



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CIVIL APPEAL NO.8 OF 2016

BETWEEN

ISAAC MASONI MAKOKHA APPELLANT

AND

WYCLIFFE OTIENO OBWOR RESPONDENT

(An appeal from the judgment and decree of Hon. J.S. Wesonga (RM) in Oyugis PMCC No.114 of 2013 dated 29th March, 2016)

JUDGMENT

1. The appellant (**ISAAC MASONI MAKOKHA**) has filed this appeal against Wycliffe Otieno Obwor (the Respondent), contesting the decision where judgment was entered in favour of the Respondent on liability at 100% and general damages were awarded at Kshs.120,000/=, and special damages at Kshs.1500/= plus interest at court rates.
2. The background to the matter is that the respondent had filed a suit in the magistrate's court seeking general and special damages as well as costs and interest to be awarded against ISAAC MASONI MAKOKHA. This was a consequence of his claim that on 19th June, 2013 he was travelling in motor vehicle Reg. No. KBK 641 B, Toyota Matatu as a fare paying passenger, when the said motor vehicle was hit by motor vehicle Reg. No. KBN 102 T Mitsubishi Lorry which was being driven along Kisumu-Oyugis Road at Center Nyamira junction area. It was his contention that motor vehicle KBQ 943V was negligently driven and the driver suddenly emerged from a feeder road onto the main road at the junction resulting in hitting motor vehicle registration No. KBN 102 T which in turn hit KBQ 641B which was stationary at a bus stop for passengers to alight. As a result of that collision, the respondent suffered injuries and the particulars of negligence were duly pleaded. He stated that the appellant was the registered owner of motor vehicle KBQ 641 N.
3. The appellant denied liability or even ownership of the said motor vehicle at all. He also disputed the claim that the respondent was a fare paying passenger in the said motor vehicle. It was further pleaded on a without prejudice basis that infact no accident took place on the alleged date, and in the alternative that if such accident occurred involving the two motor vehicles, then the same was due to the negligence and/or recklessness of the driver of motor vehicle Registration NO.KBN 102T and on the negligence on the part of the respondent.
4. WYCLIFFE OTIENO (PW1) narrated to the court how while travelling in motor vehicle Registration KBK 641B, which had stopped at the NYAMIRA junction for people to alight, motor vehicle Registration No. KBQ 943V emerged from the NYAMIRA road and joined the highway without

stopping. As a result, it was hit by a lorry which was moving towards Kisumu direction, and in turn the lorry rammed onto motor vehicle registration No.KBK 641B.

5. The respondent relied on his treatment notes which showed that he had injuries to the chest, face, right elbow, right thigh and ankle joint. On detailed examination by Dr. Okombo, the medical report presented to court described the injuries on the face as bruises, dislocation of the right elbow joint and left ankle joint, and injuries to the chest and right thigh. He also produced receipts for his medical expenses to support his claim for general damages.

6. These findings were challenged on grounds that the evidence did not prove that the appellant was 100% liable and that evidence by police investigations showed that the respondent was not involved in the accident. He suggested that respondent should have borne part of the liability. The appellant also lamented that the damages were manifestly excessive and that the trial magistrate failed to evaluate the evidence properly thus reaching an erroneous decision.

7. The appellant's prayer is that the judgment be set aside and/or quashed, and the suit filed in the subordinate court be dismissed. He has an alternative prayer asking this court to re-visit the issue of liability and the quantum of damages awarded with a view to reducing the same to what he describes as a reasonable amount.

8. The appeal was disposed off by way of written submissions. The appellant's counsel argued that the evidence showed involvement of another motor vehicle registration No.KBN 102T, which is the one that hit motor vehicle registration No.KBK 641B. He urged this court to consider the evidence of the respondent who blamed motor vehicle registration No. KBQ 943V saying that upon cross examination respondent said the saloon car (presumably KBQ 943), did not collide with the lorry, and that the lorry was trying to avoid hitting it, when it hit the car he was travelling in. He asked court to note that the respondent described the lorry as moving at a high speed because he was at a steep descent.

