



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 114 OF 2011

PETER N. MAKAUAPPELLANT

VERSUS

JEREMIAH KINGOTO MULU 1ST RESPONDENT

SULEIMAN MOHAMED MWACHOME.....2ND RESPONDENT

ALI ALI RINGI.....3RD RESPONDENT

(An appeal against the judgment of Hon. Rosemelle Mutoka, Chief Magistrate delivered on 25th May, 2009 in Mombasa CMCC NO. 5599 of 2003)

JUDGMENT

1. The appellant, Peter N. Makau filed a Memorandum of appeal on 22nd June, 2011 raising the following grounds of appeal, that:-

- i. The Honourable Magistrate erred in law and fact in finding the appellant 100% liable in a case of multiple vehicles being involved in the subject accident;
- ii. The Learned Magistrate erred in law and fact in failing to analyse all the evidence submitted in the trial;
- iii. The Learned Magistrate erred in law and fact in contradicting the evidence as presented in the trial;
- iv. The Honourable Magistrate erred in law and fact in awarding the respondent a huge award not supported by evidence;
- v. The Hon. Magistrate erred in law and fact in failing to appreciate that the respondent had suffered polio at the early age of six years and was so suffering at the time of the accident and its effects were evident; and
- vi. The Honourable Magistrate erred in law and fact in failing to apportion liability as between the various defendants.

For the above reasons, the appellant prays for:-

- a. The judgment to be set aside;
- b. The trial both on liability and quantum to be conducted afresh by a different court; and
- c. Costs of the appeal.

2. Counsel for the appellant filed his written submissions on 27th April, 2017. Counsel for the 1st respondent filed his on 31st March, 2017 and submissions for the 2nd respondent were filed on 25th April, 2017.

3. Mr. Gitonga, Learned Counsel for the appellant informed the court that the appeal is based on two issues, namely; liability and quantum of damages. He stated that the Hon. Magistrate who delivered the Judgment did not give directions on how the matter should proceed. He indicated that in his grounds of appeal he has not prayed for a retrial.

4. Counsel submitted that the Hon. Magistrate should have considered the facts before her and made a decision guided by the evidence. He argued that failure to interrogate the evidence led to a decision that was not just. He added that had the court considered the facts, liability could have been apportioned differently instead of being entered at 100% against the appellant.

5. On quantum of damages, Counsel submitted that the plaint and the amended plaint did not disclose the special damages prayed for. He asserted that parties were bound by their pleadings. He added that by awarding special damages, the court misdirected itself.

6. Mr. Gitonga took the position that the plaintiff (1st respondent) prior to the accident, at a tender age of 6 years was diagnosed with polio thus he had disability prior to the accident as result of which he was using crutches. In his view, had the court considered that fact it would not have awarded general damages of Kshs. 600,000/=. He cited the case of **Sino Hydro Corporation Ltd. Vs Daniela Alela Kamuda** [2016] eKLR where the Court gave the threshold of what an appellate court should consider if the damages are inordinately high. He was of the view that damages should have been in the range of Kshs. 200,000/= - 250,000/= as they are meant to compensate a party for loss incurred but not for unjust enrichment. He concluded by stating that the court had no basis for awarding Kshs. 600,000/= as quantum. He prayed for the appeal to be allowed with costs.

7. Mrs. Maithya, Learned Counsel for the 1st respondent informed the court that she fully supported the Judgment of the trial court. She stated that evidence was adduced by the 1st respondent and a police officer, DW1, that the appellant's Driver was overtaking in the face of oncoming motor vehicles. He failed to call evidence to rebut the evidence before the trial court. Counsel stated that the appellant's motor vehicle registration No. KAE 163Z was being driver very fast.

8. She recounted that PW3's evidence was to the effect that the accident happened off the road thus the 2nd respondent's Driver could not be blamed at all. She submitted that the appellant's Driver was overtaking carelessly. She added that the 1st respondent told the lower court that the Driver of their vehicle hooted and tried to avoid the oncoming motor vehicle.

9. Counsel referred to the 2 medical reports produced by Dr. Ajoni Adede and stated that the medical report by Dr. Hermant R. Patel was not produced by the appellant. The court held that it was difficult to draw a boundary between the pre-existing condition of the 1st respondent due to polio and those injuries arising from the accident.

