



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 181 OF 2009

JOHN MUTWII KISWILI.....APPELLANT

VERSUS

ISAIAH NZYIMI KILANGA.....1ST RESPONDENT

PACKAGING AND ALLIED (K) LTD.....2ND RESPONDENT

**(An Appeal arising out of the judgment of Hon. J.M. Munguti SRM delivered on 1st October 2009
in Machakos Chief Magistrate's Court Civil Suit No. 258 of 2008)**

JUDGMENT

Introduction

The Appellant was the original Plaintiff, and the Respondents the original 1st and 2nd Defendants in Machakos Chief Magistrate's Court Civil Suit No. 258 of 2008. The Appellant has appealed against the judgment of the learned trial Magistrate which was delivered in the said suit on 1st October 2009, wherein the learned magistrate apportioned liability at the ratio of 50:50 for an accident that occurred on 31st July 2007 along the Nairobi – Mombasa Road involving a collision between motor vehicle registration number KAX 498S, in which the Appellant was a fare paying passenger, and motor vehicle registration number KAH 982Y alleged to be owned by the Respondents. The trial Court awarded the Appellant a total award of Kshs 76,350/= against the 1st Respondent as general and special damages after deduction of the 50% contribution.

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 13th October 2009 in appealing against the said judgment. The grounds of appeal raised by the Appellants are as follows:

1. The learned trial Magistrate erred in law and fact by holding the 1st Defendant 50 % liable and exonerating the 2nd Defendant when evidence on record shows the two defendants should have been held 100% liable, jointly and severally.
2. The learned trial Magistrate erred in law and fact by totally disregarding the Plaintiffs submissions on both liability and quantum thus arriving at an erroneous finding.
3. The learned trial Magistrate erred in both law and fact totally disregarding the principle of judicial precedent in assessment of damages thus awarding inordinately low award on general damages taking into account the nature of injuries sustained by the plaintiff/ Appellant.

4. The learned trial Magistrate erred in law and fact by failing to award specials which were specifically pleaded and proved.

5. The learned trial Magistrate erred in law and fact by making finding on unpleaded issues and issues not raised by either of the parties.

The Appellant is praying that the judgment of the lower court on liability be set aside and substituted with a finding that the 1st and 2nd Respondents are 100% jointly and severally liable; and that the judgment of the lower court on quantum and special damages be set aside and substituted with a fair award thereof.

The Facts and Evidence

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect in **Jabane vs. Olenja [1986] KLR 661**, **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**.

I will therefore firstly proceed with a summary of the facts and evidence given in the trial Court. The Appellant instituted a suit in the lower court by filing a Complaint dated 19th February 2008 which was amended on 2nd May 2008 and further Amended on 25th June 2009, wherein he claimed that the accident on 31st July 2008 along the Nairobi- Mombasa Road was caused by the negligence of the Respondents and/or their agents or servants, who negligently drove managed and/or controlled motor vehicle registration number KAH 982Y causing it to collide, and as a result of which he suffered severe bodily injuries. The Appellant gave particulars of the Respondent's negligence and of the injuries he suffered in the said Complaint, and claimed special damages of Kshs 5,700/= and general damages.

The 1st Respondent filed a defence dated 29th August 2008, wherein it denied the ownership of motor vehicle registration number KAH 982Y or that the said motor vehicle was negligently driven by its driver, servant and/or agent causing the Appellant injuries and damage, and put the Appellant to strict proof. The Respondent also denied that the accident occurred on the place and date alleged, or that it caused the said accident by its negligence. The 1st Respondent averred that in the alternative, if the accident occurred then it was wholly and substantially due to the Appellant's or his agent's negligence in the manner in which he drove, controlled and/or managed his motor vehicle. The 1st Respondent gave the particulars of the said negligence.

From the record of the trial court proceedings, full hearing commenced on 14th April 2009 when the Appellant testified as PW1, and stated that on 31st July 2007, he was travelling from Makueni to Nairobi and that he boarded motor vehicle registration number KAX 498S at Machakos on the way to Nairobi. Further, that on reaching the Daystar University junction he saw an oncoming motor vehicle registration number KAH 982Y which was trying to overtake another motor vehicle, and which ended up blocking their path and colliding with the motor vehicle KAX 498S. He stated that he was injured on his right leg below the knee and left upper limb, and was admitted in hospital from 31st July 2007 to 6th August 2007. PW1 produced the P3 form, police abstract and the receipts for the police abstract and medical report as exhibits.

