in fact by failing to find that the police abstract having been produced by consent of both parties the information therein ought to be taken as uncontroverted including the fact that the police found the respondent culpable and were intending to charge him with the offence of careless driving.
- e. That the magistrate erred in law and in fact by failing to take into account the respondent's own testimony wherein he admitted that he was driving to Masinde Muliro University of Science and Technology where he was to give a lecture thereby admitting to having been over speeding and causing the accident.
- f. That the learned magistrate erred in law and in fact by failing to consider the appellant's evidence and the testimony of PW1 and reached an erroneous conclusion thereby occasioning a miscarriage of justice.
- g. That the learned magistrate misdirected himself by failing to take into account the fact that the appellant was merely a pillion passenger and was not in any way to blame for the accident.
- h. That the learned magistrate erred in law and in fact by giving undue weight to the respondent's evidence as against the appellant without setting out the grounds for the said belief and disbelief of the respective evidence and or testimony.
- i. That the learned magistrate erred in law and in fact by failing to consider the appellant's submissions thereby arriving at an unfair decision and occasioning a miscarriage of justice.
- j. That the learned magistrate erred in law and misdirected himself by ignoring relevant facts and taking into account irrelevant considerations thereby arriving at a bias decision against the appellant.
- k. That the learned magistrate erred in law and in fact by failing to properly evaluate the evidence on record thereby arriving at a decision that is against the evidence on record.

l. That the magistrate erred in law and did not exercise his discretion on the correct principles thereby assessing general damages that were inordinately low in the circumstances vis a vis the injuries sustained.

m. That as a consequence of the foregoing the learned magistrate erred in law and in fact in finding that the appellant had not proved his case on a balance of probability in spite of the nature and circumstances of the case.

2. The appellant sued the respondent seeking damages for alleged loss and damages suffered as a result of an accident that is said to have occurred on 11th May, 2010. It was the appellant's case that he was travelling as a pillion passenger aboard motor cycle registration number KMCH 186 L along Kisumu Road near Ndalat Junction in Eldoret Town at around 11.00 am when the respondent's driver negligently managed motor vehicle registration number KBJ 863 L that it veered off the road and hit him as a result of which he suffered head injury, his scalp was swollen and tender, blunt trauma to the neck which was tender, both hips were swollen and tender, both shoulders and both arms were swollen and tender with a cut wound on the right hand and both lower limbs were swollen and tender with a cut wound on the left thigh and left knee. The appellant sought special damages for medical report for KShs. 2,000/- and KShs. 200 for police abstract. He stated that he was taken to Moi Teaching and Referral Hospital (MT & RH) and produced treatment notes in that regard as P. Exhibit 1. That he was later examined by Dr. Aluda and a medical report prepared at a cost of KShs. 2,000/-. He produced the medical report and receipt as P. Exhibit 2 (a) and (b). That he reported the matter to Eldoret Central Police Station and was issued with a p3 form (P. Exhibit 3) and a police abstract (P. Exhibit 4). He blamed the driver of the motor vehicle for the accident and stated that he wanted to be compensated for the loss and damages suffered. On cross examination, the appellant stated that he did not see the vehicle. That he had open shoes and did not have a helmet. He stated that he lost consciousness when he got knocked and regained consciousness in hospital. That he learnt the details of the vehicle at the police station.

3. The respondent (DW1) testified that he was on 11th May, 2011 driving his motor vehicle KBJ 863 L from Eldoret to Kisumu. At Ndalat he saw the suit motor cycle moving from the opposite direction. That the motor cycle lost control and hit the vehicle on the driver's door. That the motor cyclist had a pillion passenger and a bundle of firewood. He stated that the bend is sharper from Kisumu direction.