10. Mrs. Maithya invited the court to refer to paragraph 20 of their submissions where they have shown the injuries suffered by the 1st respondent. She cited the case of **James Gathirwa Nguni vs Multiple Hauliers (EA) Limited and another, Nairobi HCC No. 658 of 2009** to show that an award of Kshs. 1,500,000 was made in the year 2015 for similar injuries. She stated that the 1st respondent's claim in the lower court was for Kshs. 2 Million. Counsel urged this court while reconsidering the evidence to bear in

mind that it never saw the witnesses testify.

11. On the award of Kshs. 120,000/= for special damages, Counsel submitted that the same was not mentioned in the appellant's grounds of appeal and the request for a retrial was also not prayed for. She wound up her submissions by stating that the court did not act on a wrong principle. She prayed for the appeal to be dismissed.

12. Mr. Nanji Learned Counsel for the 2nd respondent associated himself with the submissions of Ms. Maithya on the issue of liability. He submitted that although Counsel for the appellant has sought a retrial in his written submissions, he did not set out the said issue in his grounds of appeal. In this regard, Counsel stated that the provisions of Order 42 rule 4 of the Civil Procedure Rules are applicable. He added that the appellant's Counsel failed to raise the issue of directions not having been taken when Hon. Mutoka, Chief Magistrate took over the part heard from Hon. Mwangi, Chief Magistrate and as such, he cannot raise the issue now.

13. It was submitted that Counsel for the appellant indicated before Hon. Mwangi, Chief Magistrate that they had no objection with the case being heard from where it had reached. The said Counsel also raised no objection when Hon. Mutoka, Chief Magistrate proceeded with the hearing of the defence case without directions being given. In his view, the objection was an afterthought.

14. Mr. Nanji submitted that the appellant drove into the 2nd respondent's lane thus occasioning the accident in issue and therefore his client cannot be apportioned any blame. Counsel argued that the appellant in the court below admitted swerving to the right onto the path of the 2nd respondent's motor vehicle. He prayed for the appeal against the 2nd respondent to be dismissed with costs.

15. In response to the foregoing submissions, Mr. Gitonga stated that it was difficult to establish the 1st respondent's pre-existing injuries and those sustained in the accident. He added that the court below contravened the rules of procedure by not giving directions on whether the case should proceed from where it had reached or not. Counsel urged the court to consider the evidence tendered in the court below and the fact that the 2nd respondent's motor vehicle was stationary.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- i. If liability should be apportioned; and
- ii. If quantum of damages should be interfered with.

16. This court in determining this appeal has borne in mind the duty of the first appellate court as enunciated in the case of **Ephantus Mwangi and Geoffrey Ngatia vs Duncan Mwangi Wambugu** [1982 -88] 1 KAR 278. The court stated as follows:-

“The principle is that a court on appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles.”

17. The evidence in the court below as narrated by PW1 Jeremiah Kingoto Mulu, the plaintiff, was that on 2nd January 2001 at about 11-11:30 a.m. he boarded a matatu motor vehicle registration No. KAE 163Z and sat at the front seat of the said matatu. He further stated that at Kwale Post Office stage, which was a few yards from the DC's office, the Driver stopped to pick passengers. As they started to move to Mombasa, he saw a Land Rover emerge from the said offices and enter into their lane ahead of the vehicle he was in. The Land Rover was also being driven towards Mombasa.

18. It was PW1's evidence that a canter was ahead, the Land Rover behind it and the matatu behind the

said Land Rover. He then saw a white vehicle that was being driven from the opposite direction, at that time the Land Rover started overtaking the canter but the Driver of the latter vehicle suddenly stopped. He stated that at that time the matatu was very close to the canter. The matatu Driver hooted and tried to swerve to avoid hitting the canter but the vehicle hit the canter on its right side and collided with the oncoming motor vehicle. PW1 lost consciousness and found himself in Coast General Hospital that evening. It was his evidence that he sustained head injuries, one broken tooth, a fractured left elbow, an injured left leg-ankle block, broken left leg and chest injuries.

19. PW1 further testified that he was admitted to Coast Provincial General Hospital (C.P.G.H) from 2nd January, 2001 to 25th January, 2001 when his employer transferred him to Kenyatta National Hospital (K.N.H). He was treated as an outpatient in the said hospital until 21st May, 2001 when due to (health) complications, he was admitted to the said hospital. He was discharged on 26th May, 2001 and continued attending hospital as an outpatient and undergoing physiotherapy up to 24th September, 2002 (sic) when he was again admitted until 4th October, 2001. He had since then and as at the time of testifying been attending K.N.H as an outpatient.

