



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL 27 OF 2009

PETER KAIRU CHEGE.....APPELLANT

VERSUS

OSERIAN DEVELOPMENT COMPANY LIMITED.....RESPONDENT

(Being an appeal from the Judgment delivered on 21st January, 2006 by Hon. N. N. Njagi,
Senior Principal Magistrate in Naivasha SRMCC No. 706 of 2006)

JUDGMENT

FACTS

The appellant herein sued the respondent for injuries he suffered as a result of a motor vehicle accident that occurred on 29th January, 2006.

The appellant having being dissatisfied with the judgment has appealed against the whole of the judgment that was delivered.

The six (6) grounds of appeal are set out in his Memorandum of Appeal dated 10th February, 2009 and are *inter alia*;

1. **THAT the Learned Magistrate in dismissing the Appellant's case erred in law and in fact in relying on principles governing road traffic accident cases whereas the case before the trial magistrate was one of master and servant relationship.**
2. **THAT the learned Magistrate erred in law and in fact for misapprehending the evidence and the issues in question before him to wit**

i) The Learned Magistrate made a finding that if one alleges a Road Traffic Accident the court must be satisfied there was an accident, the driver must be joined as a party, that the accident was reported to the police and that ownership of the motor vehicle is proved thereby framing issues for determination which were not issues for determination by the parties

ii) The Learned Magistrate failed to make a find whether or not the Respondent had failed in its duty of care owed to the Appellant as its employee.

iii) The Learned Magistrate failed to address in his judgment the matter of Master-Servant relationship existing between the Appellant and the Respondent

iv) The Learned Magistrate dismissed the Appellant's case despite overwhelming evidence that the Respondent had failed in its duty of care by exposing the appellant to foreseeable danger and risk.

- 3. THAT the Learned Magistrate erred in law and infact is not considering the pleadings and submissions filed on behalf of the Respondent addressed and/or approached the matter as one of Master-Servant relationship.**
- 4. THAT the Learned Magistrate erred in law and infact in not considering the pleadings evidence and submissions filed on behalf of the Appellant.**
- 5. THAT the decision was arrived at on consideration, to the extent that this was done, of wrong Principles of Law.**
- 6. THAT the decision was against the weight of evidence.**

The appellant's suit was dismissed for failure to prove liability. The trial magistrate held that the appellant did not prove that an accident occurred and further that the said motor vehicle belonged to the respondent.

ISSUES FOR DETERMINATION

Having perused the trial court's proceedings and read the submissions of the respective parties herein, it is not in dispute that the appellant was an employee of the respondent but the following are the issues found for determination;

- (i) Whether the appellant was injured in the course of his employment as he alleges?
- (ii) Did the appellant prove his case on a balance of probabilities?
- (iii) Whether Vicarious liability was proved;
- (iv) Quantum;

ANALYSIS

Being the first appellate court it is incumbent upon this court to re-evaluate the evidence on record and arrive at an independent conclusion. Refer to the case of **Arrow Cars Limited V. Bimomo & 2 Others**, C.A. No. 344 OF 2004

The P3 form produced by the appellant in the trial court shows that the appellant was involved in an accident with motor vehicle registration number KAN 183Y as pleaded in the plaint.

The appellant's plaint at paragraph 5 states that the appellant was being ferried home in motor vehicle KAN 183Y when the accident occurred. In his evidence in chief, the appellant however stated that he was in the said motor vehicle on his way to put out a fire. This contradiction brings into question the credibility of the appellant's evidence.

It would appear the contradiction was in an effort to show the court that he was injured whilst in the course of his employment when the accident happened as pleaded. If this indeed was the case, the appellant ought to have amended his pleadings.

I find that an accident may have occurred, however the court record shows that the appellant failed to produce an Accident Abstract Report which means that the accident was not reported at any police station.

Further the court record shows that the appellant did not produce Copy of Record from the Registrar of Motor and therefore the ownership of the motor vehicle is unknown.

Lastly the appellant did not link motor vehicle registration KAN 183Y to the respondent. For this reason, the appellant failed to prove that the accident occurred whilst in the course of employment and that the respondent was vicariously liable for actions of the driver of motor vehicle registration number KAN 183Y.

The upshot is the appellant failed on a balance of probabilities to prove his case.

For the above reasons I agree with the trial court's findings that the appellant failed to prove his case against the respondent.

The above notwithstanding this court is duty bound to proceed to make a finding on quantum.

The trial court proceeded to assess the quantum at Kshs.70,000/=. I have perused the medical report produced by the appellant and it is clear the plaintiff suffered soft tissue injuries.

The Appellant in this case suffered the following soft tissue injuries:

- i. Swelling on the right side of the scalp
- ii. Soft tissue injures on the chest
- iii. Soft tissue injuries on the right shoulder
- iv. Soft tissue injuries on the right thigh

The decisions listed hereunder are comparable awards:

In the case of **Boniface Waiti & Another V. Michael Kariuki Kamau**, [2007] eKLR, Kshs. 85,000/= was awarded for:

- (a) bruises and contusions to the neck;
- (b) bruises and contusions to the shoulders;
- (c) bruises and contusions to the back;
- (d) bruises and contusions to the upper arm

In the case of **Richard Olwanda Otolu V. Francis K. Kamau**, [2000] eKLR, Kshs. 80,000/= was awarded for the following injuries:

- (a) soft tissue injuries to the right shoulder joint
- (b) soft tissue injury to the right thigh
- (c) soft tissue injury to the knee joint
- (d) soft tissue injury to the ankle joint

In the case of **SIBIAH ONDIEKI V. SAMUEL OCHILLO**, [2010] eKLR, Kshs. 70,000/=was awarded for the following

- (a) Deep cut wound on the back;
- (b) bruises to both legs;
- (c) bruises to both hands;

- (d) chest contusion;
- (e) cerebral contusions

and in the case of **Kenya Power and Lighting Company Limited V. Samson Macharia Makori**, [2008] eKLR, Kshs. 80,000/= was awarded.

- (a) soft tissue injury to the face
- (b) soft tissue injury to the chin
- (c) soft tissue injury to the left rib case
- (d) soft tissue injury to the right knee

The test on whether an appellate Court should disturb an award of damages is set out in the renowned case of **Butt V. Khan**, [1977]1KAR.

As was held by Law, J.A in **Butt V. Khan** (supra)

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high low.”

Similarly, the Court of Appeal in **Kemfro Africa Ltd T/A Meru Express Service Gathongo Kanini V. A. M. Lubia & Olive Lubia**, (1982- 1988) 1KAR 727 held that :-

“An appellate court can only interfere with the quantum of damages awarded by a trial Judge, where it is satisfied that the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant factor, or that the amount awarded is inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

Using the aforementioned decisions on comparable awards this court is satisfied that the award given by the trial court is neither too high nor too low. I will uphold the assessment as given by the trial court.

FINDINGS

For the reasons set out above this court makes the following findings;

This court finds that the appellant failed to prove that the respondent was vicariously liable for the actions of the driver of motor vehicle registration number KAN 183Y.

This court finds no reason to interfere with the trial courts assessment of damages.

This court finds that the appellant failed to prove its case on a balance of probabilities.

DETERMINATION

The appeal is found lacking in merit and is hereby dismissed in its entirety.

The judgment of the trial court is hereby upheld.

Each party to bear his/its costs of the appeal

Orders Accordingly.

Dated, Signed and Delivered at Nakuru this 17th day of February, 2015.

A. MSHILA

JUDGE