



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 25 OF 2013

FRANCIS MAINA KAHURA..... APPELLANT

VERSUS

NAHASHON WANJAU MURIITHI..... RESPONDENT

J U D G M E N T

1. INTRODUCTION

The appellant challenges the Judgment of Embu Chief Magistrate in CMCC No.99 of 2011 which was decided in favour of the Respondent on 30/4/2013 on the following grounds;

- a. That the magistrate erred in finding the appellant fully (100%) liable.
- b. That the magistrate ignored the discrepancies in the respondents case in regard to the date of the accident and to how the accident occurred.
- c. That the evidence of the appellant witnesses DW2 was not considered.
- d. That the award made was excessive and not comparable to the injuries sustained.
- e. That the future medical expenses awarded were excessive.

2. THE FACTS

The respondent was a pillion passenger on motor bike registration number KMCB 066K along Makutano – Sagana road when the defendant’s vehicle KBA 944K Toyota NZE which was negligently driven knocked down the motor cycle whereby the respondent sustained severe injuries. The accident was reported at Sagana Police Station from where a police abstract was later issued to the plaintiff. The defendant defended the suit which was determined in favour of the respondent.

3. SUBMISSIONS

In his submissions the appellant argued that there were several discrepancies in the respondents case which the court failed to address. Firstly, the registration number of the motor cycle was KMCB 066K and in the police abstract the registration was given as KMCB 066F. Secondly the police abstract showed that the accident was between vehicle registration number KBA 944K and a pedestrian while the plaint states that the respondent was a pillion passenger. Thirdly, the date of the accident in the plaint was indicated as 30/9/2009 while the police abstract showed 03/09/09.

The occurrence of the accident had been denied and the plaintiff had a duty to prove his case.

i. **The appellant**

The appellant submitted that the authorities cited by the respondent had more serious injuries than in the present case. The trial magistrate relied on those authorities to award excessive damages of kshs.850,000/= for loss of amenities. The appellant urged the court to consider Dr. Wambugu's report and award kshs.35,000/= as future medical expenses as opposed to kshs.130,000/= awarded by the trial court.

ii. **The Respondent**

It was the submission of the respondent that the defendant admitted in his evidence that he owned motor vehicle registration number KBA 944K which fact was admitted by his driver. The magistrate was right in holding the appellant vicariously liable for the accident. Having failed to file 3rd party proceedings, the appellant cannot be heard to blame the cyclist for the accident for he was not a party to the suit. The respondent said the award of kshs.850,000/= general damages and shs.130,000/= for future medical expenses was reasonable.

4. **THE DUTY OF THE COURT**

The duty of the first appellant court was explained by the court of Appeal in the case of **ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES –VS- JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR** where the court cited its earlier decision in the case of **KENYA PORTS AUTHORITY –VS- KUSTON (KENYA) Limited [2009] 2 EA 212**. The court 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.”

5. **THE ISSUES**

The issues for determination have been identified as follows;

- i. Whether liability was proved against the appellant on the balance of probabilities.
- ii. Whether the award was excessive or inordinately high.

6. **THE EVIDENCE**

The respondent testified that he was a pillion passenger on motor cycle registration number KMCB 066F which one Elijah Githiori was riding along Makutano-Karatina road. After riding for about 200 metres towards Karatina, they met a convoy of vehicles heading to Nairobi. The defendant's vehicle registration number KBM 948K Toyota Corolla over took the motorcycle carrying the respondent. The cyclist had tried to avoid the vehicle by moving off the road but he was still hit.

The appellant's driver DW2 said he was driving vehicle of DW1 along Sagana-Makutano road when he met the motorcycle with two people. It was being driven on the wrong side of the road. It hit the front right side of his vehicle. It had no head lights and was at a high speed.

The appellant blames the motorcyclist for negligence. However, the cyclist was not joined as a

party to this case. The issue of contributory negligence did not arise.