The second witness for the Appellant (PW2) was Dr. Kimuyu Judith, who filled the P3 form for the Appellant on 21st January 2008, which she produced as an exhibit. She testified that the Appellant suffered cut wounds to the left upper limbs and a fracture of the right tibia, and was inserted with a plate after an operation. She also produced a medical report as an exhibit and the receipts for the same and for attending Court.

The 1st Respondent gave evidence as DW1, and he testified that he was the driver of motor vehicle registration number KAH 982Y when the accident occurred, and that he saw a Nissan Matatu coming at

a very high speed and flashing its light which to him was an indication it was over speeding. Further, that he tried to swerve to the extreme right to avoid the collision but he hit a ditch and came back to the road, and ended up colliding with the Nissan Matatu. He further testified that he charged in Court with careless driving and admitted the charge, and was fined Kshs 4,000/=

On 27th August 2009 a consent was entered into between the Appellant and 1st Respondent and adopted by the trial Court to admit records from Kenya Revenue Authority and a medical report by Dr. Barad without calling their makers, and the same be attached to the Respondent's submissions on quantum. The Appellant and 1st Respondent then closed their respective cases.

The 2nd Respondent did not call any witnesses to testify during the trial, and from the record, interlocutory judgment was entered against the said 2nd Respondent on 13th August 2009 for failing to enter appearance and/or file its defence subject to formal proof.

The Issues and Determination

The Appellants and Respondent canvassed this appeal by way of written submissions. The Appellants' learned counsel, Mulyungi & Mulyungi Associates, filed submissions dated 16th March 2016, while the Respondent's counsel, Nyandoro & Company Advocates filed submissions dated 30th May 2016.

The Appellant's counsel in his submissions pointed out errors of fact made by the trial Court in its judgment, which have also been noted by this Court, being the finding that there was a 3rd Defendant in the suit when in effect there were only two Defendants after the final amendment made to the Plaint; that no judgment was entered against the 2nd Defendant when in fact interlocutory judgment was entered against the said Defendant as observed in the foregoing; and that no submissions were filed by the Plaintiff, when there were such submissions on record that were filed on 3rd September 2009 before judgment was reserved on 10th September 2009.

Therefore there are errors of fact made in the said judgment by the trial Court which from the outset affect the findings made therein.

On the findings on liability, the Appellant analyzed the evidence of PW1 and DW1 which according to him showed that the point of impact was on the lane of motor vehicle registration number KAX 498S, and also the fact that DW1 admitted pleading guilty to the charges of careless driving preferred against him in court arising from the accident. Reliance was in this regard placed on section 47 A of the Evidence Act. It was also submitted that this was not a proper case in which to apportion liability because:-

- I. DW1 who was the driver of motor vehicle registration number KAH 982Y pleaded guilty upon being charged.
- II. The point of impact was on the wrongful lane of motor vehicle registration number KAH 982Y
- III. The driver of motor vehicle registration number KAH 982Y ignored the clear warning of flashing lights and instead and wrongfully interpreted it to mean speeding by motor vehicle registration number KAX 498S .

The 1st Respondent's counsel on the other hand argued that the learned Magistrate did not err in law and fact when he held the 1st Respondent 50% liable, as the injury of the Appellant was sustained out of head on collision. According to the 1st Respondent, the motor vehicle KAX 4985 was to blame because its driver flashed the lights and thereby blinded the driver of the motor vehicle KAH 982Y thus causing the two vehicles to collide. Further, that the learned magistrate rightly held that though the first Respondent was charged and convicted, he was not the only one to blame.

On the issue of quantum of damages, the Appellant submitted that the trial court did not appreciate the

serious injuries suffered by the Appellant, thus arriving at an inordinately low award on quantum, and also misapplied the principle of judicial precedent in assessment of damages, when it relied on the case of **Francis Mwangi Muchume vs Francis Kimani Mbugua, HCCC No 263 of 1994** cited by the Respondents in awarding general damages of Kshs 150,000/ =. It was contended that in the fracture in the said judicial authority was stated as simple and healed with no disability, unlike in the present case where there more serious injuries and disability.

