



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 76 OF 2013

BAKARI MRINA NDAIKWA.....APPELLANT

VERSUS

ANN WANJIKU.....1ST RESPONDENT

RAISONS TRADING CO. LIMITED.....2ND RESPONDENT

(An Appeal from the Judgment and decree of Hon. Machage, Principal Magistrate, in Mariakani SRMCC No. 148 of 2010 delivered on 18th June, 2013)

JUDGMENT

1. On 13th January, 2009 the plaintiff (appellant) herein, Bakari Mrina Ndaikwa, was a fare paying passenger aboard motor vehicle registration No. KAN 622B belonging to the 1st defendant (1st respondent) when the said motor vehicle was allegedly hit from the rear by motor vehicle registration No. KAU 057C ZC 2246, a lorry that belonged to the 2nd defendant (2nd respondent). The Hon. Magistrate entered interlocutory judgment against the 1st defendant (1st respondent) for failure to enter appearance. After hearing 3 witnesses that testified in favour of the appellant's case, he found that the 2nd respondent was not liable for the accident. He therefore held the 1st respondent 100% liable and awarded the appellant general damages at the sum of Ksh. 70,000/= and special damages of Ksh 2,700/= as pleaded and proved.

2. The appellant being dissatisfied with the said judgment filed a memorandum of appeal on 5th July, 2013 raising the following grounds of appeal:-

- (i) That the Learned Magistrate erred in law and in fact in holding that no negligence was attributed to the 2nd defendant;
- (ii) That the Learned Magistrate erred in law and in fact in holding that the 2nd defendant was not liable for the accident;
- (iii) That the Learned Magistrate erred in law and in fact in dismissing the plaintiff's suit against the 2nd defendant; and
- (iv) That the Learned Magistrate erred in law and in fact in awarding the plaintiff general damages that were clearly on the lower side in the circumstances of this case.

As a result of the foregoing, the appellant prays for:-

- (i) The appeal to be allowed and the Judgment delivered on the 18th June, 2013 set aside; and
- (ii) For costs of the appeal to be borne by the respondents.

3. The Counsel on record filed written submissions which they expounded on verbally. Mr. Lewa, Learned Counsel for the appellant argued that the Hon. Magistrate fell into error when he found that no negligence was attributable on the part of the 2nd respondent. This was despite the appellant having pleaded particulars of negligence against the 1st and 2nd respondents in the plaint. It was his submission that the evidence tendered blamed both the respondents.

4. It was contended that the Hon. Magistrate relied on his personal knowledge in stating that a lorry cannot apply emergency brakes, yet no evidence of that nature was adduced. The said finding was therefore not supported by any evidence. Mr. Lewa relied on the case of **Kathimi Titus vs Almicdad Parcel Services Ltd & another** [2014] eKLR at p. 4 where the court found that the Judgment of the lower court should only have been based on the evidence presented before the court.

5. It was further argued that the Driver of the 2nd respondent's lorry could have assisted the court to reach a just decision if he had been called to adduce evidence. In reference to the written submissions filed by the 2nd respondent in the lower court, Counsel for the appellant submitted that the said respondent had admitted liability at 30% and proposed that the 1st respondent should bear liability at 70%. As such, the Hon. Magistrate should have found the 2nd respondent negligent.

6. Mr. Lewa contended that the award of Kshs. 70,000/= was inordinately low and was made without relying on the authorities that the Counsel for the parties had cited in the lower court. The court was informed that the appellant testified that he was still in pain but that fact was not considered by the Hon. Magistrate in assessment of damages. In the said Counsel's view, the amount awarded was plucked from the air without consideration of any authorities. He relied on the case of **Ziro Chimba Ziro vs Jarson Wario Elema & another** Msa HCCA No. 42 of 2013 to augment the foregoing submissions.

7. Ms Adhong, Learned Counsel for the 2nd respondent opposed the appeal. She submitted that no reason had been given as to why the court should interfere with the findings of the trial court. In her view, the award made was neither too high nor too low. She stated that the 2nd respondent had submitted on an award of Ksh. 50,000/= to 70,000/= before the lower court. She indicated that that the appellant's witnesses attributed the accident to the 1st respondent, thus the 2nd respondent was not liable. She added that submissions are meant to guide the court to arrive at a just finding supported by evidence, thus the holding by the Hon. Magistrate in not finding the 2nd respondent liable should not be interfered with. She added that the Hon. Magistrate had the discretion to make a finding on the issue of liability and prayed for the appeal to be dismissed with costs.

ANALYSIS AND DETERMINATION

The issues for determination are if liability should be apportioned between the respondents and if the quantum of damages should be varied.

8. The duty of the first appellate court was espoused in the case of **Shah vs Mbogo** [1968] EA 93, where the Court of Appeal stated thus:-

“I think it is well settled that a court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

This court will therefore analyze and re-evaluate the evidence tendered before the Hon. Magistrate and arrive at its own independent decision bearing in mind that it neither saw nor heard the witnesses testifying.

