



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CIVIL APPEAL NO. 102 OF 2011

BETWEEN

PAUL AMUKOLAAPPELLANT

AND

TRIDAH ENTERPRISES LTDRESPONDENT

(Being an appeal arising from the judgment of the learned Senior Resident Magistrate Hon.L.O. Onyino delivered on 12/07/2011 in original Vihiga SRMCC. No. 87 of 2011)

J U D G M E N T

Introduction

1. The appellant herein was the plaintiff in Vihiga SRMCC No. 87 of 2011. The cause of action are out of a road traffic accident which was said to have occurred on 1st May, 2007 along the verge of Chavakali – Kapsabet road near Shamakhokho area. The appellant alleged that the defendant’s motor vehicle registration number KZW 378 Mitsubishi lorry was so recklessly and/or carelessly negligently driven, managed and/or controlled along the said road that it veered off the road and violently knocked him, as a result of which the appellant suffered severe bodily injuries. The particulars of negligence on the part of the respondent’s driver/servant and/or agent are set out in paragraph 3 of the plaint dated 11th September, 2008 and filed in court on 8th October, 2008.

2. According to the plaint, the appellant suffered the following injuries;-

- a) Longitudinal scar on the forehead, b) fracture of the ribs of the right side of the chest, c) vertical scar across left side of the shoulder.

The defence

3. The respondent entered appearance and also filed defence on 3rd February, 2009. In the defence, the respondent denied all the allegations concerning the accident, and especially the particulars of negligence attributed to its driver, servant and/or agent. The respondent also averred that if any accident occurred, which was denied then the same was an inevitable accident that was beyond the control of its driver, servant and/or agent. In the alternative, the respondent averred that the accident in question was caused entirely on account of negligence on the part of the appellant or in the further alternative, that the accident was substantially contributed to by the appellant, who it accused of;-

- a) Walking in the middle of the road,
- b) Failing, refusing and/or neglecting to heed to the warning and severe hooting by the driver of the motor vehicle registration number KZW 378 Mitsubishi lorry.
- c) Walking under the influence of alcohol.
- d) Allowing the said accident to occur
- e) Failing to keep a proper and reasonable safe distance to avoid the accident.
- f) Walking in a zigzag manner
- g) Failing to give a proper look out while walking on the said road.
- h) Knowingly running into motor vehicle registration No. KZW Mitsubishi lorry.

For the above reasons, the respondent asked the court to dismiss the appellant's case.

4. **The Evidence.**

The appellant testified as PW1. He stated that on 1st May, 2007 he was walking beside the road on the left hand side from Shamakhokho towards Kapsabet at about 7.30pm when a vehicle approached from behind him and hit him. He lost consciousness and the next thing he realized was that he was in hospital at Kaimosi Friends Mission. He testified that as a result of the injuries, he was hospitalized for 9 days from 1st May, to 9th May, 2007. The appellant produced treatment notes from Kaimosi Mission Hospital (MFI – P1) Police abstract from Mudete Police Station (MFI – P2, and the P3 form (MFI- P3). He said that as a result of the injuries, he sustained during the accident, he still experienced pain and could not carry any heavy object.

5. During cross examination, the appellant stated that he could not recall the date of the accident, though he put it variously as 18th October, 2010 and 30th April, 2007. The appellant also conceded that the treatment notes (MFI –P1) were in the name of Paula Amokola. He also conceded that he did not carry out an official search with the Registrar of Motor Vehicles to confirm the owner of the subject motor vehicle.

6. PW2 was James Tolo, a senior Clinical Officer in Private Practice. He testified that he examined the appellant on 3rd June, 2008 in respect of the alleged accident. PW2 confirmed that the appellant had longitudinal scar on his fore face, healed fractured ribs on the chest, and a vertical scar across the left side of the shoulder. PW2 classified the injuries suffered by the appellant as harm.

7. The respondent's witness was Ezekiel Ukiru Ndegwa who testified as DW1. He stated that on 1st May, 2007 he was driving the subject motor vehicle from Cheptulu towards Chavakali when near Shamakhokho another vehicle overtook him and immediately swerved to his lane.

8. DW1 also testified that at that very moment, there were some two pedestrians who wanted to cross the road from the left hand side to the right. That as the two crossed they fell on his vehicle and that though he tried to stop, he was unable to do so because they had already reached the vehicle. He also testified that at the time of the accident his speed was between 20 and 30 KPH, and that though he reported the accident at Mudete police station, he was never charged with any traffic offence.

9. During cross examination, DW1 testified that he swerved in order to avoid hitting the motor

vehicle that had just overtaken him. DW1 also testified that he had not seen the two people who crossed the road from a distance, and that when the collision took place, the vehicle that overtook him was still behind him.

10. After both parties closed their cases, the trial court received submissions from counsel.

Judgment of the trial court

11. After carefully analyzing all the evidence on record, the learned trial Magistrate reached the conclusion that the appellant had not adduced any credible evidence to prove the nature and extent of injuries sustained by him though he was satisfied that the appellant had proved negligence on the part of the respondent. The trial court also found that Dw1 was not a truthful witness, and accordingly the respondent was found 100% liable for the accident, but the appellant's suit was dismissed with no order as to costs.