20. It was PW1's testimony that prior to the accident, he had a slight disability on both legs and he was using one crutch in walking but after the accident, he started using two crutches. He stated before the lower court that he had not fully recovered from the injuries as he still had pains in the back which got worse when it was cold. He added that his conjugal activities had been impaired as he was previously very active sexually. He stated that he had a young wife and two children.

21. PW1 indicated that he incurred a cost of Kshs. 214,302/= in medical expenses with an additional invoice of Kshs. 75,000/= which his Doctor had invoiced but was not included in the earlier amount. He produced a bundle of receipts as plf. exh. 1. A police abstract issued at Kwale police station was marked as MFI - 2. He undertook searches that established that the owner of motor vehicle Registration No. KAE 163Z in which he was traveling in was Peter N. Makau, the 3rd defendant (appellant) as per the certificate of ownership produced as plf. exh. 4. The owner of motor vehicle registration No. KAH 811D was Suleiman Mwachome the 1st defendant (2nd respondent) as per the certificate of ownership produced as plf. exh 5. The owner of motor vehicle Registration No. KAY 929 was Ali Ringi, the 2nd defendant (3rd respondent) as per the certificate of ownership produced as plf. exh. 6.

22. PW1 further testified that he was seen by Dr. Adede in May 2005 and February, 2007 for purposes of preparing a report. He paid Kshs 5,000/= for both visits. The medical reports dated 19th May, 2005 and 20th February, 2007 were marked as MFI-7(a) and 8(a) respectively. The receipts for the said payments were marked as MFI-7(b) and 8(b), respectively. The treatment notes from C.P.G.H were as marked MFI - 9. He stated that he did not have the treatment notes from K.N.H because he did not apply for them.

23. PW1 blamed the Driver of motor vehicle Reg. No. KAE 163Z because in his view, he was driving at a high speed and did not keep his distance. He also blamed the Driver of motor vehicle Reg. No. KYQ 929 for stopping abruptly on the road and causing a disruption. He also blamed the Driver of motor vehicle Registration No. KAH 811D for not going off the road to avoid the accident when he saw the oncoming motor vehicle. He stated that the Driver of the motor vehicle registration No. KAE 163Z was charged in Kwale court for careless driving but the case was still pending in the said court, as at the time he testified. He prayed for Judgment to be entered as per the plaint for what he incurred in hospitalization and for the injuries he sustained. He also prayed for costs and interest.

24. On cross-examination, PW1 said that the accident happened along a highway which was wide although he could not tell the measurements of the width. He stated that the site has steep edges on one side but he wasn't sure. He further stated that motor vehicle Reg. No. KAH 811D was about 5-7 meters away before collision. At that time he closed his eyes and cannot say if there was a collision between motor vehicle Reg. Nos. KAE 163Z and KYQ 929 but the vehicle he was in was hit on the left side. At the time of the collision, they were going downhill and the vehicles from Mombasa were moving uphill. He reiterated that the vehicle he was in was going downhill at a high speed. PW1 further stated that by the

time the vehicle he was in hit the canter, it was in the path of motor vehicle Reg. No. KAH 811D.

25. PW1 admitted that he had a polio attack that affected both his lower limbs between the thighs and the knee and that he would use one crutch before the accident but at times he would use 2 crutches depending on where he was going.

26. On cross-examination by Counsel for the appellant, PW1 informed the lower court that motor vehicle Reg. No. KAE 163Z in which he was traveling was not attempting to overtake the Land Rover; and that he tried to avoid the collision. The Driver of the said vehicle hooted but PW1 could not tell if he applied emergency brakes. He later learnt that the impact threw him out of the vehicle although he had fastened his safety belt. He stated that he sustained fractures to both legs but this was not mentioned in the medial report dated 19th May, 2005. The said injuries were reported in the report dated 20th February, 2007. PW1 also stated that the two reports and the P3 form made no mention of dislocation of his hip bones. He indicated that he had suffered from polio at the age of 6 years but his muscles had not wasted.

