



REPUBLIC OF KENYA
IN THE HIGH COURT
AT KISUMU
CIVIL APPEAL NO. 130 OF 2016
CONSOLIDATED WITH
CIVIL APPEALS NOS. 131 & 132 OF 2016

BETWEEN

JACOB OMULO ONYANGO.....1ST APPELLANT

JUSTUS OTIENO OHURU.....2ND APPELLANT

JULIUS OTIENO OCHIENG.....3RD APPELLANT

AND

JUBILEE JUMBO HARDWARE LIMITED.....RESPONDENT

(Being an appeals from the Judgments and Decrees of Hon. J. Sala, RM at the Senior

Resident Magistrates Court at Maseno in Civil Cases No. 171, 172 & 174 of 2012

dated 20th November 2014 respectively)

JUDGMENT

1. This is a first appeal from the judgment of the subordinate court. The duty of the first appellate court is now established and was elucidated in the case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 where Sir Clement De Lestang stated:

This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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.

2. These appeals were consolidated as they arise from the same accident. The appellants challenge the

judgment of the trial court dismissing their claims for damages for injuries sustained in a road accident that took place on 24th May 2011 along the Kisumu-Maseno road. The appellants were travelling aboard a Tuk Tuk vehicle registration number KAZ 533G (“the Tuk Tuk”). They claimed that the respondent’s driver, while driving a lorry registration number KAR 665H (“the Lorry”), drove it negligently and caused to collide with the Tuk Tuk.

3. The appeal is against the finding that the appellants failed to prove negligence on the respondent’s part. The evidence on the issue of liability as follows. **Julius Otieno Ochieng** recalled that on the material day, he was a passenger in the Tuk Tuk travelling towards Kisumu. It slowed down because of bump and at that place there were 2 vehicles in front and a lorry behind. He testified that the Lorry was travelling at a high speed headed in the same direction and it tried to overtake but due to oncoming vehicles, it swerved back to its lane and hit the Tuk Tuk on its right side whereupon it rolled into a ditch on the left side of the road. The driver of the Tuk Tuk, **Jacob Omulo Onyango**, recalled that on the material day he was riding toward Kisumu when, as a result of injuries, he sustained after the accident, he was left unconscious for 5 hours and later found himself in hospital.

4. On behalf of the respondent, **Fredrick Imbenzi** (DW 1), the turnboy, testified that as the Lorry was going back to Kisumu another vehicle tried to overtake the Lorry whereupon it hit the Tuk Tuk. DW 1 recalled that he heard a bang when the other vehicle collided with the Tuk Tuk. His position was that the Lorry did not hit the Tuk Tuk. He further stated that the Tuk Tuk only had the driver but no passengers. In cross-examination, he stated that he was sitting on the left side of the cabin hence he could not see Tuk Tuk being hit.

5. The Lorry driver, **George Karimi Macharia** (DW 3), recalled that on the material day as he was driving toward Kisumu, he saw a Tuk Tuk ahead of him. He overtook the Tuk Tuk as it was moving slowly and as he overtook it, a bus also overtook the Tuk Tuk and then overtook the Lorry. From the side mirror, he saw the Tuk Tuk drive off the road, overturn and land into a ditch. He stopped and went to put off the fire in the Tuk Tuk. He noted that the passengers and driver of the Tuk Tuk had alighted. He also told that court that DW 1 was dozing off and only woke up when he stopped the lorry. In cross-examination, DW 3 stated that the bus did not hit the Tuk Tuk and that it is the Tuk Tuk that drove off the road

6. After directing himself on the issue of burden of proof, the trial magistrate dismissed the appellants case because they had failed to prove the particulars of negligence pleaded in the plaint. The appellants’ case before this court is that the trial magistrate failed to consider the entirety of the evidence and find that the appellants proved their case on the balance of probabilities. Counsel pointed out the defence witnesses contradicted each other and that the trial magistrate did not deal with these contradictions. Counsel for the respondent supported the judgment and submitted that the appellants did not establish their case to the required standard.

7. The resolution of this appeal depends largely on the issue of the burden and standard of proof. Under **section 107** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. **Sections 108** and **109** of the *Act* further provide that the evidential burden that is cast upon any party with the burden of proving a particular fact which he desires the court to believe in its existence.

8. It is well established that the standard of proof in civil claims is on the balance of *probabilities*. This means that the Court will assess all the evidence advanced by each party and decide which case is more probable (see *Palace Investments Ltd v Geoffrey Kariuki Mwenda and Another NRB CA Civil Appeal No. 127 of 2007 [2007]eKLR*).

9. The issue then is which version of events is more probable. On the appellants’ side is the testimony of **Julius Otieno Ochieng** that is consistent with accident since an overtaking vehicle would probably hit the Tuk Tuk on its right side and cause it to overturn on the left side of the road. On the other hand, the key defence witness stated that there was no collision. Although DW 1, did not witness the collision, he recalled that he heard a loud bang which was as a result of a collision between the bus and the Tuk Tuk. If

there was no collision as asserted by DW 2, then why did DW 1 hear the loud bang? The evidence points to the fact that it was more probable that the DW 3 was overtaking dangerously without regard for other road users when he caused the Lorry to hit the Tuk Tuk and caused it to overturn and injure the appellants.

