



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 60 OF 2014

HENRY OBONYO OGELE.....APPELLANT

VERSUS

PATEL V.K.MANUBHAI.....1ST RESPONDENT

ALFRED EKASIBA.....2ND RESPONDENT

BAKARI ABDI.....3RD RESPONDENT

(Being an Appeal from the Judgment of Hon Norbert Okumu R.M in Kisumu CMCC No. 94 of 2010 delivered on 1st May 2014)

JUDGMENT

Henry Obonyo Ogele (hereinafter referred to as appellant) was a 3rd party in a case in which the 1st respondent had sued the 2nd and 3rd respondents in the lower court claiming damages for injuries allegedly suffered on 5th October 2009 when plaintiff was a passenger in M/V KAZ 678 which was registered in the name of the 2nd respondent which was allegedly driven negligently by the 3rd respondent.

The defendants and 3rd party filed their defences and denied the claim and urged the court to dismiss the 1st respondent/plaintiff's claim with costs.

In a judgment delivered on **1st May 2014**, the learned trial Magistrate **apportioned liability at 90% as against the appellant/3rd party and 10% as against defendant's jointly and severally** and awarded the 1st respondent general damages in the sum of Kshs. 400,000/- and special damages in the sum of Kshs. 120,069/-.

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed a Memorandum of Appeal on 10th June 2014 which set out 5 grounds that:-

- 1) The Learned trial Magistrate erred in law and fact in finding the appellant/3rd party contributed 70% to the accident yet evidence on record shows he was not to blame**
- 2) The Learned trial Magistrate erred in law and fact in failing to consider both the testimony and submissions of the appellant**
- 3) The Learned trial Magistrate erred in law and fact in finding to analyze critically all the**

evidence that was adduced touching on the circumstances prior and soon after the occurrence of the accident and make a finding that the whole trial was a nullity as it fell short of the required ingredients constituting a case

4) Judgment was against the weight of evidence

5) Judgment on quantum was excessive under the circumstances

SUBMISSIONS BY THE PARTIES

When the appeal came up for hearing on 14.2.17, the parties' advocates were engaged in other courts and I directed that the appeal be disposed off by way of written submission which counsels dutifully filed.

Appellant's submissions

It was submitted for the appellant that while there was evidence that the 2nd respondent was over speeding; there was no evidence pointing an accusing finger at the 3rd party.

1st Respondent's submissions

The 1st respondent similarly submitted that the plaintiff and PW3 blamed the 3rd respondent for over speeding and wondered how PW4 who was not at the scene of the accident blamed the appellant. The trial magistrate was faulted for apportioning liability at 90:10 % as between appellant on one hand and 2nd and 3rd respondents on the other hand even after finding that both drivers were negligent. 1st respondent urged the court to find that the court acted on wrong principles and to this end cited **Eastern Produce (K) Ltd (Savani Estate) V Gilbert Muhunzi Makotsi [2013]eKLR.**

2nd Respondent's submissions

It was conceded that 2nd respondent was blamed by PW1 and PW3 for over speeding and appellant for joining the main road from a feeder road without stopping. On quantum, 2nd respondent submitted that the sum of Kshs. 400,000/- was not too high to warrant interference. To this end, 2nd respondent reefered court to **Stanley Maore & Geoffrey Mwenda at Nyeri Civil Appeal No.147 of 2002, Tabro Transporters Ltd v Absalom Dova Lumbasi [2015] eKLR** and **Agroline Hauliers Limited & another v Michael Abongo Kisemba [2015] eKLR.**

The evidence

The 1st respondent/plaintiff in his testimony blamed 3rd respondent for over speeding and failing to brake as a result of which he lost control of M/V KAZ 678 which landed in a ditch as a consequence of which 1st respondent suffered injuries. He conceded that a lorry joined the road from a feeder road but did not collide with the matatu that he was travelling in. PW2 testified that the 3rd respondent was driving the matatu at a high speed and that he lost control of the vehicle while trying to avoid colliding with a lorry that had suddenly joined the road ahead of the matatu.