27. PW2 was Doctor Ajoni Adede, he testified that he examined PW1 on 19th May, 2005 following a road traffic accident on 2nd January, 2001. He suffered head injury and cut wounds on the skull, fractures of the right leg bone (fibula) and left foot bone (calcaneus), crack front incisor tooth, blunt injury to the chest and bruises on the right forearm (this court has made reference to the original medical report as the court proceedings are not clear on the nature of injuries sustained by the plaintiff). He was admitted to Coast Provincial General Hospital and Kenyatta National Hospital for 33 days. He also attended physiotherapy. PW2 testified that he saw the plaintiff 4 years post-accident. He stated that the plaintiff's lower left leg was badly injured and had a 6 cm scar and paralysis of the said limb. The Doctor concluded that the plaintiff had permanent disability due to multiple fractures, torn left foot tendon, post fracture arthritis and weakness of the left leg. He stated that the appellant may have had an underlying pre-accident nerve pathology.

28. He produced the first medical report as plf. exh. 7(a) and the receipt for the charges of Kshs. 2,000/= as plf. exh. 7(b). He examined PW1 again on 20th February, 2007. He produced the 2nd medical report as plf. exh. 8(a) and the receipt for Kshs. 3,000/= for the said report as plf. exh. 8(b). On cross-examination by Mr. Audi, PW2 stated that the plaintiff had partial paralysis.

29. PW3 was No. 218686 Chief Inspector Leonard Barasa of Kwale Police station who had been summoned to produce a police file for an accident that happened at 11:00 a.m. on 2nd January, 2001 (as counter referenced by this court from the original file) at Mwabete road, Simba along Kwale. It involved motor vehicle Reg. Nos. KAE 163Z Isuzu minibus, GK Y930 Land Rover, KYQ 929 Isuzu canter and KAH 811B Toyota Saloon. He stated that motor vehicle Reg. No. KAE (sic) is the one that triggered the accident and hit motor vehicle KAH 811B from the side. He stated that the Investigating Officers, Inspector Salome and PC Saidi were transferred from Kwale Police Station. They accused (charged) the Driver of motor vehicle Reg. No. KAE 163Z, Hendry Omondi with two Counts for careless driving. A P3 form was issued to the plaintiff which was produced as plf. exh. 3. He produced the police abstract as plf. exh. 2.

30. On cross-examination by Mrs. Maithya, PW3 indicated that the plaintiff was a passenger aboard motor vehicle Reg. No. KAE 163Z. Ahead of it was a GK vehicle, traveling in the same direction. A Mitsubishi canter Reg. No. KYQ 929 was parked on the other side of the road facing the direction to Mombasa. Motor vehicle KAH (sic) was parked on the opposite side of the road. The GK vehicle hit motor vehicle KYG (sic) and motor vehicle KAE (sic) hit the canter and KAH (Toyota salon). He stated that the collision between motor vehicles registration No. KAE and KAH (sic) was off the road on the right hand side. He added that the owner of KAH (sic) was innocent according to the evidence. PW3 further stated that the Driver of Reg. No. KAE (sic) was charged.

31. On cross-examination by Mr. Bwamoto, PW3 stated that the GK was not partly to blame for the accident. He further stated that the traffic case is yet to be concluded because the Driver jumped bail.

32. The 1st defendant, Mohammed Suleiman Machome, in the trial court testified as DW1. He stated that on 2nd January, 2001 he was driving motor vehicle Reg. No. KAH 811D from Mkombani heading to Kwale. It was his evidence that as he drove up a hill, he saw a pick up vehicle heading towards him. He was driving from Mkombani to Kwale. It was a pick up vehicle Reg. No. KYQ 929. Behind it was a GK Land Rover, and behind it was a matatu Reg. No. KAE 163Z. It was his evidence that the matatu was being driven in a zigzag manner and he moved to the extreme left of the road. It overtook the pick-up and headed straight to his vehicle and hit it on the right hand side and pushed it off the road to the trench. DW1 testified that he was hit when he was on his side of the road. The motor vehicle Reg. No. KAE 163Z also hit the Land Rover which landed on the other side of the road. He further stated that the matatu veered to his lane and that the matatu Driver was at fault.

33. On cross- examination by Ms. Ngugi, DW1 stated that he saw the matatu as it weaved in and out of the road about 100 meters away. It was on his lane and so he moved to the extreme left, leaving him half off the road.