10. The learned trial magistrate did not consider the version of contradictory nature of the respondent's evidence vis -a-vis the appellant's case. The learned magistrate also erred in holding that the appellants did not call any police officer to shed light on the circumstances of the accident. The duty of the appellant was to prove its case on the balance of probabilities. The police abstract was produced without objection to confirm that the accident took place and that the appellants were involved in the accident. The learned magistrate also held that the appellants did not prove every particular of negligence pleaded in the plaint. This was the wrong approach and I hold that provided appellant proved a substantial part of the particulars of negligence pleaded, the court is also entitled to draw inferences from the primary facts proved by the evidence in deciding the key issue whether the respondent was negligent. After evaluating the evidence, I find and hold that the appellants proved that the respondent's driver was negligent. As there is no dispute that the appellants were injured in the accident, I now turn to the issue of quantum of damages.

11. Despite dismissing the appellants' claims, the trial magistrate did assess damages. It is proper, even in such cases, for the trial court to express its view on the the expected award. This principle was expressed in the **Selle Case (Supra)** by **Sir Clement De Lestang, VP** as follows:

It is however unfortunate that the learned Judge did not assess the damages as the case will now have to go back for that to be done. It is always advisable for a Judge of first instance to decide all the issues raised in the case before him so that further expenses to the parties and further delay may be avoided in the event of the Court of Appeal having to adopt the course which we must adopt in the present case. Had this been done it would not have been necessary to send the case back to the High Court for damages to be assessed thus increasing the large costs which the parties have already incurred ...

In the same case *Law, JA.*, expressed himself thus on the issue;

It is always desirable, in a suit for damages, for the trial Judge to make a finding as to the amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgment for the defendant. Much time and expenses can be avoided if this course is followed ...

12. This court therefore has two options; to remit the matter back to the trial court for determination or to proceed with assessment of damages based on the evidence on record. In my view, the latter option meets the demands of justice since the original suit was filed five years ago, and all the evidence and submissions are on record.

13. The 1st appellant, **Jacob Omulo Onyango**, testified that after the accident he woke up in hospital after 5 hours of being unconscious. According to the P3 form and medical report prepared by Dr Manasseh Onyimbi dated 14th June 2011, he sustained a head injury with damage to the base of the skull and eardrums, blunt chest injury, dislocated left shoulder joint and dislocation of the hip joint. The doctor noted that at the material time, the appellant was complaining of persistent headaches and had diminished hearing in both ears. He expected full recovery if the course of treatment was followed through by the appellant. At the time of trial, the appellant stated that he still had chest pains and that he stopped going for treatment as the use of pain killers were sufficient for his condition.

14. The 2nd appellant, **Justus Otieno Ohuru**, told the court that during the accident, he knocked his head and sustained chest injuries and dislocated his right shoulder joint. He also sustained bruises on his hand. He was taken to Kisumu East District Hospital for treatment. According to the P3 form and medical report prepared by Dr Manasseh Onyimbi dated 31st May 2011, the appellant sustained a head injury with concussion, dislocation of the right shoulder joint with multiple bruises and a dislocation of the lumbar spine. At the time of examination, the appellant complained of frequent headaches, memory lapses and

pain all over the body. The doctor concluded that the appellant would recover in two years if he followed treatment. At the time of trial the appellant complained of aches and pains.

15. The 3rd appellant, **Julius Otieno Ochieng**, also testified that he was injured in the accident. According to Dr Manasseh Onyimbi, who examined him on 31st May 2011. He noted that the appellant sustained a head injury with a torn wound on the scalp on the occipital region, dislocation of the left shoulder joint, multiple bruises all over the trunk, a blunt chest injury, dislocation of the lumbar spine, deep cut on the right lower limb with multiple lacerations, dislocation of the pedis with damage to the nerves and a sprained right hand. At the time of examination, he complained of being in a state of constant pain, persistent headache with episodes of memory lapse. The doctor concluded that the although the constant pain affected the appellant's daily activities, the recovery process would take two to three years.

16. To assist the trial court in assessing damages, both parties cited ***Bhupinder S. Bhangra v Joseph Tuwei Koech Eldoret HCCA No. 12B of 2002 [2008]eKLR*** where the claimant sustained the following injuries; swollen scalp and forehead tender with bruises, blunt trauma to the neck, chest, lumbar spine region, swollen right shoulder, dislocation of the left shoulder joint, swollen left elbow with bruises and lacerations, swollen left knee with bruises and lacerations, swollen left ankle with bruises and lacerations, swollen thighs with bruises and lacerations and a swollen right ankle and foot with bruises and lacerations. The court affirmed an award of Kshs. 170,000/- as general damages in 2008.

17. Based on this decision, counsel for the appellants submitted that Kshs. 300,000/- as general damages was adequate compensation for all the appellants. Counsel for the respondent submitted that the sum of Kshs. 170,000/- would be sufficient compensation for the 1st and 2nd appellant while Kshs.200,000/- would sufficiently compensate the 3rd appellant.

18. All the appellants sustained multiple soft tissue injuries. Although the prognosis by the doctor is that appellants' pain would eventually subside after two to three years, there was no evidence that they would suffer long-term residual effects from the injuries or that they suffered partial or permanent disability. Considering the nature of injuries and the element of inflation in respect of the case cited, I would award each appellant **Kshs. 220,000/-** as general damages.

19. In summary, I make the following orders;

- a. The appeal be and is hereby allowed with costs to appellants.
- b. Each judgment in the subordinate court is set aside and substituted with judgment for each appellant against the respondent for the sum of **Kshs. 220,000/-** with interest from the date of judgment in the subordinate court.
- c. The respondents shall bear the costs of each suit in the subordinate court.

DATED and DELIVERED at KISUMU this 24th day of April 2017.

D.S. MAJANJA

JUDGE

Mr Maube instructed by Bruce Odeny and Company Advocates for the appellants.

Mr Taremwa instructed by L.G. Menezes and Company Advocates for the respondent.