



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 141 OF 2012

HAMID ABDULRAHMAN ABDALLA.....1ST APPELLANT

ALI FAIZ SAID2ND APPELLANT

V E R S U S

DIXON NGOTI MWAKONDI 1ST RESPONDENT

ZARMAZ IBRAHIM ALI 2ND RESPONDENT

(An appeal from the Judgment and Decree of the Hon. A. M. Obura - PM given at Kilifi on 8th August, 2012 in SRMCC 281 of 2010)

JUDGMENT

1. On 6th May 2010 there was an accident on Mombasa/Malindi involving motor vehicle Probox Registration No. KBJ 493J and lorry registration No. KAG 085G. There was one fatality and others suffered injuries.
2. The 1st Respondent **DIXON NGOTI MWAKONDI** [Mwakondi] was one of the persons injured in that accident. Mwakondi filed a Civil Suit being **Kilifi SRMCC No. 281 of 2010** seeking compensation in special and general damages against the 2nd Respondent, owner of the Probox and the Appellants who were the driver and owner of the lorry respectively. The lower Court in a very well reasoned judgment found the Appellants 100% liable for the accident; and awarded Mwakondi general damages of Kshs. 700,000/- and Kshs. 2,000/- being special damages. Appellants were aggrieved by that judgment and have appealed against it.
3. As the 1st Appellate Court I have an obligation to re-evaluate, assess and analyze the trial Court evidence. The role I am expected to undertake was discussed in the case **ABOK JAMES ODERA T/A A. J. ADERA & ASSOCIATES -Vs- JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013]eKLR** where the Court of Appeal stated-

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely; to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of KENYA PORTS AUTHORITY VERSUS KUSTON (KENYA) LIMITED (2009)2EA 212 wherein the Court of Appeal held inter alia that:-

‘On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.’

4. The grounds of Appellant’s appeal fall into two categories-
 - i. **That the trial Court erred in law and fact in finding Appellants 100% liable for the accident; and**
 - ii. **The award of damages was excessive.**

LIABILITY

5. Mwakondi; who was a passenger in the Probox; and PW3, DW1 DW2 who were also passengers in Probox gave similar testimony. That DW2 driving Probox was driving the Probox on Mombasa Malindi road going towards Malindi. He was travelling at 80kmph. As they travelled they met a lorry driving towards them but on their side of the road. DW2 tried to avoid collision by driving off the road, on his side of the road but the lorry followed them there and collided with them. That evidence was corroborated by the Police Officer, PW2 who said-

“... the point of impact was the left side.”

The fact that the lorry followed the Probox and collided with it when it was off the road is supported by the evidence of Mwakondi who stated, while being cross examined, that the Probox was hit on its side and not head on.

6. Appellants driver and turn-boy in their testimony stated that they noticed the Probox travelling in zig zag manner and the lorry was slowed down but the Probox collided with it.
7. The Learned Trial Magistrate who had the benefit of seeing the witnesses testify stated in his judgment-

“On the first issue, the 2nd Defendant (DW4) and his turnboy testified that it was the saloon car that veered onto the right and rammmed onto the lorry. The lorry then swerved to the left before swerving right as the driver had lost control. There was evidence that the lorry was carrying 17 tonnes of sand. Although reference was made to a sketch plan, it was not produced in Court for the Court’s inspection. It would assist in determining the final position of both vehicles and the possible point of impact. However, it is doubtful that a lorry carrying 17 tonnes of sand could be pushed off the road by a saloon car and still have momentum to swerve to the opposite side of the road. This is even more difficult to believe if the lorry was moving at 40kmph as stated by the lorry driver. In my view, if the lorry driver had slowed down, the impact could not have been that great. Further, even the Police Officer (PW2) told the Court that all the witnesses except the occupants of the lorry, attributed blame to the lorry driver

