



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CIVIL APPEAL NO. 5 OF 2015

MOHAMED GULAB HUSSEIN.....1ST APPELLANT

BENSON KARIUKI.....2ND APPELLANT

VERSUS

FELISTUS LENA MUEMA.....RESPONDENT

(Being an appeal from the original Judgment and Decree in Kitui Senior Resident Magistrate's Court Civil Case No. 380 of 2006 by Hon. M. O. Kizito S R M on 28/01/08)

J U D G M E N T

1. **Mohamed Gulab Hussein** and **Benson Kariuki**, the 1st and 2nd Appellants respectively, were sued by **Felistus Lenah Muema**, the Respondent. The claim was for special and general damages for pain, suffering and amenities, costs and interest. The claim arose out of a road traffic accident that occurred on **3rd February, 2006** along the **Kitui – Machakos Road** at **Kyamathyaka Area** involving motor-vehicle registration number **KAS 998V** which veered off the road and hit the Respondent. The matter was heard and judgment was entered against the Appellants jointly and severally in the sum of **Kshs. 503,650/=** plus costs and interest.

2. Being aggrieved by the decision of the court, the Appellants appealed on grounds that:

- Ownership of the motor-vehicle was not proved against the Appellants.
- The entire proceedings and judgment were a nullity, uprocedural and could not stand.
- The Respondent was partially or solely to blame for the accident.
- Generally damages awarded were too high.
- The Appellants' submissions on liability and quantum were disregarded.
- Judgment was entered in excess of the Magistrate's jurisdiction.

3. The appeal was canvassed by way of written submissions that I have taken into consideration.

4. The Respondent's case was that on **3rd February, 2006** the Respondent was at **Kyamathyaka Market** carrying on her business. At about **7.00 p.m.** a motor-vehicle hit a pedestrian and stopped in the middle of the road. The Respondent decided to rescue the pedestrian, in the process motor-vehicle registration number **KAS 998V**, **Nissan 'Matatu'** veered off the road and hit her. She blamed the driver of the motor-vehicle for the occurrence of the accident. PW2 **Phillip Munyoki** adduced evidence in support of the Respondent. He confirmed in material fact evidence adduced by the Respondent and added that the said motor-vehicle knocked a total of **four (4)** people the Respondent inclusive.

5. The 1st Appellant failed and/or neglected to enter appearance, therefore, an interlocutory judgment was entered against him. The 2nd Appellant entered appearance. At the hearing the 2nd Appellant denied ownership of the motor-vehicle. He stated that at the time of the accident the motor-vehicle was being operated by **Peter Mwangi Kariuki**, his brother. “**Zero one**” a Limited Liability Company became the owner of the motor-vehicle on **30th June, 2006** and he was one of the directors of the company.

6. This being a first appeal, this court is obligated to evaluate and re-consider all evidence tendered before the trial court and make its own independent conclusion as stated in the case of **Selle vs. Associated Motor Boat Company (1968) E.A 123 at page 126**. In doing so I must bear in mind that I neither saw nor heard witnesses who testified.

7. Ownership of the motor-vehicle is denied by the Appellants. In her testimony the Respondent stated that a search certificate was obtained that established ownership of the motor-vehicle by the 1st Appellant. Then the abstract from the police on the accident that she was issued with proved that the 2nd Appellant was the owner of the Motor-Vehicle. This evidence was refuted by the 2nd Appellant who stated that he was a director of “**Zero one**” **Company Limited** which acquired the motor-vehicle on **30th June, 2006**. **Section 8** of the **Traffic Act, Cap 403 Laws of Kenya** provides thus:

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

The position stated above was expounded in the case of **Charles Nyambuto Mageto vs. Peter Njuguna Njathi (2013) eKLR** thus:

“.....The courts recognize that there are various forms of ownership, that is to say, actual, possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report even, In the case of Joel Muna Opija vs. East African Sea Food Limited (2013) eKLR the Court of Appeal held that the best way to prove ownership of motor vehicle would be to produce a document from the registrar of motor-vehicle showing the registered owner. However if a police abstract is produced in court without any objection its contents cannot be denied.”

8. The certificate of records from the Registrar of Motor-vehicles adduced in evidence proved that the legal registered owner of the motor-vehicle registration number **KAS 998V** as at **3rd February, 2006** was the 1st Appellant. The police abstract adduced in evidence on the other hand has the name of the 2nd Appellant as the insured/beneficial/possessory owner as his name does not feature on the copy of records. There was no objection to the production of the documents in evidence. The 2nd Defendant (2nd Appellant) failed to challenge the documents even on cross-examination.

9. It is averred that proceedings against the 1st Appellant were a nullity because he was not served with summons to enter appearance. The affidavit of service dated **6th October, 2006** sworn by **Justus Mulwa Nyula**, a Process Server shows that summons to enter appearance in respect of the 1st Appellant were served upon one **Tracilar Milcah Karanja** described as the wife of the 2nd Defendant.

Order V Rule 7 which is in respect of service on several Defendants provide thus:

“Save as otherwise prescribed, where there are more defendants than one, service of summons shall be made on each defendant.”

Order V Rule 8 provides:

“(1) Where it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service in which case service on the agent shall be sufficient.”

Order V Rule 12 provides:

“When in any suit, after a reasonable number of attempts have been made to serve the defendant, and the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.”

