



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 6 OF 2015
(FORMERLY KISII HCCA NO. 46 OF 2012)

BETWEEN

AGROLINE HAULIERS LIMITED 1ST APPELLANT

JOSEPH OPIYO OMOLLO..... 2ND APPELLANT

AND

MICHAEL ABONGO KISEMBA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. K. Sambu, PM at the Senior Principal's Magistrates Court in Migori in Civil Case No. 234 of 2010 dated 29th February 2012)

JUDGMENT

1. On 6th September 2010, the respondent was a pillion passenger on motor cycle registration number KMCJ 872D riding along Awendo-Rapogi road when, according to the respondent, a tractor registration number KAV 472B pulling trailed number ZA 5092 was driven negligently and lost control and rammed onto the motorcycle causing the respondent severe injuries.
2. The respondent filed a suit seeking general and special damages for negligence. The appellant filed a defence denying negligence and blaming the rider of the motor cycle. The trial court considered the evidence and held that the appellants were fully liable jointly and severally. The respondent was awarded Kshs. 600,000/- as general damages and Kshs. 39, 500/- as special damages.
3. The appellants now challenge the judgment on the grounds set out in the memorandum of appeal dated 28th March 2012. Mr Kanyangi, learned counsel for the appellant merged the grounds of appeal and argued the appeal on two grounds; liability and quantum of damages.
4. On the issue of liability, Mr Kanyangi submitted that the respondent failed to establish through the evidence that the appellant was liable in accordance with the particulars pleaded in the plaint. He pointed out that the police officer who testified did not establish the point of impact and as such the court ought to have apportioned liability on an equal basis in the absence of clear evidence. He further submitted that even though the 2nd appellant was convicted of the offence of careless driving, that fact alone does not connote full liability as it was still open to the court to find contributory negligence.

5. As regards quantum, Mr Kanyangi submitted that the respondent was awarded special damages which were neither pleaded nor proved. He argued that the injuries pleaded in the plaint were not those established by the doctor who examined the respondent and there for the award was excessive in the circumstances. He urged that a sum of Kshs. 350,000/- was adequate to compensate the respondent.
6. Mr Abisai, learned counsel for the respondent, submitted that the respondent's witnesses gave clear evidence on how the accident happened. He submitted that the appellants could not deny liability as the 2nd appellant was convicted of the offence of careless driving. On the issue of quantum, counsel submitted that the award was justified and within the range of awards supported by the evidence and that no basis had been established for the court to interfere with the award. He submitted that the respondent pleaded and proved the special damages awarded.
7. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co. [1968] EA 123*).
8. On the issue of liability, it is not in dispute that the 2nd appellant, as the driver of the subject tractor, was charged and convicted of the offence of careless driving in *Rongo Traffic Case No. 503 of 2010*. By reason of **section 47A of the Evidence Act (Chapter 80 of the Laws of Kenya)**, the appellant could not deny that there was negligence on the part of the 2nd appellant. However, as correctly pointed out by Mr Kanyangi, it was still open for the court to find contributory negligence against the rider of the motor cycle (see *Robinson v Oluoch [1971] EA 376* and *Queens Cleaners & Dyers Limited v East Africa Community & Others [1972] EA 376*). Although the appellants pleaded particulars of negligence against the motorcycle rider in their statement of defence, they did not join him as a third party to the suit. In the absence of the third party, the court could therefore not apportion liability for contributory negligence. The 2nd appellant denied that he was the driver of the subject tractor but in view of the conviction, such an argument could not be entertained by the court.
9. I therefore find that the learned magistrate was correct in holding the appellant fully liable.
10. In an appeal on the quantum of damages, the appellate court will only interfere where trial court either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence (see *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727*, *Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR* and *Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5*).
11. According to the plaint, the respondent sustained a contused neck, contused chest, contused left hand and swollen and a fracture of the left patella. He was examined on 25th August 2011, by Dr Idagiza who noted that the sustained contused chest anteriorly, fracture patella, degloving injury of the left knee joint, cut wound on over the anterior mid left forearm, contused lumbar region and cut wound on the right lateral forehead.
12. Although the appellant argues that the injuries stated in the plaint are not consistent with those in the medical report, I find that the plaint contains particulars of the injuries in very general terms while the medical report was very specific. For example, the fact that the patella sustained a fracture implies that the knee joint was injured and had to be operated on hence the reference to the degloving injury. I therefore find that the respondent sustained a knee fracture and soft tissue injuries.
13. At the subordinate court, the plaintiff submitted that a sum of Kshs. 800,000/- as general damages was adequate compensation. He cited *Joseph Kitheka v Stephen Mathuka Pisu NRB HCCC No. 1750 of 1999 (UR)* where the plaintiff suffered a fracture of the left leg and was awarded Kshs.

700,000/- in the year 2000. He also relied on the case of ***Samwel Mwangi Kamau v Joseph Kimemia and Another*** NKU HCCC No 192 of 2011 (UR) where the plaintiff sustained a fractured leg amongst other injuries and was awarded Kshs. 1,000,000/- in 2004. The respondents on their part submitted that Kshs. 200,000/- was most appropriate based on ***Titus Lijidi Alumasi v J K Kamunge and Another*** NRB HCCC No. 2723 of 1998 (UR) where the plaintiff had a left knee fracture amongst other injuries and was awarded Kshs. 175,000/- and ***James Kirambu Mbugua v D. V. Shah (K) Ltd & Anor*** NRB HCCC No. 277 of 1996 (UR) where the court awarded Kshs. 200,000/- for a fracture of the femur, compound fracture of the left leg bones and a fracture of the knee cap in 2000.

14. I am aware that the assessment of general damages is not an exact science and the court in doing the best it can takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.

15. I have considered the cases cited and the nature of the injuries sustained and in particular the fact that the plaintiff was injured at the knee joint which limits his movement and as a result he is unable to stand for long periods of time. The cases cited by the appellant were admittedly of more serious injuries and disabilities, while those cited by the respondent did not bear any relationship to the injuries. In my view, the award of learned magistrate was on the higher side and I therefore substitute the same with an award **Kshs. 400,000/-** as general damages.

16. As regards special damages, the established principle is that they must be pleaded and proved (see ***Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others***, NRB CA Civil Appeal No. 192 of 92 (UR) and ***Charles C. Sande v Kenya Co-operative Creameries Ltd***, NRB CA Civil Appeal No. 154 of 1992 (UR)). In the instant case the plaintiff only pleaded Kshs. 3,000/- for the medical report. While the plaintiff claimed treatment expenses, no figure was attached to this claim and as a result the learned magistrate erred in awarding Kshs. 39,500/-.

17. As a result of the foregoing, I affirm the judgment on liability and substitute the award of damages with the following award;

- a. **General Damages – Kshs. 400,000/-.**
- b. **Special Damages – Kshs. 3,000/-.**

The amount shall accrue interest from the date of judgment in the subordinate court.

18. The appellant is awarded 1/3 of the costs of the appeal.

DATED and DELIVERED at MIGORI this 14th day of May 2015.

D.S. MAJANJA

JUDGE

Mr Kanyangi instructed by Okongo, Wandago & Company Advocates for the appellant.

Mr Abisai instructed by Abisai & Company Advocates for the respondent.