



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 247 OF 2010

PANNER SEED(K) LIMITED.....APPELLANT

VERSUS

AMOS KARANJA MWANGI.....1ST RESPONDENT

JAIB A.A. JABER.....2ND RESPONDENT

JAMES WAWERU.....3RD RESPONDENT

CONSOLIDATED WITH

NAKURU CIVIL APPEAL NUMBER 248 OF 2010

PANNER SEED(K) LIMITED.....APPELLANT

VERSUS

JOSEPH KIHU JUMA.....1ST RESPONDENT

TAIB A.A. JABER.....2ND RESPONDENT

JAMES WAWERU.....3RD RESPONDENT

(An Appeal From The Judgment And Decree Of Honourable N.N. Njagi (Principal Magistrate)

in Naivasha SPMCC No. 129 of 2008 delivered on 24th day of August, 2010)

JUDGMENT

1. The appeals hereof arise from the Judgment of the trial court sitting at **Naivasha in SPMCC No. 127 of 2008 and 129 of 2008 and delivered on the 24th August 2010.** The Respondents who were the plaintiffs in the trial court sued the appellant, and the 3rd parties later enjoined in the suit, for damages arising from a road traffic accident on the 10th July 2007 along the **Nakuru-Naivasha road** involving them as pedestrians and the appellants motor vehicle **Registration No. KAQ 034M** and the 3rd parties vehicle **Registration Number KAM 501Y.**

2. The trial court after hearing the suit found the Appellant wholly to blame for the accident and awarded special and general damages to the Respondents for the injuries they sustained.

3. Being dissatisfied with the whole of the said judgment, the Appellant lodged this appeal against both liability and quantum.

In summary, the appellants **Grounds No. 1, 2, 3, 4, 5, 6, 7 and 10** fault the trial court's judgment on liability while **Grounds No. 8 and 9** are on quantum of damages that are said to have been so high as to be an erroneous estimate of the damages.

This being the 1st appellate court, it is obligated to reconsider the evidence on record and re-evaluate the same and come up with its own findings and conclusions, bearing in mind that the court neither had the opportunity to hear or see the witnesses, and also being guided by the principle that the court will normally not interfere with the findings of fact by the trial court unless it is demonstrated that the same were arrived at as a result of a misapprehension of the evidence or application of wrong principles. See **Selle -vs- Associated Motor Boat Company Limited (1968) EA 123**.

4. The First Respondent's case and submissions on liability

The 1st Respondent **Joseph Kihiu Juma in HCA No. 248 of 2010** and the plaintiff in **SPMCC NO.127 of 2008** and whose Evidence was, by consent of parties advocates adopted for purposes of this appeal testified before the trial court that on the material date the 10th July 2007 at about 6.30 a.m. he, together with Amos Karanja (**1st Respondent in HCA of 247/2010**) were walking on the right side of the Nakuru-Naivasha road as one faces Nairobi direction and off the tarmac when he saw a vehicle Registration No. **KAQ 034M** that hit another vehicle that was coming towards Nakuru, and that it hit a woman killing her forcing him to run away but nevertheless hit him causing him to sustain injuries. He blamed the said vehicle for overspeeding and moving in a zig-zag manner. He also testified that he was with Amos Karanja. He stated that he did not know the Registration number of the other vehicle.

Police Officer No.37718 PC Hesbon Mutesh produced two police abstracts one showing that as at 13th September 2007 the case was pending investigations and another showing that the driver of **KAM 501Y**, the Third Respondent, one James Waweru was charged for careless driving and fined a sum of Kshs.3,000/= and therefore blamed the said James Waweru for the accident between the two vehicles. He however did not produce the police file in court or any other document.

5. **The Second Respondent Taib A.A. Bajaber** was the first third party and registered owner of **Motor Vehicle Registration No. KAM 501Y**. He did not tender any evidence nor did the third Respondent James Waweru, the driver of the said vehicle – albeit filing a statement of defence denying all allegations labelled against them by the appellant in the primary suit.

6. **The Appellant's case on causation** was stated by its witness, and driver of the vehicle **Registration Number KAQ 034 M, DW1** – one **Jared Aggrey Masawa Osore**. He stated that on the material date while travelling to Nairobi he saw a vehicle coming from opposite direction that swerved to his lane and lost control and landed on a ditch after hitting two pedestrians and that the vehicle was Registration No. **KAM 501Y**.

He stated that he was not charged with any offence but the driver of the other vehicle was charged in traffic case **No. 2831/2007**, and fined Kshs.3,000/= in default two months imprisonment.

He denied having hit the two pedestrians. He insisted that the two pedestrians were hit by motor vehicle Registration **KAM 501Y**. DW2 Francis Ndungu Sob told the court that he was in the company of the driver DW1 and reiterated the evidence tendered by DW1, though he never recorded a statement with the police.

