



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 41 OF 2010

EVANS WANYONYI.....1ST APPELLANT

DATA RUSH CO. LTD.....2ND APPELLANT

VERSUS

JACKSON WAWERU KIBOROH.....RESPONDENT

(Appeal from the original judgment and decree of L.K Kandet (SRM) in Milimani Commercial Courts, CMCC No. 7516 of 2005, delivered on 3rd February 2010)

JUDGEMENT

1) **Jackson Waweru Kiboroh** the Respondent herein, filed a compensatory suit before Chief Magistrate's court, Milimani, Nairobi, against **Evans Wanyonyi and Data Rush Co. Ltd**, the Appellants herein, for the injuries the Respondent is alleged to have sustained as a result of a road traffic accident which occurred on 2nd April 2004 involving motor bike registration no. KAQ 710S. The Appellants filed a defence to deny the Respondent's claim. **Hon. K.L. Kandet**, learned Senior Resident Magistrate partly heard and determined the suit. He found that the Appellants were fully liable for the accident. The Respondent was awarded ksh 400,000/= as general damages and kshs, 200 as special damages. Being aggrieved by the aforesaid decision, the Appellants filed this appeal to have the same impugned.

2) On appeal, the Appellants put forward the following grounds their memorandum of appeal:

1. That the learned trial magistrate erred in law and misdirected himself when he based his judgement on evidence which had not been adduced.

2. That the learned trial magistrate erred in law and misdirected himself in law and facts when he held that the appellants' were the owners of motor cycles in question when the ownership was not sufficiently proved.

3. That the learned trial magistrate erred in law and misdirected himself in law and facts when he found the appellant 100% negligent when the respondent involvement in the accident was not sufficiently proved.

4. That the learned trial magistrate erred in law and misdirected himself when he failed to appreciate that the evidence adduced did not prove the case against the appellants.

5. That the learned trial magistrate erred in law and misdirected himself when he failed to consider the appellants evidence which was overwhelming.

6. That the learned trial magistrate erred when he awarded kshs 400,000/= for general damages for pain and suffering which award was too high as compared to the alleged injured such that it resulted to miscarriage of justice.

7. That the Honourable learned trial magistrate erred and misdirected himself when he failed to appreciate that the respondent had not proved his case on a balance of probabilities.

3) When the appeal came up for hearing, learned counsels appearing in this appeal consented to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. The Appellant argued that the learned Resident Magistrate erred in holding the appellants 100% liable for the accident yet there was no evidence of ownership adduced at trial to prove that the appellants were the owners of the Motor Cycle KAQ 743M contrary to section 108 of the Evidence Act. They claimed further that they were inconsistencies both in examination in chief and cross examination on how the alleged accident occurred since the Respondent claimed that the accident occurred suddenly and he lost consciousness yet on cross examination he alleged to have seen the 1st Appellant from a distance. They averred that the Respondent failed to keep proper outlook and therefore must have contributed to the accident. They asserted further that the sum of kshs 400,000/= awarded as general damages was excessive in comparison to the injuries suffered since **Dr. Wokabi** opined that the injuries were soft tissue injuries and did not warrant kshs 400,000/=. They claimed that the trial Magistrate ignored the submission by the Appellants of kshs 180,000/=.

4) The Respondent on the other hand submitted that the decree as drawn is incomplete since it omitted to include the certificate of costs and is thus fatal. He argued that the appellants did not call any evidence in the trial court to controvert the evidence of the Respondent and cannot purport to import evidence by way of appeal. On ownership of the KAQ 710S, the Respondent adduced evidence that the 1st Appellant worked and himself worked for the 2nd Appellant and he produced his employment contract, police abstract, termination letter and clearance of all documents that are not challenged by the appellants. He claimed that the police abstract indicated the 2nd appellant was the owner of the motor cycle. On the matter of quantum, the Respondent argued that the sum of kshs 400,000/= was not inordinately high as compared to the injuries. He reiterates the cited case of **Severe Stress Limited vs David Mwangi Kimotho HCCA No. 12 of 2005** where the plaintiff was awarded kshs 800,000/= for similar injuries.

5) The grounds of appeal can be summarised into two grounds, which include whether the Appellant was liable and what quantum is payable. I have examined the evidence tendered before the trial court in respect of liability. The Respondent, **Jackson Waweru Kiboro** (PW1) told the trial court that he was in employ of the 2nd Appellant and together with the 1st Appellant, they were tasked with riding motorcycles for the Company for purposes of deliveries. He narrated how on the material day he was riding to K rep Bank Kawangware and the 1st Appellant was following him behind and upon arriving at the entrance he indicated that he was turning left to enter the Bank parking but the 1st Appellant overtook him from the left side causing a collision between the two. He subsequently, broke his leg and lost a tooth. The learned Senior Resident Magistrate appreciated that the Respondent indicated that he was turning left and despite doing so the 1st Appellant attempted to overtake him on the left side causing the collision between the two. He therefore held the Appellants 100% liable. After a careful re-evaluation of the evidence, I am convinced the learned Senior Resident Magistrate was correct in his holding. There is clear evidence that the parties in the suit are not strangers to each other. The Respondent's evidence was he was an employee of the 2nd Appellant who assigned them duties and offered him the motor bike he was using at the time. It was also his evidence that the 1st Appellant, his colleague, who was riding motor bicycle registration number KAQ 710 as was following him behind as they were heading in the same direction. The Respondent claimed that the 1st Appellant attempted to overtake him on the left when he indicated that he was turning left causing a collision between the two that caused the injuries suffered by the Respondent. This evidence was not controverted by the Appellants. The Appellant however claims that the Respondent

did not prove his case since he did not produce evidence to show that the Motor cycle belonged to the 2nd Appellant. Indeed the Respondent did not produce copy of records which is normally prima facie proof that a vehicle or motor cycle in this case belonged to a particular person. The question that arises therefore is whether failure by the Respondent to produce that certificate is enough to exempt the Appellants from liability. I think not. It is clear that the Respondent was an employee of the 2nd Respondent as per the Contract of employment dated 7th January 2004 and therefore knew without a doubt that the motor cycle belonged to the 2nd Appellant. He also knew the person riding the bike since they were colleagues who worked for the 2nd Appellant. This is therefore not a case of strangers and the Appellants did not adduce any evidence to controvert his. In addition, the Police abstract admitted in evidence, listed the 2nd Appellant as the owner of the subject motor cycle hence being held vicariously liable. The uncontroverted evidence shows that the accident occurred when the Respondent indicated that he was turning left only for the 1st Appellant to overtake on the contrary to the leading to the occurrence of the accident. Without any evidence to the contrary I am convinced the appellants should shoulder 100% liability.

6) The Appellant has also challenged the decision on quantum.

The appellants are of the view that the general damages of kshs 400,000/= awarded is too high and have proposed sum of kshs 180,000/= but they did not refer to any authorities to justify their argument. The Respondent has urged this court not to interfere with the decision of the trial court on quantum because the learned Resident Magistrate considered the relevant material and the authorities supplied to her before arriving at her decision. I have carefully examined the record of trial court and it is clear to me that the learned Resident Magistrate considered all the relevant factors and decisions in respect of similar cases. With respect, the decision on quantum of the learned Resident Magistrate cannot be faulted.

7) In the end, the appeal is dismissed in its entirety.

8) The Respondent to have costs of the suit and that of the appeal.

Dated, Signed and Delivered in open court this 20th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellants

..... for the Respondent