9. He also cast doubts on whether the respondent was a passenger on motor vehicle KBK 641T, saying investigations by police from Oyugis police station disclosed the names of the victims found at the scene, and the respondent was not among them. The police officer (PW2) BUAUO MWASHI upon being shown a copy of the police abstract which the respondent relied on, disowned the same, saying he did not know who had issued it. Furthermore, the respondent had confirmed that he did not record a statement at the police station, leading to queries as to how then the police abstract form was obtained.

10. On this limb the respondent's counsel argued that apart from the police abstract, all the other documents which he relied on supported his claim and the issue raised comes in too late. Counsel also pointed out that PC MWASHI (PW2) admitted that he could not capture the details of all the accident victims because some of them had been taken by their relatives to various health institutions after the accident.

11. Further that although PW2 did not issue the police abstract, that did not mean it did not originate from Oyugis police station, as PW2 had confirmed that the same was issued by his colleagues at the police station, only that he could not immediately tell the name of the officer. The appellant's counsel had raised this issue even at the trial court and submitted that the respondent was an imposter. How did the trial magistrate resolve this issue?

12. The trial magistrate indeed addressed the issue in his judgment, saying once the respondent indicated he was involved in the accident, and produced a police abstract, the burden was on the appellant to prove that the document he relied on to support his claim was a fraudulent one. The trial magistrate cited the decision in **HARIT SETH T/A SETH ADVOCATES –VS- SHAMAS CHARANI (2014) e KLR** which stated that allegations of fraud must be strictly proved.

13. Whereas the above observation is true, I think the starting point is that the party relying on a document must demonstrate its authenticity before that burden can shift onto the one alleging that it is a fraudulent document. Surely it would be totally chaotic if members of the public were simply to produce

police abstracts purportedly obtained from a police station, issued by unknown officers who cannot even be called to testify in court, and accept that as proof of what they allege, then turn to the one accused and tell them:-

”now prove that this document which police from the very station it is said to have originated from, did not issue it.”

14. I am of the view that it would be unfairly shifting the burden of proof onto the defendant. But was this the only evidence available?

15. However to his credit, the respondent had all other documents i.e the P3 form and the treatment notes from Jaramogi Oginga Odinga Teaching and Referral Hospital which recorded that he was involved in Road Traffic Accident on 19th June 2013. The respondent’s description of how the road traffic accident occurred was also corroborated by the evidence of the investigating officer (PW2) and it is this evidence when taken in totality that shifts the balance of probability in favour of the respondent and gives credence to his claim that he was a victim in the road traffic accident which involved 4 motor vehicles.

16. Certainly there was no contact between the motor vehicle the respondent was in, and the appellant’s motor vehicle – the respondent confirmed as much. However it was the negligent manner in which the respondent’s motor vehicle was driven from the feeder road into the main road that triggered a series of confusion, leading to the lorry avoiding to hit respondent’s motor vehicle and thereby hurtling down to ram into motor vehicle registration KBK 641B.

17. The motor vehicle was stationery, so that the issue of the respondent contributing to the accident by not wearing a seat belt is farfetched and does not arise, and no contribution can be apportioned whatsoever. The trial magistrate correctly visited liability on the appellant at 100%. If the defendant believed the other motor vehicle was to blame, he should have enjoined them as third party.

18. On quantum, the appellant took issue with the manner the injuries were described by the respondent in his testimony and *visa vis* the contents of the medical report, and that these were even a departure from his pleadings. I have considered the arguments and find that the variation in the description of the injuries is not fatal. The limbs alleged to have suffered injuries are the same ones – the appellant is a lay person who simply said which limbs were injured whilst the Doctor gave them a more detailed professional labelling – after all a dislocation is an injury.

19. As concerns the quantum of damages awarded, counsel for appellant submits that the same is manifestly excessive and proposed Kshs.50,000/=. I have considered the past decisions cited by the appellant *visa vis* those cited by the respondent – the decision cited by the appellant is over 20 years and given the rate of inflation and devaluation of the Kenya Shilling, I am satisfied that the sum awarded was commensurate with the injuries suffered and not manifestly high.

20. Consequently I find no merit in the appeal and it is dismissed with costs to the respondent.

Delivered and dated this 21st day of **December, 2016** at Homa Bay

H.A. OMONDI

JUDGE

Miss Aron holding brief for Odero Othim for Respondent

Mrs Masese holding brief for Otieno for Appellant.