7. Upon analysis of the above evidence, the trial court made a finding that the 1st Respondent (Plaintiff)

had established a case on a balance of probability against the appellant and found no blame to attach upon the 2nd Respondent the 3rd party, and proceeded to assess general damages for pain and suffering arising from the injuries sustained by the 1st Respondent and special damages.

8. The appellant's submissions as filed on the issue of liability in this appeal is that the 1st Respondent did not establish any case against it on a balance of probability in that the 3rd parties (**owners of motor vehicle Registration No. KAM 501Y**) tendered no evidence in the primary suit and therefore its evidence remains uncontroverted and unchallenged, that it was the 3rd party's vehicle that hit the 1st Respondents and not its vehicle and relies heavily on the evidence of the Police Officer (PW3) who stated:

“---the case was finalised and driver of KAM 501Y was charged with careless driving and fined Kshs.3,000/=--- James Waweru was blamed for the accident.”

It was produced by the police officer a charge sheet in respect of the said offence in respect of **Naivasha PMCC Traffic Case No. 2831 of 2007- Republic -vs- James Waweru**, that on the face of it shows that the said James Waweru was convicted and sentenced to pay a fine of Kshs.3,000/= or in default, serve the two months imprisonment for an offence of careless driving.

9. The appellant relies on the alleged conviction and **Section 47A of the Evidence Act** as proof of guilt and therefore faults the trial court for ignoring the said provisions of the law, and the controverted evidence.

It is further submitted that the third parties having not tendered any evidence in the trial court, and having not challenged the appellants evidence, ought to have been held wholly liable. The appellant further faults the trial court in failing to take into account the fact of the alleged conviction of the third party vehicle driver thereby arrived at an erroneous finding on liability. The trial Magistrate is also faulted for awarding excessive general damages to the first Respondent as opposed to in the injuries alleged to have been sustained.

10. The 1st Respondents submissions are that the trial court analysed the evidence as tendered and rightly found the appellant wholly liable for the accident. It is submitted that the first Respondent and DW1 both agreed in their testimonies that DW1(driver of Motor Vehicle **Registration No. KAQ 034M**) swerved to the left side off the road while facing Nairobi direction, hit and killed a woman pedestrian. The first Respondent is clear that he was hit by the above vehicle and not the 3rd partie's vehicle.

On the police abstracts, it is submitted that the same were not based on any police investigations as no police file was produced to prove that indeed the 2nd Respondent was ever charged and/or convicted – in any court of law as the originality of the alleged charge sheet was doubted.

11. Analysis of Evidence, submissions and findings

As a first appellate court, it is my duty to analyse the evidence tendered, re-evaluate the same and come up with my own independent findings. See **Selle -vs- Associated Motor Boat Company Limited (1968) EA 123**. (Supra). The 1st Respondents evidence was clear and could not be shaken on cross examination that he was hit by the motor vehicle that had hit and killed a woman **Registration No. KAQ 034M**. The evidence by the appellants witness and driver of the said motor vehicle **Registration Number KAQ 034M** and his companion that the Respondent and another were hit by another vehicle cannot be taken seriously. I have looked at the police abstracts produced in court.

Police Abstract Serial No. 962870(PEXh.6) dated 13th September 2007 indicates that as at that date, the case was pending under investigation.

Police Abstract Serial No 962869(PEExt. 10) also dated 13th September 2007 (PEEx. 10) also bears same

information. I have not seen the alleged police abstract indicating that the case was finalised and the 3rd party driver was charged and convicted as stated by the appellant.

Defence **Exhibit No. 3** is a charge sheet purportedly drawn by the Naivasha Police station on the 10th July 2007. It indicates that the accused **James Waweru**(driver of Motor vehicle KAM 501Y) was in custody, was charged and fined Kshs.3,000/= in default to serve two months imprisonment. The police officer who produced the police abstracts stated to the court that he did not have the police file. It is clear that the two police abstracts were filled after the alleged conviction, yet they indicated that the case was under investigation. The question that begs answer is then where the police officer obtained the said charge sheet when he could not produce the police file. Noteworthy is that the original charge sheet and court proceedings leading to the conviction were not produced in court.

As submitted by the first Respondents, without the police file to ascertain the authenticity and genuineness of the charge sheet, the said alleged charge sheet and the courts sentence remain as such, doubtful. This court is unable to place any weight on the said document.

12. It was submitted that a conviction under **Section 47A of the Evidence Act, Chapter 80, Laws of Kenya**, ought to be taken as conclusive evidence that the person so convicted was guilty of the offence as charged.

I agree to the above but only as it relates to a in traffic case. This being a civil case, it is my considered view, that such a conviction in a traffic court alone does not close the door in a matter in civil liability, where there is defence to culpability and/or causation of an accident. A civil court will rely on evidence tendered before it to evaluate culpability for each of the parties.

See High Court **Civil Appeal No. 121 of 2012** where Judge Odunga was of the same opinion.