The respondent in his plaint said he was a pillion passenger on the motor cycle. He testified that he was a passenger on the motor cycle ridden by one Elijah Githiori. He produced a police abstract which stated that the respondent was a pedestrian in the introductory paragraph. In paragraph 9 of the abstract the persons injured are named as follows;

1. Nahashon Wanjau – pillion passenger
2. Elijah Githiori – rider

The opening paragraph as read with paragraph 9 contains some discrepancy on the capacity of the plaintiff. However, the plaint and the evidence of the respondent himself leaves no doubt that the respondent was a pillion passenger. The respondent was cross-examined on this issue and he clarified that he was a pillion passenger. The mistake of the police officer who filled the abstract cannot be revisited upon the respondent. The pleadings and the plaintiff's testimony contain no discrepancy and it is clear that the respondent was a pillion passenger on the motorcycle driven by the Elijah Githiori on the material day. The appellant produced his own P3 form obtained from another police station other than Sagana police station where the accident was being investigated. This abstract was disregarded by the trial magistrate in her judgment. The appellant in cross examination admitted that the author of the document may have made an error. It is my considered opinion that the error is negligible given the pleadings which were supported by evidence.

The registration number of the motorcycle was given as KMCB 066K in the plaint. The respondent in his evidence did not give the registration number of the motorcycle. He referred to it as the motor cycle drive by Elijah Githiori. The appellant's police abstract shows the registration of the motorcycle as KMCB 066F. This is the document which originated from the appellant and which he had errors. The magistrate rejected the dicynebts as I have stated earlier. For this reason and given the fact that the motor cyclist was not joined in the suit as a party, I do not find the discrepancy of any major importance. However, the discrepancy was not in the respondent's case but was introduced by the appellant through the abstract he produced and whose authenticity was questionable.

In the pleadings, the plaintiff stated that the accident occurred on the 30/08/2009. This was supported by his testimony and confirmed by the evidence of DW1 and DW2. The police abstract gave the date of accident as 03/09/09. It is not known when the respondent reported the accident since he was admitted in various hospitals till 21/11/2009 when he was discharged. However it is not in dispute that the applicant made his report at Sagana police station on 03/09/2009. This is the date that the police gave as the date of the accident and which was also entered in the P.3 form. It is important to note that part I of the P.3 form is filled by the police before it is sent to the doctor. The date of the accident was clarified in cross examination by the respondent. There is no variance in the plaint and in the respondent's testimony as to the date of the accident.

The appellant also agreed in cross examination that this was another error by the police.

Consequently I do not find the discrepancy on the date of the accident fatal to the respondent's case.

The respondent produced a copy of records showing the appellant as the owner of the vehicle KBM 944K. This fact was admitted in evidence by the appellant and his driver. Ownership of the vehicle was therefore proved. The appellant's driver was said to have been overtaking at the time of the accident. He overtook a convoy of five vehicles before he met with the motor cycle and knocked it down. Although he denied he was overtaking, the appellant's driver admitted that he caused a hit and run accident. Despite the hostile crowd at the scene as he told the court, DW2 had an option of driving to the nearest police station which was either Sagana or Makutano. He opted to go to Kikuyu police station and went to Sagana four (4) days after the accident.

The court believed the respondent that the appellant was overtaking when the accident occurred. The trial magistrate is better placed in assessing the demeanor of a witnesses. The appellant did not dispute the existence of five vehicles on the road. The fact that it was only his vehicle which met with the motorcycle confirms that it is highly probable that he was overtaking. Overtaking when there is an oncoming vehicle amounts to negligence on the part of the driver.

It is my considered opinion that the trial court was correct to find the appellant's driver was negligent and responsible for the accident which makes the appellant vicariously liable. Consequently, I find that liability was proved against the appellant on the balance of probability.

7. THE QUANTUM OF DAMAGE

The respondent suffered a segmental fracture of the mid-shaft right femur and a cut wound on the right knee. He was admitted for about almost three months. The fracture united leaving a surgical scar of 8x6cm on the right leg which was shortened by 2cm.

