



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 556 OF 2009

SIMON MUNIU KINUTHIA.....1ST APPELLANT

AMOS MBUGUA.....2ND APPELLANT

VERSUS

GEORGE OKWERO MAGERO.....RESPONDENT

(From the judgment and decree of Kiema, Resident Magistrate in Milimani CMCC No. 12484 OF 2005)

J U D G M E N T

The Respondent/Plaintiff was involved in a road accident on 29th June 2005 along Red Hill Road within Nairobi area involving a motor vehicle registration No. KAS 062Q owned by the 1st Appellant/Defendant and driven by the 2nd Appellant/Defendant. The Respondent/Plaintiff sued for damages in Nairobi CMCC No. 12484 of 2005. The court apportioned liability at 50:50 and awarded general damages of Kshs.90,000. The Appellant being dissatisfied with the judgment appealed against the judgment and the order of the resident magistrate at Milimani Commercial Court, Mr. Kiema, dated 15th September, 2009 on the following grounds:

- 1. The learned magistrate erred in law and in fact in finding that there was an admission by the Defendant that the accident did not happen involving the Plaintiff and motor vehicle registration no. KAS 062Q.**
- 2. The learned magistrate erred in law and in fact by failing to consider the evidence tendered by the defence witnesses.**
- 3. The learned magistrate erred in law and in fact in finding the Defendants 50% to blame for the accident.**
- 4. He learned magistrate erred in law and in fact in failing to take into consideration that by failing to produce the police abstract the Plaintiff had failed to prove the occurrence and/or his involvement in the alleged accident.**
- 5. The learned magistrate erred in law and fact in failing to take into consideration that Plaintiff had failed to prove that the motor vehicle reg. No KAS 062Q collided with the bicycle or the Plaintiff.**
- 6. The learned magistrate erred in law in fact by failing to find that Plaintiff had not proved**

his case on liability on balance of probabilities.

- 7. The learned magistrate erred in law and in fact by entering judgment in general damages at Kshs. 90,000/- which amount was not merited.**
- 8. The learned magistrate erred in law and in fact by failing to consider Defendants submissions.**

On ground 1, the Appellants/Defendants submitted that the magistrate erred in law and fact in his judgment. They argued that in their joint defence they denied the occurrence of the accident therefore the learned magistrate erred in finding that the Defendants admitted that the accident happened. In addition, the Appellant submitted that **DW2** during the examination in chief, denied having knocked down the Plaintiff. That he had stated that the Plaintiff was cycling in a zigzag manner which made him lose control of the bicycle when **DW2** hooted. That the passenger jumped off the bicycle and fell with the bicycle; that therefore the Plaintiff was not knocked down by the 2nd Appellant/Defendant.

Ground 2, the Appellants/Defendants complained that the learned magistrate summarized all evidence in one sentence in his judgment. That no reasons were given as to how he arrived at his conclusion that the accident did happen.

On ground 3, the Appellant submitted that they could not be held 50% liable for the injuries of the Plaintiff/Respondent. That the Appellant had tendered evidence rebutting the allegation that the said motor vehicle knocked the Plaintiff down. That he had called two 2 witnesses who testified that there was no contact between the motor vehicle and the Plaintiff.

On Ground 4, 5, 6, the Appellant submitted that the Plaintiff failed to produce the police abstract in spite of having been given adequate notice by the Defendant. The Appellant stated that a police abstract is a vital document to prove occurrence of an accident. The Appellant complained that they were denied an opportunity to cross examine the police officer as to scene over the circumstance under which the P3 was issued. Ground 7, the Appellant submitted that the Plaintiff failed to discharge his burden of proof by not producing the police abstract, and that therefore the Plaintiff did not deserve the award of damages. In ground 8 the Appellant argued that the learned magistrate failed to demonstrate how he came about his findings.

In response, the Respondent/Plaintiff submitted that the magistrate was right in holding that the accident did occur and the Appellants were to be blamed in this case. On ground 1, 2, 3, & 4 the Respondent submitted that failure to produce a police abstract was not an issue in this case. The Respondent maintained that the occurrence of the accident was admitted by the witnesses of the Appellant. DW1 and DW2 produced proceedings to the effect that DW2 was charged in a traffic case. The Respondent further submitted that DW1 and DW2 admitted that on the material day the Plaintiff/Respondent was riding a bicycle and fell as DW2 passed him although he did not see him until DW1 alerted him.