See also **Everlyine Shirachi -vs- Thera Trading Co. Ltd (2013) KLR and HCVA No 85 of 2012 Kathini Titus -vs- Almidad Panel Services & Another.**

13. To that extent, it is my finding that the purported conviction in the alleged Traffic case, if any, did not bar the parties in the civil suit, and particularly the first Respondents from challenging the appellants evidence on liability in the trial court. In any event, the first Respondent in his testimony stated clearly that he was hit by the appellants motor vehicle that had hit a woman and killed her.

If indeed the third party vehicle Registration **No. KAM 501Y** driven by the third Respondent is the one that hit and killed a woman – and not the first Respondents, it would have been logical that the said James Waweru would have been charged with the offence of causing death by dangerous driving, and not the offence shown the charge sheet produced by the police officer, of careless driving was preferred. This in my view adds more doubt as to the genuineness of the said charge sheet, the the conviction and sentence.

14. I have considered the trial courts judgment. I find that the Magistrate did not address his mind in writing of the purport and effect of **Section 47A of the Traffic Act**. That could be so, but then, I find that the said magistrate reasonably analysed the evidence as tendered and arrived at sound findings contrary to the appellants assertion that the findings were erroneous. Failure to mention the above provision alone did not make his judgment erroneous.

Coming to the alleged uncontroverted and unchallenged evidence tendered by the Appellants witnesses, it is this courts finding that the said evidence was tendered in defence after the First Respondent (then plaintiffs) had testified which was a complete departure of the first respondents testimony. Looking at the said evidence, it presents itself clearly that it is the first Respondents evidence that stands unchallenged and uncontroverted, not vice versa.

A party ought to prove its assertions and allegations whether the evidence is uncontroverted or not in terms of **Order 2 Rule 11** of the **Civil Procedure Rules** and under **Section 107, 108, 109** of the

Evidence Act where the burden of proof of any particular fact is placed on the person who wishes the court to believe in its existence.

In the case **Mwanasokoni -vs- Kenya Bus Services Ltd (1982-88) 1 KAR 278**, the Court of Appeal held that a Court on Appeal will not normally interfere with a Judges finding of fact unless it is based on no evidence or on a misapprehension of evidence or it is shown demonstrably to have acted on wrong principles in reaching that finding.

15. The court has considered all the evidence and the judgment of the trial court and authorities tendered. The grounds of appealed submissions by both counsel have been considered. In its entirety, I find no plausible grounds upon which the trial courts judgment on liability can be set aside. **Grounds No 1, 2, 3, 4, 5, 6 7 and 10** are therefore dismissed as without merit.

16. The awards on general damages for pain and suffering are faulted as having been manifestly excessive and not in relation to the injuries sustained by the First Respondents.

The 1st respondent in **HCA No. 247 of 2010 Amos Karanja Mwangi** was awarded a sum of Kshs.100,000/= in general damages and Kshs.4,600/= in special damages.

The Medical Report prepared by Dr. Obed Omuyoma dated 17th August 2007 showed injuries sustained as cut wound on the right middle finger, blunt injury to the anterior chest wall and blunt injury to the hip joint.

The plaintiff submitted for a sum of Kshs.120,000/= the appellant(defendant) submitted for a sum of Kshs.30,000/=, the trial court awarded a sum of Kshs.100,000/=.

In respect of the 1st Respondent in **HCA No. 248/2010, Joseph Kihui Juma** was awarded a sum of Kshs.120,000/= in general damages. The appellant had proposed Kshs.30,000/= while the plaintiff proposed Kshs.150,000/=. He had sustained soft tissue injuries to the right leg, blunt injury to the anterior chest wall and soft injuries to the right hand as stated in the medical report by Dr. Omuyoma dated 17th August 2007. I have considered the injuries sustained by both respondents and find them to be of soft tissue nature. The awards proposed by the appellant of Kshs.30,000/= were too low to represent a fair and reasonable award. Authorities tendered by the appellant were too old as not to represent a reasonable assessment and guidance.

The court while assessing the damages considered several precedents on similar awards. I however find that the said awards of Kshs.120,000/= and 100,000/= respectively to have been slightly higher than the average and global awards for similar injuries at the time.

17. Guided by the Case **Bashir Ahmed Butt -vs- Uwais Ahmed Khan (1988-88) 1 KARS**, and the principle that a court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate, I am of the view that this is a matte that the court ought to disturb the awards of the trial court. The court finds that a sum of Kshs.80,000/= in general damages for pain and suffering for each of the **two First respondents Amos Karanja Mwangi and Joseph Kihui Juma** is reasonable. In arriving at the above amount, regard has been had to inflation and the applicable awards during the relevant period, and relevant authorities among them **Stanford O. Ochieng -vs- C.C. L Ltd HCCC No 309 of 1998 Nakuru**.

The awards on special damages being not contested shall remain undisturbed.

18. Accordingly, the appeal is dismissed on the matter of liability while the awards on general damages to the first respondents are adjusted as above.

As the appeal has succeeded partly, each partly shall bear its own costs.

Dated, signed and delivered in open court this 28th day of January 2016

JANET MULWA

JUDGE