34. In his submissions Counsel for the appellant raised the issue of the Hon. Mutoka, Chief Magistrate, not having given directions after she took over the hearing of the case from Hon. Mwangi, Chief Magistrate. The foregoing issue was not raised as one of the grounds of appeal by the appellant, whom I note was represented during the hearing of the case in the court below. The provisions of Order 42 rule 4 of the Civil Procedure Rules provide as follows:-

"The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the High Court shall not rest its decision on any ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground."

35. Although the issue of lack of issuance of directions by Hon. Mutoka, Chief Magistrate was not raised in the memorandum of appeal, the appellant's Counsel was given an opportunity to address the court on the same. The appellant's Counsel did not show if any prejudice was occasioned to the appellant by failure of the said Magistrate to give directions on how the case was to proceed when she took it over from Hon. Mwangi, Chief Magistrate. I therefore find the foregoing submission to be devoid of a sound basis.

36. On the issue of liability, PW1's evidence was to the effect that motor vehicle Reg. No. KYQ 929, Mitsubishi Canter, suddenly stopped and in order to avoid a collision, the Driver of motor vehicle Reg. No. KAE 163 Z swerved and moved onto the path of motor vehicle Reg. No. KAH 811D. It must be noted that the evidence that PW3 gave on the position of the Mitsubishi Canter KYQ 929, was with regard to its final resting place at the time police visited the scene. PW1 who was an eyewitness was categorical that motor vehicle Reg. No. KYQ 929, was in motion before it suddenly stopped. There was therefore no contradiction in the evidence of PW1 and PW3 in regard to the said vehicle. Interlocutory judgment was entered on 21st January, 2007 against the 2nd defendant (Ali Ali Ringi, now the 3rd respondent), the owner of the said vehicle when he failed to enter appearance within the required time.

37. As a result of the evidence of PW1 on how the accident occurred, it is my finding that the Hon. Magistrate misdirected herself when she assigned 100% liability as against the appellant. I hereby set aside the said holding and apportion liability at 70:30 as against the appellant and the 3rd respondent, respectively. The Driver of motor vehicle Reg. No. KAH 811D, the 1st defendant was driving when the appellant swerved onto his path thereby occasioning the accident. I hold that he was not liable for the said accident. On the other hand, it is apparent that the Driver of Reg. No. KAE 163Z failed to keep a safe distance behind motor vehicle Reg. No. KYQ 929. He is thus liable to the extent that I have apportioned.

38. The authority cited by Counsel for the 2nd respondent of **James Macharia Gakere and Another vs**

Joseph Ngigi C.A. No. 36 of 1980, goes to the benefit of his client to show that the Driver of motor vehicle Reg. No. KAH 811D was not to blame at all for the accident.

39. In arriving at the quantum of damages, the Hon. Magistrate considered the injuries that the 1st respondent sustained from the accident and also bore in mind those that he had sustained from polio at the age of 6 years. The Hon. Magistrate awarded the 1st respondent general damages in the sum of Kshs. 600,000/= and special damages at Kshs. 120,000/= inclusive of interest and costs. The award of damages is an exercise of discretion. The Hon. Magistrate did consider the authorities that had been cited by the Counsel for the parties before making the said awards. Counsel for the 1st appellant aptly cited the case of **Kemfro Africa Ltd. T/a Meru Express Service Gathogo Kanini vs A.M. Lubia & Olive Lubia** [1982 – 1988] 1 KAR 727 at 730 where Kneller J stated thus:-

“The principles to be observed by an 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 for Eastern Africa to be that it must be satisfied either the Judge in assessing the damages took into account an irrelevant factor, or left out of the account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage this court follows the same principles.”

40. The appellant in this case did not show the factors that the Hon. Magistrate took into account which should not have been considered, or those that she considered which she ought to have omitted. I therefore fail to see any justifiable reason to interfere with the award on the quantum of damages. The upshot of this appeal is that it is only allowed to the extent of the apportionment of liability as stated earlier in this judgment.

41. Costs of the lower court case and this appeal are awarded to the 1st and 2nd respondents. Interest is awarded at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of September, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the appellant

Ms Okata holding brief for Mrs. Maithya for the 1st respondent

Ms Munyingi holding brief for Mr. Nanji for the 2nd respondent

Mr. Oliver Musundi - Court Assistant