The Respondent further submitted that the Appellant have not shown any evidence that the learned magistrate gave an excessive award of general nor acted on wrong principle in arriving at the estimation of the same so as to invite this court to interfere with the award.

I have carefully perused the record including the lower court pleadings and the ruling. I have also perused the written submissions before this court on the face of the grounds of appeal all of which I have carefully considered all the above documents, and the main issue raised in this appeal ***is whether or not the Trial Magistrate on matters of fact was entitled to arrive at the conclusions he did.***

This being a first appeal, it is the duty of this court to assess and re-evaluate the evidence before the lower court, bearing in mind that this court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. The court must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before her and that she has not acted on wrong principles in reaching her conclusion.

The Appellant/Defendants contention is that the court entered judgment against them based on the allegation that they admitted that the accident occurred although blamed the Respondent for riding carelessly on the road. **DW1** evidence is that he met two people riding on a bicycle who were in front of the motor vehicle KAS O62Q and hooted. The passage on the bicycle jumped out and the bicycle lost control. The motor vehicle stopped and they found the driver of the bicycle on the ground. **DW2** on the other hand testified that the two people were in front riding the bicycle in a zigzag way and he hooted alerting them that he was overtaking. He stated that he saw them down on the ground through the side mirror and the conductor also told him the same. From the evidence, I also make the same finding that the Defendant evidence supports the Respondent/Plaintiff's case that the accident actually occurred. The question begs whether the said accident can be attributed to the Appellants/Defendant. The Respondent alleged that he was hit from the back by the said motor vehicle. It is the evidence of both **DW1** and **DW2** that the Respondent/Plaintiff was riding the bicycle in front of the motor vehicle. **DW2** who was driving the motor vehicle testified that he saw the Respondent down on the ground after passing him from the side mirror. It is not disputed that there was no other motor vehicle on the road at that particular time when the accident occurred. Again, both **PW1** and **DW2** testified that they were all on the left side of the road. In my view, from the evidence, the Appellant/Defendant hit the Respondent/Plaintiff from the back causing him to fall down and sustain the injuries. I further find that the learned magistrate was right in apportioning the liability at 50:50. There is a probability that the Respondent also contributed to the accident. The trial magistrate listened to and tested the evidence. He came to conclusion after taking into account all the relevant aspects to it. This first court of appeal is not in a position to arrive at a different conclusion without sufficient reasons.

The Appellant has also complained that the Respondent/Plaintiff did not produce a police abstract or even call a police investigator to prove the occurrence of the accident. In my view, the police abstract is merely a record of the accident. It does not show whether the Appellant/Defendant or the Respondent/Plaintiff is to blame for the accident. In this case there is sufficient evidence to prove on a balance of probabilities that the Respondent was injured in an accident involving the Appellants/Defendant car. The evidence of DW I and DW 2 goes a long way to establish that the Defendants Motor vehicle was at material time and that in one way or another was involved in the accident. Absence of the Police Abstract did not therefore dent the fact that the accident actually occurred.

On the issue of damages, the trial court held that the Respondent/Plaintiff suffered, bruises on the right wrist, soft tissue injuries on both knee joint and soft tissue injuries on right leg and awarded Kshs.90,000/- as general damages. Kshs.200/- as special damages and Kshs.3,000/- as witness expenses. I am persuaded that the Appellants proved their case of damages against the Respondent/Plaintiff. In a claim of damages it is trite that the burden of proof lies on the Appellant to connect the damages suffered and the omission on the part of the Respondent/Plaintiff. The Appellant must prove that the Respondent was responsible for the injuries that he suffered.

In the end, am satisfied that the learned trial magistrate arrived at the correct decision having taken into consideration the evidence and material that was before him. Taking the totality of all the evidence into account, I find no merit in this appeal which I hereby dismiss with costs.

Dated and delivered at Nairobi this 24th day of March, 2015.

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D A ONYANCHA

JUDGE