



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HIGH COURT CIVIL APPEAL NUMBER 67 OF 2011

1. BAWANI STORES LIMITED1ST APPELLANT

2. BIPIKUMAR & D.J . SHAH.....2ND APPELLANT

VERSUS

MARGARET MAGIIRI GITAU.....RESPONDENT

(Appeal from the judgment of the Principal Magistrate, Nakuru (Hon. J. Njoroge) Nakuru CMCC 1190 of 2008, delivered on 11th of April, 2011)

JUDGMENT

1. The appellants herein being dissatisfied with the Judgment of the trial court sitting at the Principal Magistrates court at Nakuru in PMCC Number 1190 of 2008 lodged this appeal and stated 9 grounds of appeal. The grounds will be grouped into two.

(1) On Liability

(2) Quantum of damages. This grouping was also suggested by the appellants in their submissions.

2. Briefly, the appellants were the owners and driver respectively of vehicle registration Number KAN 815C which is alleged to have hit and knocked down the Respondent off the road along the Nakuru-Narok road on the 18th January, 2008.

The respondent pleaded vicarious liability upon the 1st appellant as a result of the negligence of its driver the 2nd appellant.

In their defence, the appellants alleged that the respondent was the sole cause of the accident as she jumped onto the road, and onto the path of the vehicle thus contributed substantially to the accident.

Upon full trial, the magistrate found in favour of the respondent on 100% liability and awarded Kshs.600,000/= in general damages for pain and suffering. The appellants were dissatisfied with the trial courts findings and thus this appeal.

3. The Appellants case,

The appellants in their defence pleaded issue of contributory negligence on the part of the respondent and stated that she too was negligent in that she crossed the road while it was not safe to

do so, that she jumped into the road along the path of the vehicle and thus substantially contributed to the accident. In his evidence in chief, the 2nd appellant stated that while driving towards Naivasha, he saw the respondent from the left side crossing the road. He applied brakes, hooted and put on lights, but unfortunately knocked her down with the left side of the bumper. He further stated that he saw her from a distance of 100 metres, and was driving at a speed of 40-45 Kilometres per hour, and could not swerve to the left as there were oncoming vehicles. She was taken to hospital and traffic police officers visited the scene of accident and after investigations blame was placed upon the respondent as exhibited in the police abstract issued thereafter.

4. **The Respondents case** is that she was knocked down while walking off the road around Lanet area. In her very short evidence in chief, she stated that the driver of the vehicle was careless as he veered out of the road and knocked her down. She did not call any witnesses. The police officer who investigated the accident was not called.
5. In his submissions before the trial court, the respondents advocates blamed the driver of the vehicle and urged that the respondent was never charged with any offence and that the appellants did not have the sketch maps taken at the scene of the accident produced in court. He further stated that the driver of the accident vehicle had enough time to brake and control the vehicle from a distance of 100 metres if he had been driving at a speed of 40-45 Kilometres per hour. He therefore urged the court to find the driver wholly to blame.
6. The appellants submissions before the trial court were that the respondent never filed a reply to defence and thus admitted the particulars of negligence attributed to her in their defence. It was further submitted that the respondent ought to have proved allegations of negligence attributed to the 2nd appellant, and that the police who visited the scene lamed the respondent and a police abstract produced an exhibit by the plaintiff clearly stated that the Respondent was to blame. The appellant urged the court to find the respondent equally to blame for the accident.
7. I have considered the trial courts Judgment and analysis of the evidence on record:

Ground Number 1

On the issue of liability, the trial magistrate stated that accident was not disputed. He went further to state that the respondent was an elderly lady, a fact that was not stated by either the respondent or the appellants. On that aspect the Magistrate found the appellant to blame for the accident though the police abstract found her to blame, and further stated that the police did not give any basis for its conclusion, and also proceeded to state that the police did not produce any evidence of measurements taken and prior mechanical condition of the appellants motor vehicle.

8. The appellant in submissions to this court revisited the issue of the respondent having not filed a reply to defence as provided under Order 2 rule 12 of the Civil Procedure Rules, 2010, and stated that failure to file the reply to defence to traverse the negligence attributed to her is deemed that she had admitted the said allegations and thus she ought to have been held wholly to blame.
9. It is submitted that the burden of proof lay on the respondent and she did not discharge that burden, but the trial court shifted the burden of proof to the appellant when he stated that the police did not produce sketch maps of the accident scene.
10. On the same breath, the appellant faulted the trial court from considering extraneous matters not based on any evidence that based his reason for his decision when he held that the respondent was an elderly lady and on that aspect, found the appellant to blame. It is further argued that the police abstract, issued to the respondent and produced by herself as an exhibit lay all the blame on her, and that she did not dispute the police findings. It was therefore urged that the trial court arrived at a wrong decision in both law and fact in finding the appellants wholly to blame, a finding not based on the evidence as recorded.

11. I have carefully analysed the scanty evidence on record by both the appellants and the Respondent in the trial court as well as submissions filed on the appeal by both counsel for the appellant and the Respondent.

It is trite law that he who alleges must prove. The Respondent alleged and placed blame on the driver of the accident vehicle. It is not in dispute that the Respondent was knocked down by the 2nd Respondent. It is however not clear from the very scanty evidence from where she was knocked. No evidence was adduced to clearly state whether it was off the road as she stated or on the road stated by the 2nd appellant. The police officers who visited the scene were not called by either of the parties to produce sketch maps to show where the point impact was.

