



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.191 OF 2010

BETWEEN

PAUL W. KIBOI 1st APPELLANT

STEPHEN MURITHI NDUNGU2nd APPELLANT

AND

EPHANTUS KANYI MAINA RESPONDENT

*(Appeal arising from the judgment and decree of Mr. Kibet Sambu, Esq., RM, in Migori
dated and delivered on the 5th day of May 2010 in Migori SPMCC No.382 of 2007).*

JUDGMENT

Introduction

1. The appeal herein arises from the judgment and decree of Mr. Kibet Sambu, Senior Resident Magistrate in Migori dated and delivered on the 5th May 2010 in Migori SPMCC NO.382 of 2007 where he found the appellants herein jointly and severally 100% liable for the road traffic accident that occurred on 17th March 2005 along Kisii-Migori road. He entered judgment in favour of the respondent for Kshs.350,000/= general damages, special damages Kshs.45,000/= plus costs and interest of the suit.

The Appeal

2. Being aggrieved and dissatisfied by the judgment and decree, the appellants filed appeal on the following seven (7) grounds:-

·The learned trial magistrate erred in both law and in fact when he held that the respondent had proved negligence against the appellant.

·The learned trial magistrate erred in both law and in fact in believing that the respondent had been involved in the accident when no credible evidence was led in that regard.

·The learned trial magistrate erred in fact and in law when in the premises he failed to note the material departure from the pleadings and the evidence which was led at the trial.

·The learned trial magistrate erred in fact and in law when he failed to detect that the person who gave evidence as the respondent at the trial was in fact not the respondent but

an imposter.

·The learned trial magistrate erred in both law and in fact in awarding to the respondent general damages in the sum of Kshs.350,000/= which amount was both excessive and manifestly high such as to constitute an erroneous estimate in the circumstances.

·The learned trial magistrate erred in law and in fact when in the circumstances he awarded to the respondent special damages which had been neither pleaded nor proved at the trial.

·The learned trial magistrate erred in both law and in fact in deciding the case against weight of evidence led at the trial, in failing to consider the totality of the thereof and in ignoring the basis and substance of the submissions filed on behalf of the appellant at the trial.

The Pleadings

3. The respondent herein had sued the appellants jointly and severally by a plaint dated 20th December 2007 claiming that they were liable for the accident which occurred on the 17th March 2005 while he (respondent) was travelling as a fare paying passenger in motor vehicle Registration Number KAQ 339 H Matatu. He claimed that the 2nd appellant while driving motor vehicle registration No. KZP 641 was negligent thereby causing the same to lose control and violently ram onto the matatu. The particulars of negligence on the part of the 2nd appellant are set out at paragraph 4 of the plaint.

4. That a result of the said accident, the respondent sustained severe bodily injuries for which he held the appellants liable. He claims that he suffered the following injuries:-

- Bruised left forehead;*
- Fracture of three (3) right lower ribs;*
- Contused chest;*
- Fracture left ulna radius;*
- Scattered bruises on the lower limbs.*

5. He also claimed special damages arising from the accident:-

- Treatment expenses – Kshs.42,300/=;*
- Medical Report – Kshs.3,000/=.*

6. The suit was defended by the two defendants now appellants who filed a joint defence on the 19th March 2008 in which they denied each and every allegation made by the respondent putting him to strict proof thereof. Although they admitted that the accident occurred on the 17th March 2004 involving motor vehicle KZP 641 and motor vehicle KAQ 339 H at Nyachenge area, they denied that it was as a result of negligence on the part of the 2nd appellant. They also denied that the respondent was a lawful passenger in motor vehicle KAQ 339 H and they maintained that the said accident was caused by the negligent driving of motor vehicle KAQ 339 H and motor vehicle KAR 987 C. The appellants enumerated the particulars of negligence of motor vehicle KAQ 339 H and KAR 987 C in their defence.

7. There was no reply to defence. As it were at the close of pleadings, a date for hearing was fixed and the matter proceeded for hearing where only the respondent and the doctor gave evidence. No one else was called by the respondent to give evidence. The appellants did not testify. In its considered opinion

and after analyzing the evidence on record, the trial court made the finding, the subject of this appeal.

First Appellate Court

8. This is the first appeal. The parties herein agreed to canvass the same by way of written submissions. It is the duty of the first appellate court to review the evidence tendered in the trial court afresh order to determine whether the conclusion originally reached upon the evidence should stand. However, this duty should be exercised with caution and it is not enough that the appellate court might have come to a different conclusion in the matter. This court is very much aware that it was not present when the witnesses gave their respective testimonies. See **Selle & Another –vs Associated Motor Boat Company Ltd. & Others [1968] EA 123.**

The Evidence

9. It is common ground that there was an accident on the 17th March 2004 which involved motor vehicle KAQ 339 H and KZP 641 Isuzu Lorry where the respondent sustained injuries. It is also common ground that motor vehicle registration No. KZP 641 Isuzu Lorry belonged to or was owned by the 1st appellant in this case. During his testimony, the respondent said that the vehicle he was travelling in was hit by another vehicle that came from behind which was the Isuzu Lorry KZP 641. He was then taken to hospital and was treated. He produced the treatment notes **Exhibit 1, P3 Form – MF1-2**, Police Abstract **MF1-3**, Medical Report **MF1-4**, Receipts **Exhibit 5** and Receipt from Dr. Idagiza **Exhibit 6**. He blamed the Isuzu Lorry for the accident.