The Appellant urged the Court to award Kshs 800,000/ = as damages for pain, suffering and loss of amenities, and relied on the decisions in **Julius Edwin & Anor vs George Kithinji Mwiandi (2014) e KLR** where an award of Ksh. 800,000/ = was upheld for injuries to the leg leading to shortening, and **Kenya Farmers Association Ltd & Anor vs Zipporah Kobilu Kangogo (2015) e KLR**, where an award of Kshs 600,000/= was made for similar injuries. Similar authorities were also cited by the Appellant in the submissions he filed in the trial Court.

Lastly, it was submitted that the trial Court in its judgment observed that the Appellant had pleaded Kshs 2 ,700/ = and proved Kshs 10,500/ = which was erroneous, as the Appellant in the Further Amended Plaint filed on 26/ 6/ 2009 pleaded Kshs 5,700/ = and produced a receipt for the P3 form of Kshs. 1,500/ and for the medical report of Ksh 4,000/ as proof.

The 1st Respondent on its part argued that the trial magistrate applied the principle of precedent in his assessment of damages. Further, that the case of **Francis Mwangi Muchume v Francis Kimani Mbugua HCC No. 263/1994** was relied on in which an award of Ksh. 150,000 was awarded as general damages.

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that both the issues of liability and quantum of damages are contested, and particularly whether there was a basis for finding the 1st Respondent only 50% liable, and the 2nd Respondent not liable for the accident that occurred on 31st July 2007.

The legal burden of proof is set out in sections 107(1) of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, which provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

In addition, the evidential burden is cast upon a party to prove any particular fact which he desires the court to believe in its existence under **sections 109** of the *Evidence Act* as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The position as to proof in civil cases was reiterated in the case of **Kirugi & Anor vs Kabiya & 3 Others [1987] KLR 347** wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof. The Appellant therefore had both the legal and evidentiary burden of proof of any facts alleged to the standard required which is on a balance of probabilities.

I have evaluated the evidence given in the trial Court, and note that the Appellant testified that the car he was in, was being driven on its lane of the road and towards Nairobi from Machakos. This would normally be the left side of the road. DW1 was driving on the same road from Nairobi which would normally have placed him on the right side of Appellant, which would have been DW1’s left lane. DWI testified that he then tried to swerve to the extreme right and collided with the car registration KAX 4985. This testimony places him on the lane of the car KAX 4985 and corroborates the evidence of PW1. In addition, the Respondents did not controvert the evidence that DW1 was overtaking another motor vehicle at the time, and DW1 admitted to a charge of careless driving and was convicted and fined.

It is my view that the evidence by PW1 and admission by DW1 was sufficient to prove negligence on the part of the 1st Respondent, and the particulars thereof alleged in the Appellant's Further Amended Plaint of failing to exercise due and reasonable care, driving carelessly and dangerously, failing to keep any or proper look out, and moving from his lane into that of oncoming vehicles. It is also my finding from the evidence that DW1 was substantially to blame for the accident that occurred on 31st July 2007 involving the two motor vehicles.

As regards apportionment of liability, I note that the reason given by the trial magistrate for blaming motor vehicle registration KAX 498 S was because it was flashing lights when it collided with motor vehicle registration number KAH 982 Y. The police abstract produced by the Appellant as an exhibit shows that the accident took place at 3pm on 31st July 2007. It is therefore not clear how flashing of lights in daylight can be indicative of negligence, other than being used as a warning sign to an oncoming vehicle.

This finding notwithstanding I will still allocate minimal contributory negligence to the driver of motor vehicle registration KAX 498 S, for reasons that there was an element of failure on his part to take steps to avoid the accident including swerving or driving at a lower speed. I accordingly apportion liability at 80:20 in favour of the Appellant.

On the liability of the 2nd Respondent, this Court notes that interlocutory judgment was entered against the said Respondent. The parties in the trial Court in addition consented to the production of a copy of a records from Kenya Revenue Authority dated 3rd September 2008 that showed that as at 31st July 2007 the motor vehicle registration number KAH 982 Y was owned by the 2nd Respondent, Packaging & Allied K. Ltd.