9. The appellant, Bakari Mrina Ndaikwa testified as PW1 before the lower court. His evidence was to the effect that on 13th January, 2009 he was travelling aboard motor vehicle registration No. KAN 622B along Mariakani-Samburu road. The vehicle (matatu) he was in short (sic) to overtake when he (sic) was hit from behind by the lorry. He further testified that he (Driver of the matatu) joined the road without ascertaining if there was a vehicle (the road was clear).

10. The appellant blamed the lorry for ramming into the matatu. The lorry whose registration number was KAU 057C, was owned by Raisons. The matatu was owned by Ann Wanjiru (sic). He informed the court that he got the information about the owners of the motor vehicles at the Police Station. It was his evidence that he was injured on the stomach, back and rib. He stated that the accident happened at 3.00 p.m., after which he was treated at Mariakani hospital and discharged at 7.00 p.m. His treatment notes were marked as MFI-1. He was issued with a police abstract at Mariakani Police Station where the accident was reported. The police abstract was marked as MFI-2. He paid Kshs. 500/= for it. He also paid Kshs. 200/=. He testified that he healed fully after one and a half months. His back however still pains.

11. A demand notice was issued which he produced as plt. exh. 4. He was examined by John Adede who prepared a report for which he paid Kshs. 2,000/=. He produced the report as plt. exh. 5 (a) and the receipt as plt. exh. 5 (b). He blamed both motor vehicles for the accident. He prayed for general and special damages as well as costs of the suit.

12. On cross-examination, the appellant stated that he was on the back seat of the matatu which had joined the main road to proceed on. He did not look back to see the other vehicle. He could not tell exactly what happened as he regained (sic) in hospital.

13. PW2 was No. 86123 PC Collins Muganda of Mariakani Traffic Department. He confirmed that an accident happened which was investigated by Sergeant Mwaniki. It occurred at Barracks stage. The Nissan matatu registration No. KAN 622B driven by Njogu Keta was hit from behind by a trailer registration No. KAU 057C ZC 2246 driven by Simon Muhoro Maina. The two vehicles were heading towards the same direction.

14. It was PW2's evidence that the appellant who was seated at the rear seat sustained injuries. He was taken to Mariakani District Hospital where he was treated. He was issued with a P3 form and a police abstract. PW2 produced the P3 form as plt. exh. 2 and the police abstract as plt. exh 3.

15. PW3 was Bildad Bargoge a Senior Clinical Officer at Mariakani District Hospital. He had clinical notes for the appellant who went to hospital on 13th January, 2009 after a road traffic accident. He complained of a backache and a cut. He had been seen at Samburu Health Centre on the same day where he was given antibiotics and analgesics. PW3 produced the clinical notes as plt. exh. 1.

16. On cross-examination, PW3 stated that the appellant was examined on 20th January, 2009 by PW3's colleague by the name of Mwangolo Chigulu. The appellant had sustained soft tissue injuries.

17. The Counsel on record agreed to have the medical report dated 20th October, 2010 (sic) produced as plt. exh. 5 and the receipt dated 20th October, 2013 (sic) for Kshs. 2,000/= produced as plt. exh. 6.

18. The defence called no witnesses. Counsel for the defendant by consent, produced a medical report dated 16th April, 2012 as def. exh.1.

19. In his Judgment the Hon. Magistrate found that the appellant had blamed the Driver of motor vehicle registration No. KAN 622B for taking to the road from the terminus without ascertaining safety of the

road and as a result he (sic) was hit from behind.

20. The Hon. Magistrate held that there being no other evidence to the contrary, motor vehicle registration No. KAN 622B was to blame for joining the road without ascertaining the safety of its passengers and as a result caused the accident. The Hon. Magistrate stated that he was aware that lorry (sic) to apply emergency brakes is almost impossible and the Driver of KAN (sic) was therefore 100% liable hence the owner is vicariously liable for the actions of the Driver. Having considered the medical reports which indicated that the appellant sustained soft tissue injuries which healed without resultant scars, he awarded him Kshs. 70,000/= as general damages and Kshs. 2,700/= as special damages, plus costs and interest at court rates.

21. In the submissions made in the lower court, Counsel for the appellant prayed for an award of Ksh. 150,000/= as general damages and relied on the case of **Kenneth Onyango & Otieno vs Hassan Genya & Another**, Nairobi HCCC No. 3944 of 1990 where an award of Kshs. 50,000/= was made as general damages. Due to the passage of time and inflation, Mr. Lewa had then submitted that Kshs. 150,000/= would do as general damages, payable by both defendants jointly and severally.

22. In the lower court, the 2nd respondent's Counsel prayed for apportionment of liability at 70:30 as against the 1st and 2nd respondents, respectively and for an award of general damages in the sum of Kshs. 50,000/= to 55,000/=. He at that time relied on HCC No. 1647 of 1988, **James Ndung'u Wainaina vs James Muregi Guchu**, delivered on 25th July, 1991 and HCC No. 2357 of 1990 and **Millicent Wangui Wamutegi vs Stephen N. Gathui**, a Judgment delivered on 26th July, 1991.