10. On cross examination, he told the court that at the time of accident, the vehicle he was travelling in was stationary as they had stopped on the road because there was an accident which had occurred ahead of them. He testified that they were hit from behind.

11. The only other person to testify in this case was Dr. Idagiza A. Akidiva a medical practitioner at Akidiva Memorial Hospital. He testified that he examined the respondent herein on 10th December 2007 and established the following injuries:-

- a. *A bruised forehead;*
- b. *Fractured right lower ribs;*
- c. *Chest contusion;*
- d. *Fracture of the ulna and radius;*
- e. *Scattered bruises on the limbs;*
- f. *Contused muscles*

12. He told the court that at the time of examination the respondent was still complaining of chest pains and restrained/reduced movement in the left wrist joint. He formed the opinion that the respondent had sustained severe injuries which he assessed at 50%.

Appellant's Case and Trial Court's Judgment

13. The appellants did not call any witnesses to rebut the testimony by the respondent and the doctor herein. Written submissions were made by each party herein through their respective counsel on the twin issues of liability and quantum of damages payable. Respondent's counsel urged the court to hold the appellants 100% liable for the accident and to award the respondent Kshs.400,000/= in general damages. On the other hand the appellants' counsel submitted that the respondent failed to prove negligence on the part of the appellants as required and further that the respondent failed to file a reply to the appellants' written statement of defence as required under the repealed **Order VI Rule 9 (I) Civil Procedure Rules.**

14. After considering the evidence adduced and the written submissions filed together with the cited legal authorities, the trial court found that the respondent had proved his case against the appellants on a balance of probability and held the appellants 100% liable for the accident and awarded general damages of Kshs.350,000/= together with special damages and costs.

Submissions

15. Parties in this appeal agreed to canvass the appeal herein by way of written submissions. I only see on record the written submission by the appellants dated 28th June 2012.

16. On liability, counsel for the appellants argued grounds 1-4 together and submitted that there was no reply to defence that was filed and/or served upon them denying the particulars of negligence pleaded against the owner of KAQ 339 H and KAR 987 C that is at paragraph 7 and 8 of the Statement of defence. That failure to do so meant that the respondent admitted the said particulars of negligence pursuant to **Order 7 Rule 17 of the Civil Procedure Rules (2010)**. He relied on the case of **Unga Maize Millers Ltd. -vs- James Munene Kamau – HCCA No.16 of 2011 Eldoret** and **Mount Elgon Hardware -vs- United Millers Ltd. Kisumu Court of Appeal Civil Appeal NO.19 of 2006**.

17. Counsel further submitted that there was nothing in the respondent's evidence to suggest that the appellants were negligent as pleaded in the plaint; that the respondent did not describe how the accident occurred; he did not witness the accident in order to impute negligence on the part of the 2nd appellant and that respondent only confirmed the negligence of motor vehicle KAQ 339 H, when he stated that **“they were stationary and had stopped on the road on our left.”**

Analysis

18. I have considered the submissions on liability and the evidence on record. The respondent did not contest negligence imputed on their part by the appellants as they did not reply to the defence. I am of the same persuasion as the judges in the above cited cases that is **Unga Maize Millers Ltd -vs- James Munene Kamau** and **Mount Elgon Hardware -vs- United Millers Limited**, that it is proper for a party to traverse any allegation against them by way of filing a reply to the same. Failure to file a reply to defence would mean that the particulars of negligence pleaded remain uncontested and admitted by the respondent.

19. I also find that the respondent did not witness the accident herein. He claims in his testimony that the vehicle he was travelling in was hit from behind. He does not however allude to any of the particulars of negligence set out in the plaint against the appellant. He therefore cannot truly confirm negligence on the part of the 2nd appellant as pleaded and/or alleged.

20. There was also no independent witness who corroborated the evidence of the respondent's testimony herein. Even though the police abstract was produced as evidence, the respondent's case would have been more complete if he had called the police officer who investigated the complaint. This would have made it easy for the trial court to know who was to blame for the accident as the investigating officer would explain and even make a sketch map of the scene at that particular point thus shedding some more light on how the accident occurred.

21. Finally the respondent told the trial court that the vehicle he was riding in was stationary on the road on their left. This means that the said motor vehicle was obstructing the lawful path of the Isuzu lorry KZP 641. The lorry driver could therefore not be blamed for the accident.

22. For the above reasons, I do find that the respondent did not prove his case against the appellant on a balance of probability, he never proved the particulars of negligence attributed to the 2nd appellant as indicated in his plaint. I would therefore not apportion liability against the appellants at 100%. This means therefore that grounds 1-4 of the appeal herein succeed.

23. On grounds 5, 6 and 7, it is submitted that the injuries allegedly suffered by the respondent are suspect. The doctor who took in the respondent as a patient in the first instance did not carry out any x-ray on the alleged fractures though he was the same doctor who prepared the P3 form. I agree with the appellant's contention that the alleged injuries suffered by the respondent were not proved.

Conclusion

24. The upshot of what I have stated above is that the appeal herein succeeds on grounds that the respondent did not prove his case against the appellant on a balance of probability. I set aside the judgment of the trial court and proceed to dismiss the respondent's suit. Each party shall bear its own costs both in the court below and on this appeal.

Judgment written and signed by

R.N. SITATI

JUDGE.

Judgment delivered, dated and countersigned in open court at Kisii this 9th day of January 2015

C. NAGILLAH

J U D G E

In the presence of:-

Mainga h/b for Odhiambo Kanyari for Appellants

N/A for Respondent

Edwin mongare Court Assistant