



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 483 OF 2011

JOSEPHAT OMWITAKHO.....1ST APPELLANT

JOSEPH MWANDERI KARIUKI.....2ND APPELLANT

VERSUS

MUTUA KATUMO.....RESPONDENT

(Being an appeal against the Judgment delivered on 9th September, 2011 by Hon. Mr. A.K. Ndung'u, Senior Principal Magistrate in The Chief Magistrate Milimani Commercial Courts in CMCC No.6703 of 2008)

JUDGMENT

1. The Respondent, Mutua Katumo who was the Plaintiff in the lower court filed suit against the Defendants, Josephat Omwitakho and Joseph Mwanderi Kariuki claiming damages arising out of a Road Traffic Accident that occurred on 21st April, 2008. The Plaintiff blamed the accident on the driver's negligence.
2. The 1st Respondent who was the 1st Defendant was sued as the registered owner of motor vehicle KAJ 240S and the 2nd Respondent who was the 2nd Defendant sued as the beneficial owner who had the possession of the said motor vehicle. The Defendants in their statement of defence denied any negligence on their part and stated that the accident was wholly caused or materially contributed to by the Plaintiff's negligence.
3. During the hearing of the case, the Plaintiff (PW1) gave evidence that he was riding a bicycle along Waithaka-Naivasha road heading towards Kawangware when he was hit by the motor vehicle in question. According to the evidence of the Plaintiff who was injured in the accident, he was riding on the left side of the road and he had a pillion passenger, PW3 Festus Kyalo Muoki. The plaintiff's side blamed the motor vehicle for hitting the bicycle from behind while the bicycle was on the left side of the road.
4. The driver of the motor vehicle testified (DW1). His evidence blamed the cyclist for suddenly emerging from the left and colliding with the motor vehicle.
5. In his judgment the trial magistrate apportioned liability at 70% against the Appellants and 30% against the Respondent. General damages were assessed at Ksh.600,000/= less 30% contribution. Special damages awarded was Ksh.4,985.

6. The Appellants were dissatisfied with the said judgment and appealed to this court on grounds that can be summarized as follows:

a) That the trial magistrate failed to take into account the Appellants' submissions regarding the Plaintiff's age.

b) That the trial magistrate erred in apportioning liability at 70% against the Appellants.

c) That the award of Ksh.600,000/= as general damages was excessive and amounted to an erroneous estimate of damages.

7. During the hearing of the appeal, the parties opted to file written submissions. I have considered the said submissions.

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

9. During the hearing in the lower court on 8th September, 2010 the Respondent gave his age as 19 years and stated that he was born in 1992. The plaint herein was filed on 28th October, 2008. Simple arithmetic reflects that going by this evidence the Respondent was a minor at the time he filed suit. The Appellants have submitted that the Respondent's suit ought to be dismissed for lack of compliance with order 32 (1) & (2) Civil Procedure Rules which provides that a suit filed by a minor be instituted through the next of friend. In the plaint, the Respondent described himself as an adult of sound mind. In the statement of defence, the Appellants admitted the description of the Respondent. A case is anchored in the pleadings. The Respondent therefore had no responsibility to prove his age as it was not denied that he was an adult. In any event, under Section 3A of Civil Procedure Act, the court has the inherent powers to make orders as may be necessary to meet the ends of justice. In my view the ends of justice will be served in this case by not dismissing the Plaintiff's case on account of the issue of age.

10. The defence denied the averment in the plaint that the 1st Defendant was the registered owner of the motor vehicle and also denied that the 2nd Defendant was the beneficial owner who had possession of the motor vehicle. DW4 Police Constable Orewo Ombuni of Kabete Police Station produced a police abstract which reflects the owner of the motor vehicle as Josephat Omwitakho the 1st Appellant. In his evidence the 1st Appellant stated that he was the one driving the motor vehicle. No copy of records was produced from Kenya Revenue Authority to show who the registered owner was. There is also no evidence on record to show whether the 2nd Appellant, Joseph Mwanderi Kariuki was the beneficial owner of the motor vehicle. However, the evidence of ownership as reflected in the police abstract was not rebutted by any other evidence. The Respondent therefore proved the ownership of the motor vehicle by the 1st Respondent. (See for example **Kebengo M. Kuzi v Leonard Njoroge Mbugua [2007] eKLR**).

11. The Appellants dissatisfaction with the judgment of the lower court in respect of liability is in the apportionment of the same at 70% against the Appellants and 30% against the Respondent. My understanding of this ground of appeal which is the Appellants second ground of appeal is that it does not

touch on whether it was the 1st Appellant or the 2nd Appellant who is liable for the accident but is in respect of the apportionment of liability between the Appellants and the Respondent. The evidence of PW1 and PW2 was that the bicycle was hit by the motor vehicle from behind while the bicycle was on the left side of the road. Although the evidence of DW1 was that the bicycle emerged from the left, it does not come out clearly whether the bicycle emerged from the left side of the road or from outside the road. However, it is noted that the motor vehicle was the one that was behind and had a view of the road ahead. The trial magistrate who had the benefit of seeing the witnesses testify and observing their demeanour apportioned 70% liability on the Appellants side. Based on the evidence on record, I am in agreement with the finding of the trial magistrate and do not fault the same.

12. The Respondent was examined by Dr. Musau who made a report dated 18th July, 2008. The report which was produced as an exhibit reflects the injuries as follows:

- a) Blunt injury to the head with loss of consciousness.
- b) Blunt injury to the right leg.
- c) Fracture of right fibula
- d) Multiple cuts on the face

The Respondent was admitted in hospital for three days. The Respondent had already developed post traumatic osteoarthritis of the right ankle by the time of the examination by Dr. Musau.

13. The Appellants counsel submitted that the award of general damages is excessive. He relied on the case of **Amrital S. Shah wholesalers Ltd & another v Joshua Ekeno – HCCA No.99 of 2010 [2012]eKLR** wherein an award of Ksh.350,000/= as general damages was upheld for a compound fracture of the leg with development of post traumatic osteoarthritis. The leg could also not bear excessive weight.

14. The Respondent on the other hand supported the award of general damages and relied on the case of **David Kiplagat & another vs Richard Kipkoech Langat & another Kericho HCCA 91/2004** where an award of Ksh.550,000/= was made in year 2006 for a fractured left leg, hip joint and knee.

15. Taking into account the Respondent's injuries, the authorities cited and inflationary trends, my view is that the award of general damages is within the range of awards for similar injuries. There is nothing to suggest the trial magistrate applied the wrong principles. As stated by the Court of Appeal in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**

“...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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

16. With the foregoing, I find no merits in the Appellants appeal and dismiss the same with costs.

Date, signed and delivered at Nairobi this 21st day of Sept., 2017

B. THURANIRA JADEN

JUDGE