Analysis and Determination

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

“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 (Abdul Hammad Sarif v Ali Mohammed Solan (1955, 22 EACA 270).)

I have perused the entire record of appeal and considered the submissions by counsels for all the parties. I note that the entire appeal revolves around the question of liability and quantum. The appellant and 1st respondent hold the view that the learned trial magistrate acted on wrong principles in reaching his conclusion that appellant was 90% to blame for the accident. Appellant also holds the view that the award to the 1st respondent was inordinately high. The 2nd respondent on the other hand holds the view that the trial magistrate's findings both on liability and quantum are supported by the evidence on record and require no interference.

I have considered the evidence and it is not disputed that 3rd respondent's motor vehicle registration KAZ 678 was driving along the highway while the appellant's lorry was approaching the highway from a feeder road. It is also not in dispute that the appellant's lorry joined the highway in a hurry. 2nd respondent who was driving motor vehicle registration KAZ 678 was unable to brake as a result of which the vehicle landed in a ditch and 1st respondent suffered injuries. The law governing traffic obligates those motorists joining the highway, from feeder roads like the appellant's driver, to give way to those motorists who are already driving on the highway. I am satisfied that the learned Resident Magistrate came to the correct conclusion on liability. The evidence tendered clearly indicates the appellant's driver was to blame to a large extent.

In assessing damages as is the norm, the court will consider comparables to arrive at an opinion bearing in mind the principles set out in making considerations in appeals of this nature. In **Stanley Maore & Geoffrey Mwenda at Nyeri Civil Appeal No.147 of 2002** the Court of Appeal relied on the authority of **Kemfro Africa Limited t/a Meru Express Services Gathogo Kanini A. Jubia and Olive Lubia [1982 – 88] 1 KAR 727** at page 730 where Kneller J. A said:

“The principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that, it must be satisfied that either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

In **Tabro Transporters Ltd v Absalom Dova Lumbasi [2015] eKLR**, the court on appeal set aside an award of Kshs. 500,000/- and substituted it with an award for Kshs. 400,000/- for: blunt trauma to the chest, blunt trauma to the back, blunt trauma to the spinal column, swollen left leg and fracture of the left tibia and fibula.

In **Agroline Hauliers Limited & another v Michael Abongo Kisemba[2015] eKLR**, the court on appeal set aside and substituted it with an award for Kshs. 400,000/- for contused chest anteriorly, fracture patella, degloving injury of the left knee joint, cut wound on over the anterior mid left forearm, contused lumbar region and cut wound on the right lateral forehead.

1st respondent/plaintiff suffered fracture to the right hand which healed with a 12 cm surgical scar and mal-union and deformity to the hand. He was awarded general damages in the sum of Kshs. 400,000/-. The Court of Appeal in This Court in **Shabani -vs- City Council of Nairobi (1985) KLR 516**, expressed as follows:-

“There is no doubt that some degree of uniformity must be sought in the award of damages and the best guide in this respect isto have regard to recent awards in comparable cases in the local courts.”

I have considered decisions in the recent cases of **Tabro Transporters Ltd** (Supra) and **Agroline Hauliers**

Limited (Supra) are recent cases and I find that the trial magistrate's decision was in tandem with the previous decided cases of similar nature and was therefore exercised judicially.

Decision

I have reviewed the entire record at trial and the judgment passed regarding assessment of damages and quantum and I have failed to find any error that would invite this court's interference with the discretion as exercised. I find no merit in the grounds of appeal impugning assessment of liability and general damages. For the reasons given on the assessment above, the appeal is dismissed in its entirety. The lower court's decision is confirmed. The respondents will have costs of the appeal.

DATED AND DELIVERED THIS 27th DAY OF July 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Mr Odeny

1st Respondent - Ms Wafula holding brief for Ms Osudo

2nd Respondent - N/A

3rd Respondent - N/A