It was held in the case of **BETT –VS- KHAN [1977] 1 KAR Law JA** which case was cited in that of **KENYATTA UNIVERSITY –VS- ISAAC KARUMBA NYUTHE 2014 eKLR** that;

“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 the judge proceeded on the wrong principle, misapprehended evidence in some material respect and gave a figure inordinately high or low”.

The appellant urged the court to reduce the award of sh.850,000/= arguing that it was inordinately high. The respondent in the lower court asked the court in his submissions to award him kshs.1,000,000/= for loss of amenities citing two authorities.

- a. **HCCA NO. 21 OF 2009 (MERU) RONALD DEWAYNE ENOCK –VS- JOSIAH K. WAWERU** where the plaintiff was awarded kshs.850,000/= for a comminuted fracture of the left femur and the left 1st-rib. The plaintiff underwent two operations to fix the fracture. The high court upheld the trial magistrate's award terming it reasonable.
- b. **OMAR MUSA HASSAN & ANOTHER –VS- RASHID SALIM & ANOTHER NAIROBI HIGH COURT CIVIL SUIT NO.2391 OF 1995** where the plaintiff was awarded shs.700,000/= for a comminuted fracture of the right femur and several soft tissue injuries.

The plaintiff was given shs.135,000/= for future medical expenses for a further operation to remove the mental plates.

The appellant relied on two authorities;

- a. **KINYANJUI WANYOIKE –VS- JONATHAN MUTURI CHOGA [2004] eKLR** where the plaintiff had suffered a fracture of the right femur and soft tissue injuries. He was awarded kshs.100,000/= by Angawa, Judge in 2004.
- b. **AKIPO ODHIAMBO OTIENO –VS- KENYA BUS SERVICES LTD 2005 eKLR** where the plaintiff was awarded kshs.150,000/- for fracture of the right femur in 2005 by Angawa, Judge.

The appellant for a reason only known to himself chose to rely on two authorities by the same Judge. The fracture in the two authorities by the appellant were fractures with complete reunion and did not cause any permanent disability or complication.

The appellant relied on the 2nd opinion report of Dr. Wambugu on the injuries and future medical expenses. The doctor opined that shs.35,000/= was adequate for corrective surgery. Dr. Z. Githui Muriuki recommended a figure of Kshs.180,000/= for corrective and orthopaedic surgery. Dr. Njiru considered that the respondent had been treated as an inpatient for over 2½ months where he underwent surgery for reduction and internal fixation of the fracture. The fracture healed with

permanent shortening of the leg by 2cm.

I wish to refer to two independent authorities which are comparable with the injuries suffered by the respondent. In the case of ***KENYATTA UNIVERSITY –VS- ISAAC KARUMBA NYUTHE (2004) eKLR*** the plaintiff was awarded kshs.700,000/= in 2004 for a fracture of the femur and soft tissue injuries which was reduced by the appellate court to kshs.350,000/=.

In the case of ***JAMES MAKABI MAINA –VS- M.A. BAYUSUF & SONS LTD 2013 eKLR*** Civil Appeal the plaintiff was awarded kshs.80,000/= for a fracture of femur with shortening of the leg by 1cm and hospitalization for two months.

It is my considered opinion that the authorities relied on by the appellant were not comparable to the injuries and resultant complications and long hospitalization of the respondent. The respondent's authorities on the other hand had more serious injuries which are not comparable with the ones he suffered. This resulted in an award that was inordinately high since it was not based on the applicable principles.

I award the following damages and medical expenses;

- i. General damages Kshs.500,000.00
- ii. Future medical expenses Kshs.100,000.00

The special damages were not a subject of this appeal and remain as awarded kshs.41,870/=.

The award by the trial magistrat given on 30/4/2013 is hereby set aside.

The total award will now be kshs.641,870/= payable to the respondent with interests and costs from date of lower court judgment. The appeal is only partly successful and the appellant is awarded half costs of this appeal.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 23RD DAY OF APRIL 2015.

F. MUCHEMI

J U D G E

In the presence of:-

1. Ms. Muriuki for Kinyua Kiama for Respondents