10. It is not suggested that an attempt was made to serve the 1st Appellant. It has not been averred that **Tracilar Milka Karanja** was an agent empowered to accept service on behalf of the 1st Appellant. Therefore the provision of **Order 5 Rule 8** of the **Civil Procedure Rules (Previously Order V Rule 9 of the Civil Procedure Rules)** cited by the Respondent cannot apply.

11. Further, the purported representation of the 2nd Appellant’s wife as an agent does not arise as it is not stated in the affidavit of service.

12. I do not note that an appearance was made on behalf of both Appellants at the outset. Later on the appearance for the 1st Appellant was revoked with leave of the court. Prior to entering the interlocutory judgment it would have been imperative for the trial court to interrogate if service in the circumstances was procedural. What transpired was an irregularity which calls for setting aside the judgment entered against the 1st Appellant.

Liability

13. It was pleaded that the Plaintiff was lawfully walking along the road when the 2nd Defendant by himself, his driver, servant and/or agent drove, controlled and or managed the motor-vehicle so negligently permitting it to knock the Plaintiff.

14. In her evidence PW1 testified that she moved to the road to rescue a pedestrian. On arrival another motor-vehicle that she later identified as **KAS 998V** which came from **Kitui** direction swerved to where she was and hit her. She stated that she was off the road. PW2 an eye-witness stated that PW1 was walking off the road when the motor-vehicle veered off the road and hit her and three (3) other persons.

15. No evidence was called by the defence controvert evidence adduced by the Plaintiff/Respondent as to how the accident occurred.

16. In emphasizing the importance of pleadings Counsel for the Appellants quoted **Order 2 Rule 6** which provides that:

“no party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.”

17. In the case of **Adetoun Oladeji (NIG) LTD vs. Nigeria Breweries PLC SC 91/2002** the Supreme Court Judge **Pius Aderemi** stated thus:

“.....It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put it in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

18. Pleading that the Respondent was walking along the road depended in what context the Respondent expressed herself – which turned out to be on the side of the road. There is no deviation from the pleadings as alleged.

19. The trial Magistrate has been faulted for awarding **Kshs. 500,000/=** in general damages. It was proved on a balance of probabilities that the Plaintiff suffered the following injuries:

- Soft tissue head injuries.
- Fracture of the left collar bone.
- Fracture of the 3 left ribs.
- Fracture of the right humerous.
- Fracture of the left tibia and fibula.

These injuries however healed well.

20. It has been contended that the learned trial Magistrate failed to consider authorities cited by the 2nd Appellant. Looking at the judgment of the learned trial Magistrate, he took into consideration authorities cited by both the 2nd Appellant and Respondent and decided to rely on the authority of **Francis Ngema Mutuli vs. John Kitheka Kwara and Another Nbi HCCC No. 3548 of 1989**. He gave the reason why he came to the conclusion, namely, the multiple injuries sustained were comparable to those suffered in the cited case where an award of **Kshs. 600,000/=** was made. It is therefore not right for the Appellants to allege that the authorities cited were not considered.

21. As an Appellate Court, I must however reconsider authorities cited. The Respondent sought an award of **Kshs. 700,000/=** for injuries sustained (in general damages) while the 2nd Appellant proposed a sum of **Kshs. 200,000/=** as adequate compensation for injuries suffered. The Respondent sustained injuries in the year 2006. All authorities cited were more than **15 years older**. In considering authorities cited by both parties I must remind myself that courts have held in the past that damages for injuries sustained must be within consistent limits. They should not be too low and in the same vein they should not be excessive. For instance it has been stated that:

“Damages must be within limits set out by decided cases and also within limits the Kenyan Economy can afford. Large damages are inevitably passed to members of public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees. (See the case of Osman Mohamed & Anor vs. Saluro Bunit Mohamed Civil Appeal No. 30 of 1997.”

22. With this in mind and considering the authorities cited before the Lower Court in mind I find a sum of **Kshs. 400,000/=** to have been a reasonable award in general damages. This therefore brings us to the issue whether the court was justified in entering jurisdiction for a total sum of **Kshs. 503,650/=** when its pecuniary jurisdiction amounted to a maximum of **Kshs. 500,000/=**. What has been questioned is the issue of jurisdiction. In the case of **Owners of the motor vessel “Lillian S” vs. Caltex Oil (Kenya) LTD (1989) KLR 1, Nyarangi, Masime and Kwach JJA** had this to say:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.....

By jurisdiction is meant authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means..... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.”

23. It is conceded that the learned Magistrate was aware of the limit of his pecuniary jurisdiction. It was not a matter of appreciating the pecuniary jurisdiction that he had, but he had a duty of awarding what was within the limit of the court’s jurisdiction.

24. From the foregoing, the appeal must succeed, partially. In the premises, I do set aside the judgment of the Lower Court. With regard to the 1st Appellant, proceedings against him and the subsequent judgment entered having been a nullity, is quashed and set aside with no orders as to costs.

25. With regard to the 2nd Appellant, the Respondent is awarded general damages in the sum of **Kshs. 400,000/=** and special damages in the sum of **Kshs. 3,650/=** that is not in dispute. The aggregate award is **Kshs. 403,650/=**. Special damages will attract interest from the time of filing the suit in the Lower Court. Interest of general damages will be calculated from the time of judgment of the Lower Court. Costs of the suit in the lower court and Appeal shall be borne by the 2nd Appellant.

26. It is so ordered.

Dated, Signed and Delivered at Kitui this 22nd day of September, 2016.

L. N. MUTENDE

JUDGE