23. The evidence tendered before the lower court by the appellant clearly indicates that the 1st respondent's Driver joined a road from the terminus before ascertaining that it was safe to do so. As a result thereof, motor vehicle registration No. KAN 622B was hit from the back by a lorry registration No. KAU 057C ZC 2246 driven by the 2nd respondent's Driver.

24. The appellant herein sustained injuries on his back and a cut as a result of the accident as evidenced by the treatment notes from Mariakani District Hospital that were produced as plt. exh. 1 by PW3. A perusal of the court file reveals that although the proceedings indicate that the medical report by Doctor Ajoni Adede is dated 20th October, 2010, it is actually dated 12th October, 2010. It was produced by consent as plt. exh. 5. The said report states that the appellant sustained a blunt injury to the back and to the abdomen. At the date of examination the appellant had no complaints, the Doctor concluded that the appellant sustained soft tissue injuries.

25. The medical report by Dr. Udayann R. Sheth dated 16th April, 2012 produced as def. exh. 1 shows that the appellant sustained soft tissue injuries over the back and abdomen. He was treated as an outpatient at Samburu Health Centre and Mariakani District (sic). He had no complaint as at the date of examination on 13th April, 2012. There was no tenderness over the back and abdomen. In his opinion, the appellant had fully recovered, there was no deformity and permanent incapacity.

26. Although the appellant informed the court that his back was still painful, the two Doctors who examined him recorded in their medical reports that he had no complaint. I therefore hold that the appellant was not being candid when he testified in court on 19th June, 2012 and said that his back was still painful. I note that the medical examination by Doctor Sheth was conducted barely two months before the appellant testified in court. If the appellant's back had a problem, he would have had no difficulties in stating so to Doctors Adede and Sheth. I therefore do not believe that part of the appellant's evidence and I hereby disregard the same.

27. It is my finding that the Hon. Magistrate took into account extraneous issues that were not adduced in evidence when he stated that it is almost impossible for lorries to apply emergency brakes. The Hon. Magistrate also misdirected himself when he found the 1st respondent 100% liable for the accident when the evidence was clear that the 2nd respondent's lorry hit the 1st respondent's motor vehicle from the

back. The 1st respondent however bears more blame for having joined the main road before ascertaining that it was safe to do so. I therefore apportion liability on the percentages that had been proposed by Counsel for the 2nd respondent in the lower court at 70:30 against the 1st and 2nd respondent's, respectively.

28. The appellant's Counsel is of the view that an award of Ksh. 150,000/= as general damages would be adequate compensation. Counsel for the respondent proposed an amount of Kshs. 50,000/= - 70,000/= as general damages. The general principle on the circumstances in which an appellate court will interfere with an award of damages was stated in the case of **Bashir Ahmed Butt vs Uwaiz Ahmed Khan** [1982 – 88] KAR 5 as follows:-

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

29. The Hon. Magistrate in his Judgment awarded general damages without indicating the authorities that he had relied upon so as to arrive at an award of Ksh 70,000/=. The accident in issue happened on 13th January, 2009 and the Judgment was delivered on 18th June 2013. He should have taken into consideration the inflation of the Kenya Shilling as from the time when the accident happened up to the date of delivery of the Judgment. He did not state that he did so.

30. In the case of **Michael Kariuki Muhu vs Charles Wachira Kariuki & another** [2015] eKLR, the appellant therein suffered a deep cut wound on the right forehead, blunt head injury and blunt trauma on the left hip, the High Court awarded him Kshs. 120,000/= as general damages on 13th July, 2015. In **Peter Kahugu & another v Ongaro**, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR, the plaintiff suffered soft tissue injuries. An award of Kshs 80,000 was made. In **Mumias Sugar Company Limited v Julius Shibia**, High Court, Kakamega, Civil Appeal 112 of 2011 [2004] eKLR the court reduced the general damages for multiple soft tissue injuries to Kshs 100,000.

31. In the circumstances of this case, I am of the considered opinion that an award of general damages in the sum of Kshs. 120,000/= will be adequate compensation after taking into account inflationary trends since the time the accident happened in the year 2009. I also note that the appellant did not suffer any disability, permanent incapacity or disfigurement. I set aside the award of Kshs.70,000/- awarded by the lower court and substitute herewith an award of general damages at the sum of Kshs.120,000/=. Special damages remain at the sum of Kshs. and Kshs. 2,700/= as pleaded and proved.

32. The appeal is hereby allowed. I award costs of this appeal and of the case in the lower court to the appellant. Interest is also awarded to the appellant.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of April, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the appellant

No appearance for the 1st respondent

Mr. Owino holding brief for Mr. C.B. Gor for the 2nd respondent

Mr. Oliver Musundi - Court Assistant