Section 8 of the Traffic Act (Chapter 403 of the Laws of Kenya) which provides for registration of motor vehicles provides as follows:

“The person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle“

It is therefore the position that a logbook or certificate of search is not conclusive proof of ownership, and though such document may purport to show the registered owner, it may not be conclusive proof of actual ownership of a motor vehicle as the above section clearly points out that the contrary can be proved.

In the case of **Samwel Mukunya Kamunge vs John Mwangi Kamuru Civil Application No.34 of 2002**. Okwengu, J (as she then was) stated as follows in this regard:-

“It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often time's vehicles change hands but the records are not amended.

The 2nd Respondent did not deny ownership of the motor vehicle, and having offered no evidence to contradict the information from Kenya Revenue Authority, the Appellant had established on a balance of probability that motor vehicle registration number KAH 982 Y was legally owned by the 2nd Respondent.

The police abstract produced as an exhibit by the Appellant also showed that the 1st Respondent was owner of the said motor vehicle, and this Court finds him to have been a beneficial owner of the said motor vehicle by being in actual possession and having use of the said vehicle at the time of the subject accident.

On the remaining issue of damages, it is an established principle of law that that the Appellate court will

only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727**, **Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**).

This Court in its findings in the foregoing has illustrated that the trial Court in this respect did leave out various relevant factors including the issues raised in the Appellant's submissions, and the nature of the liability of the 1st and 2nd Respondents.

In addition, the legal principles that apply to award of damages is that a sum should be awarded which is in its nature a conventional award, in the sense that awards for comparable injuries should be comparable, and the amount of the award should be influenced by the amounts of awards in previous cases in which the injuries appear to have been comparable, and adjusted in light of the fall in the value of money since such awards were made. See in this regard **Kemp & Kemp on The Quantum of Damages, Volume 1** paragraphs 1-003. In my view to be comparable the previous cases must have been made at the time or close to the time the injuries were suffered by a claimant, hence the provisions for adjustment.

The injuries suffered by the Appellant in this regard from the medical report produced by PW2 as an exhibit were a cut wound of the left upper limb, cut wound of the right lower limb and commuted right tibia fracture at distal 1/3. It is indicated in the report that the Appellant suffered a shortening of the right lower limb by 2 cm, was walking with a limping gait, and that movement at the ankle joint was restricted on flexion and extension. He was healed partially although he was still on crutches for weight support, and still had an inplant plate in his right tibia bone, which would require removal when the fracture healed completely. Lastly, that he needed occupational therapy to enable him carry out his daily chores.

It is evident that the injuries suffered by the Appellant in the present appeal were different from those in **Francis Mwangi Muchume vs Franics Kimani Mbugua, HCCC No 263 of 1994** that was relied on by the trial Court, in which the claimant had healed completely. The accident in the said case occurred more than 10 years before that in the present case, and an adjustment for inflation ought to have been made by the trial Court.

In the circumstances I find the authorities cited by the Appellant in his submissions herein and in the trial Court more comparable, and an award Kshs 600,000/= as general damages for pain and suffering would in my view be reasonable. Finally, I agree with the submissions made by the Appellant that there was an error made by the trial Court in its finding on the special damages that were pleaded and proved, which I find to be Kshs 5,500/=.

This appeal therefore succeeds in the finding that both the 1st and 2nd Respondents were jointly and severally liable for the accident that occurred on 31st July 2007; and in apportioning liability as between the owners of motor vehicle registration number KAH 982 Y and owner of motor vehicle registration number KAX 498S at the ration of 80:20 in favour of the Appellant; on the award of general damages which is substituted with an award of Kshs 600,000/=; and on the award of special damages which is substitute with an award of Kshs 5,500/=.

I consequently set aside the award in the trial court in this respect, and substitute it with a total award to the Appellant of Kshs 484,400/= as against the 1st and 2nd Respondent's both jointly and severally, which has been computed as follows arising from the findings in the foregoing:

(a) General Damages	600,000.00
(b) Special damages	<u>5, 500.00</u>
	<u>605,500.00</u>

Less 20% contribution 121,100.00

Total **484,400.00**

The Appellant is awarded 80% of the costs of the trial and Appeal as against the 1st and 2nd Respondent's jointly and severally.

It is so ordered.

DATED AT MACHAKOS THIS 22nd DAY OF MARCH 2017.

P. NYAMWEYA

JUDGE