4. The appellant contended that the respondent did not call a witness to corroborate his evidence or rebut his evidence. That the respondent's evidence that he saw the motor cycle shows that he saw the same but chose to negligently manage the vehicle thereby he is liable. In support of his arguments, the appellant relied on section 107 of the Evidence Act, Leonard Nyongesa v. Derick Ngula Righa [2013] eKLR, Kirugi & Another v. Kabiya & 3 others [1987] KLR 347, Baker v. Market Halborough Industrial Co-operative Society Ltd [1953] 1WLR 1472 and Farah v. Lento Agencies and Multiple Hauliers Ltd v. Ralids Muthoni Kimani [2015] eKLR. On quantum, it was submitted that in view of the extent of injuries suffered and the current rate of inflation, an award of KShs. 1,000,000/- suffices. He in that regard relied on Ali Abdalla Mbarak v. Jagdish Udani, Mombasa HCCC No. 3 of 2002 and David Kimathi Kaburu v. Dionisius Mburugu Itira, Meru HCCC No. 18 of 2016. On special damages, the appellant submitted that he pleaded and proved KShs. 2,000/- which he was entitled to. In that regard he cited National Social Security Fund Board of Trustees v. Sifa International Limited [2016] eKLR, Macharia & Waiguru v. Muranga Municipal Council & Another [2014] eKLR and Provincial Insurance Co. EA Ltd v. Mordekai Mwanga Nandwa, KSM CACA 179 of 1995. It was the respondent's submission that the appellant did not call an eye witness to support his case and that he could not explain the circumstances surrounding the accident thereby he failed to prove liability on the part of the respondent. That the police abstract merely proves that an accident was reported. The respondent thereby cited Peter Kimani Kimunya v. Aden Guyi Haro [2014] eKLR and Alfred Kioko Muteti v. Timothy Miheso & Another [2015] eKLR. That if the appellant is found to have proved liability, the sum of KShs. 100,000/- would be reasonable to compensate him. The respondent relied on Caroline M. Kabae & another v. Nancy Muthoni Njora & another [2010] eKLR.

5. This is a first appeal and thus this court is therefore under duty to re-evaluate the evidence adduced before the subordinate court both on points of facts and law and come up with its findings and conclusions. See: Selle v. Associated Motor Boat Co. Limited [1968] EA, 123. It is an undisputed fact that the accident occurred on the material day. The issues that fall for this court's determination therefore are whether or not the appellant proved liability on the part of the respondent and if so, the damages he is entitled to.

6. It emerged from the respondent's evidence that he saw the motor cycle coming from the opposite direction. That it lost control and hit his vehicle. From the said evidence an inference is made that the respondent too was driving in a careless manner no wonder despite seeing the motor cycle he could not control the vehicle to avoid the accident. Based on that disposition, this was an accident between two motor machines. As correctly submitted by the appellant, in cases where such an accident occurs and the court finds it difficult to ascertain liability it is safe to apportion the same at 50:50. Considering the above deduction, I borrow the holding in Isabella Wanjiru Karanja v. Washington Malele, Nairobi Civil Appeal No. 50 of 1981 (1982-1988) 1KAR 186 where it was held:

“What I find makes the distinction in their blameworthiness is the fact that Isabella had under her control a lethal machine when Washington had none and all things being equal she was under an obligation to keep a greater lookout for other road users.”

In the circumstances, I apportion liability as between the Appellant at 50:50.

7. On the issue of quantum of damages the Appellant is noted to have sustained head injury, blunt trauma to the neck, swollen scalps, swollen and tender hips, swollen shoulders and arms as well as cut wound on left thigh and left knee. He was examined by Dr. Aluda who formed the opinion that the said injuries would completely heal. The authority cited by the Respondent namely Caroline M. Kabae & Another =Vs= Nancy Muthoni Njora & Another [2010] eKLR appears relevant since the plaintiff therein who had sustained blunt injuries on forehead, anterior chest lower back, left hip and left knee was awarded general damages of KShs.80,000/=. These injuries are more or less similar to those of the Appellant herein. The treatment notes and the medical report clearly showed that the Appellant sustained soft tissue injuries. Due to the fact that the authority was cited several years ago the effects of inflation on the economy must be factored as well. I find an award of KShs.200,000/= would be adequate as general damages for pain, suffering and loss of amenities. On special damages, I find the sum of KShs. 2,200/= were pleaded but only a receipt for KShs.2000/= was produced. Hence I award special damages of KShs.2000/=. As the trial court appeared to have misapprehended the law and evidence regarding the Appellants injuries, an inordinately award of damages was arrived at and which warrants this court to interfere with it.

8. In the result the appeal succeeds. The judgement by the trial court is hereby set aside and substituted with an order that judgement is entered for the Appellant against the Respondent as follows:-

a. Liability50:50

b. General damages Kshs. 200,000/=

c. Special damagesKshs. 2,000/=

d. Half costs of the appeal and full costs in the lower court to the Appellant,

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this 28TH day of November, 2018.

O. SEWE

JUDGE