My analysis is that it must have been the lorry that swerved to the right thus colliding

with the saloon car. It was broad day-light about 3-4pm. There was also evidence that the saloon car was extensively damaged. Considering the impact, it is highly probable that the saloon car driver was speeding though on his correct lane. The resultant collision could also have caused the lorry steering control to brake. I also find that had the lorry driver slowed down as he avers, then the lorry which was loaded with tones of sand, should have been able to stop on impact and not be swerved from the left to the right. I therefore find that the lorry driver must have caused the accident by veering towards the right and colliding with the motor vehicle Reg. NO. KBL 493L. I do not find the 2nd and 3rd Defendant's account convincing for the reasons I have mentioned. The evidence of DW3 and DW4 could have been self-serving. If their position is true, why did the Police not act on his report and blame the driver of the saloon car? PW2 testified that no one had been blamed so far. I do not accept the Defence by the 2nd and 3rd Defendants. I find that the 2nd Defendant caused the accident. The 3rd Defendant is vicariously liable for the negligence of his driver and or agent. I absolve the driver of the saloon car of any liability. It follows that the 1st Defendant is not liable. I hold so."

8. Having re-evaluated the evidence tendered at the trial I can find no reason to depart from the finding of the trial Magistrate on liability. In reaching that conclusion I am well advised by the following cases-

i. KARANJA V MALELE [1983]KLR-

"Apportioning of blame represents an exercise of discretion with which an Appellate Court will not interfere with unless it is clearly wrong, based on no evidence at all or if the wrong principle applied; which was not the case here."

That holding resonates with my finding in this case-

ii. GAKERE V NGIGI [1981] KLR 306

"... and the Judge was justified in finding some slight degree of negligence on the part of the Plaintiff but the decision cannot be interfered with by the Appeal Court unless it can be proved that the Judge acted on the wrong principle or misapprehended the relevant facts while exercising this discretion."

Having considered the evidence of the trial Court, therefore I find that I am unable to substitute any other finding of fact, other than that made by the Learned Trial Magistrate. I will not therefore upset the finding of the trial Court on liability.

QUANTUM

9. Mwakondi suffered the following injuries-

- **Posterior dislocation of the left hip.**
- **4cm cut wound on the right shin.**
- **2cm cut wound on the lower lip.**

According to Dr. S. K. Ndegwa, Mwakondi suffered severe joint and soft tissue injuries and that the prognosis was that he was likely to develop severe post traumatic arthritis of the left hip.

10. Dr. Udayan Sheth examined Mwakondi on 10th March 2011 and his report shows that Mwakondi was having no pain and that he was fully recovered with no deformity and no permanent incapacity.

11. Mwakondi in evidence stated that he had continued to suffer pain, and that he was limping. Dr. Ndegwa confirmed having noted, at trial, that Mwakondi had a severe gait as he walked.

12. Contrary to what was stated in submissions by Appellant, the Learned Trial Magistrate considered parties authorities. On this he said-

“I have looked at the authorities cited by the parties. The case of SIMON GITHIOMI –VS- PETER WACHIRA relied upon by the 2nd and 3rd Defendants is the most recent and relevant. The Plaintiff in that case was awarded Kshs. 350,000/- in 2000 for comparable injuries. Given the passage of time, and the incidence of inflation, I award General Damages of Kshs. 700,000/- to the Plaintiff herein.”

13. In the case SAVANA SAW MILLS LTD –V- GEORGE MWALE MUDOMO (2005)eKLR the Court stated that the award of general damages is always an exercise of discretion and in so stating referred to the Court of Appeal decision CATHOLIC DIOCESE OF KISUMU –Vs- SOPHIA ACHIENG TETE – KISUMU CIVIL APPEAL NO. 284 OF 2001 as follows-

“It is trite law that the assessment of general damages is at the discretion of the trial Court and an appellate Court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

14. On my part I have considered the authorities of the parties and I am unable to fault the Learned Trial Magistrate’s award. All I would add is that one cannot trivialize the injury suffered by Mwakondi. He suffered dislocation of the hip bone. The Oxford Advanced Learners Dictionary defines dislocation as-

“To put a bone out of its normal position in a joint.”

Such an injury to occur on the hip is fairly painful and accordingly the award granted to Mwakondi cannot be interfered with.

CONCLUSION

15. In the end the appeal is dismissed with costs to all the Respondents.

DATED and DELIVERED at MOMBASA this 26TH day of FEBRUARY, 2015.

MARY KASANGO

JUDGE