



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. 5 OF 2016

SUKARI INDUSTRIES LIMITEDAPPELLANT

VERSUS

NICHOLAS ODHIAMBORESPONDENT

(Being an appeal from the judgment and decree of Hon. Mrs. Ochieng, SRM in

Ndhiwa PMCC No.49 of 2015 delivered on the 2nd March, 2016

JUDGMENT

1. The respondent (**NICHOLAS ODHIAMBO**) had filed a suit against the appellant seeking damages result of injuries he sustained as a following an accident which occurred on 7/03/2015 in which the appellant's (**SUKARI INDUSTRIES LIMITED**) motor vehicle registration number **KBJ 277E** Toyota Pick-Up last control and hit him. The appellant had denied liability saying it did not own the vehicle in question and also disputed that the accident ever occurred or that the respondent sustained injuries. It was pleaded in the alternative that if an accident occurred then it was due to the respondent's negligence.
2. The background to the claim was that the respondent was riding his motor-cycle along the left side of **RIAT-RAPEDHI** road on his way to **NDHIWA** while carrying a pillion passenger. There were two on-coming vehicles and the one behind (i.e. **KBJ 277F**) overtook the one ahead of it and hit the respondent resulting in a dislocation of the left hand, fracture of the left thigh, a deep cut on the ankle joint, a cut on the knee and the right leg. The driver of the said vehicle which he said belonged to the appellant was charged in court and fined Kshs. 9000/- for the offence of careless driving
3. He attributed the accident to the negligence of the appellant's servant/agent whom he blamed for veering off the road onto his lane and causing the collision.
4. The appellant's driver **MERCELL OTIENO OPIYO (DW1)** admitted occurrence of the accident but explained that the vehicle ahead of him was emitting a lot of smoke and when he saw the cyclist in front of him he tried to brake but the vehicle skidded and collided with the cyclist. He confirmed being charged in court for the offence of careless driving I TRC No 4 of 2015 where he was convicted and ordered to pay a fine.
5. The trial court found that the occurrence of the accident was not disputed or that the motor vehicle in question belonged to the appellant. It was held that the appellant's agent was liable at 100n% having been convicted for careless driving and no appeal was preferred against that conviction. The trial magistrate pointed out that the appellant's driver ought to have paid attention to the other road users.
6. The respondent's medical report indicated that he fractured the femur,, had multiple cut wounds on the

left knee and deep cut wounds on the left ankle and awarded Kshs. 800,000/- for pain and suffering. There was no award for special damages.

7. The appellant is aggrieved with the outcome on grounds that the trial magistrate misdirected herself on the evidence presented and ought to have apportioned some level of liability on the respondent. The judgment is described as wanting in all material aspects.

8. In the written submissions the appellant's counsel argued that the trial court erred in relying on the provisions of section 47 of the Traffic Act saying there was an aspect of the respondent contributing to the accident. He cited the case of **ROBINSON –VS- OLUOCH (1971) E.A.**, it was held that:-

“a person convicted of careless driving may allege that another person was also guilty of negligence which caused or contributed to the accident.” the court sitting in this matter further made an effort to explain this point on page 378 where the court stated that, *“we are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff or any other person was guilty of negligence which caused or contributed to the accident.”*

9. In reply the respondent's counsel pointed out that the evidence clearly demonstrated that it was the appellant's driver who caused the accident and he was in fact convicted for careless driving. The appellant's witness stated that his view was impaired by the heavy smoke being emitted from the vehicle ahead of him. That alone required him to take extra care regarding the presence of other road users and move with a lot of caution. Obviously in his bid to keep up with the vehicle he was escorting and which was ferrying money, his attention was not on any other road user.

10. The appellant's driver claimed that the cyclist veered onto his lane yet the conviction in the traffic case negated that. If the respondent was the negligent one then either he should have been charged in court, or the appellant ought to have appealed against the conviction. He did not, and I cannot fault the trial magistrate for holding him liable at 100% after-all it was an unequivocal plea of guilt.

11. Although the appellant's counsel did not make any detailed arguments on quantum, I find that the trial court considered the nature of the injuries and the residual effects. The medical report by **DR NYAWADE** indicated that the respondent still walked with a limping gait and with the aid of crutches. It was not clear from the judgment what measures the trial court used in determining quantum-certainly the decisions cited by the respondent's counsel and which the trial court mentioned being **MARK WANYONYI V SAMUEL MBUGUA [2004] eKLR** dealt with far more serious injuries with serious residual effects. I am persuaded that the decision in **JULIUS KIPROTICH V ELIUD MWANGI KIHOSHIA [2006] eKLR** was closer to the present situation. Under the circumstances the award was inordinately high even if the high cost of living and the dwindling value of the Kenyan shilling was to be taken into account. In my view a sum of Kshs 600,000/- was adequate compensation. I therefore set aside the sum awarded as general damages and substitute it with the sum of Kshs. 600,000/-. The costs of this appeal is awarded to the appellant

Delivered and dated this 25th day of July 2017 at Homa Bay

H. A. OMONDI

JUDGE