12. Needless to say, the burden of proof lay with the Respondent and I must fault the trial court for attempting to shift that blame and for taking into account extraneous matters, based on no evidence or even law, to base his finding and conclusion that the 2nd appellant was wholly to blame. It is too obvious that the trial magistrate did not analyse the evidence adduced before his court sufficiently and was influenced by his own perception of age, and ability of the Respondent in the circumstances, and submissions tendered by the respondents counsel before him without giving due consideration to the evidence before him. It must be noted that an injury *per se* does not constitute proof of negligence. Negligence against a party must be proved on a balance of probability by the person so alleging this was not done.

13. The Respondent did not file a reply to the appellants statement of defence filed where the appellants denied particulars of negligence and attributed contributory negligence on the respondent.

I have been urged to hold that failure to file a reply to defence constitutes an admission of allegations as particularised.

Order 2 rule 12 of the Civil Procedure Rules states that a jointer of issue operates as a denial of every material allegation of fact in the pleading on which there is a jointer of issue. If no reply is filed, there is a jointer of issues in the defence, but any allegation which is exempted from the jointer is admitted.

See case **Kenya Commercial Bank Limited -vs- Suntra Investments Bank Ltd (2015) e KLR in High Court Civil appeal No 380 of 2013**. I am not inclined to hold that the failure to file a reply to defence amounts to an admission. In their evidence, both the appellants and the respondent blamed each other. It is therefore incumbent upon this court, upon analysis the evidence, and re-evaluating it afresh, to come to its own finding, as a first appellate court and as held in the case. **Selle & another -vs- Associated Motor Boat Co. Ltd & others (1968) EA 123**.

14. It is trite law that the burden of proof of any fact or allegation is on the plaintiff who must prove causal link between someones negligence and his injury. The plaintiff must adduce evidence from which on a balance of probability a connection between the two may be drawn. The scanty evidence on record supports a finding that both parties contributed to the occurrence of the accident. In the circumstances, I shall set aside the trial courts finding on liability and apportion the same on 50:50 basis between the Appellants and the Respondent.

15. The Respondents injuries as stated in the medical records all produced as exhibits in the trial court, and summarised in Dr. Wellington K. Kiamba medical report prepared on the 14th August, 2008 are compound fracture of the left fibula in the distal $\frac{1}{3}$ and fracture of the left medial malleolus. On examination, the left leg was still swollen and had a scar 15 cm x 3 cm and all movements of left ankle joint were restricted, and function of the limb reduced. He awarded a 20% permanent disability. The trial court after considering authorities by both parties awarded a sum of Kshs.600,000/= in general damages and Shs.12,730/= in special damages. This sum on general damages the appellant claims to be too excessive and unrealistic. The trial Magistrate is

too faulted for not considering and referring to any authorities and this court is urged to revise the said sum.

16. In their submissions in the trial court, the appellant quoted **Joseph Thuita -vs- David Kihui Kimani and another HCCC No 431 of 1996** where a sum of Shs.300,000/= was awarded for a compound failure of the right tibia and fibula, injury to mouth, loss of one tooth and soft tissue injury to the arm and chest wall. This was in February 2000. The respondent quoted the case of **Gladys Kadzo Tsofa -vs- Samuel Kamau Njoroge HCCV No 207 of 1995** where in March 2000 the court awarded a sum of Shs.600,000/= in general damages. I have analysed the injuries as stated in the medical report.

This court shall be slow to interfere with the trial courts discretion on the award of damages unless it is satisfied that either the trial court in assessing the damages took into account an irrelevant factor or left out a relevant factor of the amount is too low or wholly erroneous estimate of the damages. See the case of **Kemfro Africa t/a Meru Express Services & another -vs- Lubia & another (1982-88) KLR 727**. In a more recent case **HCA No. 149 of 2003 – Soren Peterson & Another -vs- Charles Muliani (2008) KLR** – for almost similar injuries, the court awarded a sum of Shs.300,000/= in 2003.

17. The injuries sustained by the Respondent were analysed in detail. The appellant has not shown this court in what manner if any the trial court applied wrong principles in arriving at the award of Shs.600,000/=. I am satisfied that the trial court in arriving at the above amount considered the two authorities tendered by both parties. The appellant's submission was that Shs.300,000/= would be sufficient while the respondent submitted for a sum of Shs.1,000,000/= and relied on the case of **Gladys Kadzo Tsoda (Supra)**. The injuries in this case were for more serious as the plaintiff therein apart from the fractures to the tibia and fibula also was rendered unconscious, and the full judgment was not availed to the court.

The courts have held over and over that where an award of damages differs widely from the awards given in comparable cases, the court ought to interfere. I have considered the above authorities. I am satisfied that this is a proper case for the court to interfere with the award of damages. I find the award to be excessive and reduce the same to Kshs.450,000/=. In arriving at this sum, I have considered inflation and age of the authorities and minded that each case ought to be considered on its own peculiar fact. I shall not interfere with the trial courts award on special damages.

In conclusion, the appeal succeeds in part in the following terms.

1. That liability shall be apportioned equally on 50:50 basis between the appellant and the Respondent.
2. The award of General Damages for pain and suffering is reduced to the sum of Kshs.450,000/=. 50% thereof comes to Shs.225,000/=. .
3. Special damages shall be confirmed at the sum of Kshs.12,730/=. .
4. Interest on General Damages shall apply from the date of the trial courts judgment while interest on special damages shall apply from the date of filing the lower courts suit.
5. Each party shall bear its own costs of the appeal, while costs of the lower court shall be borne by the Appellant.

Dated signed and delivered this 21st day of May 2015

JANET MULWA

JUDGE

In the presence of:

Malonza holding brief for Mahinda - for appellant

Karanja Gekong - for respondent

Lina - Court clerk