



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 818 OF 2007

CEASAR KARANJA JUSTIN.....APPELLANT

- V E R S U S -

JOSEPH NDUNGU KARIMIRESPONDENT

(Being an appeal from the ruling and orders of Hon. A. Ireri

(Ms) Resident Magistrate delivered on 18th October 2007

in Milimani Civil Suit no. 5267 of 2004)

JUDGEMENT

1) Ceasar Karanja Justin, the appellant herein, was on 4th July 2003 hit by motor vehicle registration no. KQT 378 along Haile Selassie Avenue, Nairobi while in the course of his duties as a police officer. As a result of the accident he sustained serious injuries. The appellant filed a compensatory suit before Chief Magistrate's Court, Nairobi against Joseph Ndungu Karimi, the respondent herein, the owner and the insured the aforesaid motor vehicle. The respondent filed a defence to deny the appellant's claim. The suit was heard and dismissed by Hon. A. Ireri, learned Resident Magistrate on 18.9.2007. Being dissatisfied by the dismissal order, the appellant preferred this appeal.

2) On appeal, the appellant put forward the following grounds:

1. THAT the learned trial magistrate erred in law and in fact in finding that the plaintiff (appellant) did not prove his case on a balance of probability and in dismissing the plaintiff's (appellant) suit with costs.

2. THAT the learned trial magistrate erred in the manner she analyzed the evidence before her and in finding that the plaintiff (appellant) jumped into the road ahead of the respondent's (defendant's) motor vehicle.

3. THAT the learned trial magistrate erred in law by failing to give adequate consideration to the evidence adduced by and for the plaintiff concerning the defendant's (respondent) conviction in traffic case no. 12188 of 2003 (Nairobi Law Courts) for two counts of careless driving and failing to report an accident for which he was sentenced to fines of kshs.5,000 and kshs.2,000 respectively.

4. THAT the learned trial magistrate erred by failing to consider evidence adduced for the plaintiff that the defendant not only hit the plaintiff but also another person named as Jamleck Muasya and hence she should have found as a fact that it was the motor vehicle that veered off the road into the pavement and hit both the plaintiff and the said Jamleck Muasya.

5. THAT the learned trial magistrate erred in law and in fact in failing to find that the accident was caused by the defendant (respondent) and accordingly that the defendant was liable.

6. THAT the learned trial magistrate erred in law in failing to enter judgment in the suit in favour of the plaintiff(appellant).

7. THAT the learned trial magistrate erred in law in failing to make a finding on the quantum of damages the plaintiff(appellant) would have been awarded if judgment on liability would have been entered in his favour.

3) Though the appellant put forward a total of 7 grounds of appeal, those grounds revolve around the twin questions of liability and quantum. The record shows that the suit was dismissed on the basis that the appellant had failed to prove his case on a balance of probabilities. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

4) At the time of writing this judgment, the appellant was the only party who had filed his submissions. On liability, the appellant urged this court to set aside the order dismissing his suit because the dismissal was issued yet there were credible evidence proving liability on a balance or probability. Unfortunately, the respondent did not present his written arguments to explain his position. I have re-evaluated the case that was before the trial court. The appellant testified and summoned two independent witnesses in support of his case while the respondent testified alone in support of his defence. Ceaser Karanja Jusitn (PW2) stated that he was performing his police duties along Haile Selassie Avenue in company with one P.C. Bosco Kariuki. He said he was hit by a motor vehicle while walking inside the pavement of KPCU towards railways. As a result of the accident PW2 said he lost conscience and only regained consciousness at Armed Forces Memorial Hospital. PW2, summoned Dr. Moses Kinuthia to testify and produced in evidence, his medical report showing the injuries he sustained. PW2 stated that he blames the driver of motor vehicle registration no.KQT 378 because he hit him while he was on the pedestrian kerb and not on the road. PW2 also tendered evidence showing that the respondent pleaded guilty to a charge of careless driving and was fined ksh.5,000/= CPL. William Musau (PW3), corroborated the evidence of the appellant. PW3 stated that he successfully prosecuted the respondent and had him convicted and fined ksh.5000/= for careless driving. In his testimony, the respondent (DW1) claimed that he was driving from Machakos Bus stage along Haile Selassie Avenue near KPCU when the appellant suddenly ran across the road to stop a matatu and stood by his lane thus forcing him to hit him. DW1 claimed that he swerved to avoid a matatu thus hitting the appellant. Faced with those conflicting evidence, the learned trial resident magistrate dismissed the suit. After a careful re-evaluation of the evidence, I am convinced that the trial resident magistrate fell into error. The evidence tendered by the appellant clearly lay blame on the respondent. It is not contested that the respondent was convicted for the offence of careless driving. In my assessment of the evidence, I find that in the circumstances of this case the respondent was solely liable.

5) On quantum, the trial resident magistrate did not deem it fit to assess damages. The law enjoins courts who dismiss an action for damages to assess damages they would have awarded had the suit succeeded. The main reason for doing so is to avoid a scenario where a successful appellant is referred back to the trial court for assessment of damages. The cause of action arose on 4th July 2003 about more than 14 years ago. It will be unfair if this court refers back the matter to the trial court to assess damages. This court takes up the matter and proceeds to assess damages on the material and submissions presented before the trial court and on appeal. It is not in dispute that the appellant suffered the following injuries:

i. Loss of consciousness

ii. Global dull ache

iii. Deep cut around the neck

iv. Abrasion wounds on the right knee, right hand, left elbow and right shoulder as shown in the medical report of Dr. Kinuthia and Dr. Shah.

6) The appellant proposed an award of ksh.300,000/= for pain and suffering and loss of amenities. In special damages the appellant asked for ksh.1,600/= and ksh.5,000/= for doctors' attendance for before the trial court.

7) On appeal, the appellant sought to have the claim enhanced to ksh.500,000/= for general damages for pain and suffering due to passage of time.

8) The respondent had proposed payment of ksh.50,000/= as adequate compensation for general damages and ksh.1,500/= for special damages.

9) I have considered the rival submissions on quantum. I have also taken into account the authorities supplied and the fact that time has really passed from the date of the accident. I find that a sum of kshs.350,000/= is sufficient for general damages for pain, suffering and loss of amenities. I find that a sum of ksh.1,600 is pleaded and proved.

10) In the end, this appeal is allowed thus giving rise to the following orders:

i. The order dismissing the suit is set aside and is substituted with an order of entry of judgment in favour of the appellant and against the respondent.

ii. The appellant is awarded a sum of ksh.350,000/= as general damages and

iii. Kshs.1600/= as special damages

iv. Costs of the suit and appeal are awarded to the appellant.

Dated, Signed and Delivered in open court this 8th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent