



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 503 OF 2009

BHACHU INDUSTRIES LTD.....APPELLANT

VERSUS

PETER KARIUKI MUTURA.....RESPONDENT

(Appeal from the original judgment and decree in Nairobi CMCC No. 13148 of 2004 delivered on 17th August, 2009 by Hon. M/s. Ileri (R.M.))

JUDGMENT

1. The respondent sued the appellant seeking compensation following a road traffic accident that occurred on 20th April, 2004 along Lusaka Road.
2. It was the respondent's claim that while lawfully pushing a handcart on the material day, the appellant's motor vehicle registration number KAG 814W which was being negligently driven hit him occasioning him injury to the chest and right thigh and a fractured femur.
3. PW1, Dr. Moses Kinuthia confirmed the respondent's injuries. He indicated that; the fractured femur was fixed with a K-nail whose removal he estimated would cost KShs. 80,000/- in a medium size hospital; that the injury to his right thigh caused him to walk with a limping gait and he could not walk for long and that he had a 45 cm scar. He drew an inference that the respondent would suffer eighteen (18) months temporary incapacity and could develop arthritis. The Doctor produced Receipts for medical report and court attendance for KShs. 1,500/- and 5,000/- as P. Exhibit 1b and 1c respectively to establish the cost incurred by the respondent for the services he rendered.
4. PW2, Police Constable Isaac Muneeni produced an occurrence book extract as P. Exhibit 2.
5. The respondent, PW3 recounted that he was hit when the suit motor vehicle which was trying to overtake a bus whose registration number he could not recall hit him. He stated that the suit motor vehicle hit him while he was on the left side of the road. He stated that the bus was on the right side of the road. He was admitted at the Kenyatta National Hospital for treatment of his injuries. He stated that he reported the matter to the Industrial Area Police Station where he was issued with a police abstract (P. Exhibit 3). He was later examined Dr. Kinuthia who prepared a medical reports for him. The respondent also produced a copy of records as P. Exhibit 6. He stated that the handcart had reflectors and denied being negligent. He also stated that the accident occurred at 6:00 p.m.
6. The appellant denied the respondent's claim but did not tender any oral evidence.
7. The Learned trial Magistrate subsequently entered judgment in favour of the respondent as follows:

Liability 100% against the appellant

General Damages KShs. 300,000/-

Special Damages KShs. 1,500/- Doctor's fee be in the costs

Removal of K- nail KShs. 50,000/-

8. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on the following grounds:

- a. ***The Learned Magistrate erred in law and fact by holding that the Appellant was 100% liable for the accident.***
- b. ***The Learned Magistrate erred in law and fact by not appreciating that the accident occurred at 7.30 p.m. at night.***
- c. ***The Learned Magistrate erred in law and facts by ignoring the evidence of the police officer regarding the motor vehicle that injured the Respondent.***
- d. ***The Learned Magistrate erred in law and facts by awarding general damages that are excessive in the circumstances.***
- e. ***The Learned Magistrate erred in law and fact by not appreciating that the Respondent sued the wrong party.***

9. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: **Peter v. Sunday Post (1958) at pg. 429**).

10. This appeal was canvassed by way of written submissions. According to the appellant, the respondent exposed himself to danger and was to be found negligent for pushing the handcart on the road at 7.30 p.m. at night as per the police abstract considering that a handcart has not lights. The appellant took issue with the fact that the respondent in the plaint stated that he was hit by the suit motor vehicle and the police officer contradicted by stating that he was hit by motor vehicle registration number KAG 579J yet the trial magistrate went ahead to find in favour of the respondent.

11. The respondent submitted that the appellant failed to controvert his evidence that its driver was carelessly driving the suit motor vehicle which was defective; that the respondent testified that his handcart was fitted with reflectors and a careful driver could have spotted him; it was submitted that the respondent's evidence that he was hit by the suit motor vehicle was supported by the occurrence book and police abstract which were produced in evidence. As for quantum, the respondent relied on the Doctors opinion that the injuries he sustained occasioned him a lot of pain and blood loss and urged that trial court's award was in order.

12. What falls for this court's determination is whether the learned trial magistrate erred in relying on the police officer's contradictory evidence and whether the respondent proved on a balance of probabilities that the appellant was liable for the accident, if so to what extent and what damages are available to the respondent.

13. The police officer who testified was not the investigating officer, other than the documents he produced his opinion with regard to the occurrence of the accident is not binding to this court. It is in fact in my view not valuable. However, the documents. I shall now delve on the issue of liability.

14. The appellant did not as have been stated earlier, controvert the respondent's claim by way of oral evidence. The consequence of failure to adduce evidence has been vastly considered by this court. In **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** Makhandia J held:

"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

15. In **Janet Kaphiphe Ouma & Another v. Marie Stopes International (Kenya)** HCCC No. 68 of 2007, Ali-Aroni J, stated:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

16. In the absence of evidence in rebuttal from the appellant, it followed that the respondent proved his case on a balance of probability. In the circumstances I uphold the trial court’s finding on liability.

17. On the issue of quantum, I have considered authorities where plaintiffs suffered injuries similar to those of the respondent including **Martin M. Mugi v. Attorney General (2000) eKLR** and **Anne Muriithi, Lilian Kathoki, Naomi Nzisa, Mary Nzomo, Anne Njeru and Jane Syombua Sammy v. The Headmistress Mks Girls, The Chairman, Board of Governors and Wambua Makau (2003) eKLR** and find that the award by the trial magistrate was reasonable. The upshot is that this appeal is dismissed with costs to the respondent.

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A MABEYA

Dated, Signed and Delivered at Nairobi this 28th day of January 2015