The Appeal

12. Being aggrieved by the judgment of the learned trial magistrate, the appellant preferred this appeal on the following grounds:-

1. THAT the learned trial magistrate erred in failing to assess quantum of damages available based on the evidence on record.
2. THAT the plaintiff having testified on his injuries, produced documents in relation to his injuries and availed a Clinical Officer had discharged his onus of proof on a balance of probability.
3. THAT the learned Magistrate erred in finding that the issue of the treatment notes being dated 31.04.2007 and not 01/05/2007 was minor and ought not to have been visited adversely upon the appellant.
4. THAT the learned Magistrate erred in finding of the Defendant to be 100% liable but subsequent dismissal occasioned gross injustice on the plaintiff
5. THAT the learned Magistrate with respect having found the defendant 100% created a peculiar precedent against public interests in finding that quantum awardable was not determinable.

13. The appellant therefore prays that the judgment of the Subordinate Court on liability be upheld and the Honourable Court do proceed to assess the damages awardable based on the evidence on record.

14. This appeal is a first appeal and on this appeal this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. Generally see **Peters – Vrs – Sunday Post (1958) E.A424 and Selle & another – vrs – Associated Motorboat Company Ltd & Another (1968) E.A 123.**

The Submissions

15. This appeal was canvassed by way of written submissions. The appellant's submissions are dated 2nd October, 2014 and filed on 8th October 2014. It is the contention of the appellant that the reasoning that led to the conclusions reached by the learned trial Magistrate was erroneous since the contradictions in the P3 form and the treatment notes were so minor and easily reconcilable to human error. That the contradiction did not in any way affect the contents as to injuries. It was also submitted that it was wrong for the learned trial magistrate to conclude that the documents produced by the appellant may have belonged to another person who was involved in a parallel

accident, that the trial magistrate acted in error when he ignored the evidence of PW2. Counsel submitted that the learned trial magistrate should have assessed damages at kshs.400,000/=. He urged this court to award the same.

16. In response, counsel for the respondents filed the submissions on behalf of the respondent on 3rd December, 2014. The gist of the respondent's submissions is that the conclusions of the learned trial magistrate on quantum of damages were well founded. That the failure to assess damages was a matter of discretion of the learned trial magistrate. On the issue of liability it was submitted that the learned trial magistrate erred in holding the respondent 100% liable for the accident since the appellant did not prove his allegations against the respondent, for example that there was no medical report to support the P3 form and the evidence of the appellant. It was submitted that even in cases where a defendant is found 100% liable for the accident the trial court need not assess quantum when there is no basis for doing so.

Analysis and Findings

17. After subjecting the whole of the evidence in this case to a fresh scrutiny the only issue that I think arises for determination is whether the trial court was right in not assessing the damages awardable to the appellant for indeed that is appellant's major complaint against the judgment of the trial court.

18. As far as the findings on liability are concerned, I am satisfied that those findings are well founded on the facts and the evidence before court. Although it is clear that the appellant did not see the vehicle that hit him or how the said vehicle was being driven there is no doubt that the respondents motor vehicle which was being driven by its authorized driver, servant and or agent hit the appellant in circumstances that were negligent on the part of the said driver servant and or agent. I have myself carefully considered the evidence given by DW1 and I do find and hold as the trial court did that DW1 was not a truthful witness and that he was unable to stop in time because he was driving at high speed.

19. As regards the injuries sustained by the appellant and the events subsequent thereto, the appellant told the court that his name was Paul Amukola and that he got involved in an accident on 1st May, 2007. He further testified that on impact he lost consciousness and when he came to one hour after he found himself in hospital at Kaimosi and according to his further testimony, he remained at the hospital until 9th May, 2007. To support his claim, the appellant produced a discharge summary of one Paula Amogola aged 52 years showing that the patient was admitted at Friends Hospital Kaimosi on 31st April, 2007 and that the patient was discharged on 10th May, 2007. The injuries of the patient on that discharge summary were deep cut on the face, bruises on the toes with pains on the right side of the chest. The patient was also found to be sick looking and that some pieces of bone were seen on the face with fractured ribs on right side. The P3 form showed that the injured person was one Paul Amukole aged 57 years. According to this exhibit, the injuries suffered by the appellant were longitudinal scar on fore face, fractured ribs on the right side of chest and a vertical scar across left side of the shoulder.

20. I have also carefully looked at the evidence of the clinical officer, James Tolo who testified as PW2. According to PW2 the only injuries he noted when he examined the appellant were as follows:- Longitudinal scar on the foreface; fractured ribs on the chest seen through x-rays, vertical scar across the left side of his shoulder. Pw2 did not make mention of the bruises on the toes.

21. It thus appears to me that the appellant's allegation of hospitalization was not supported by evidence. Consequently there was no evidence to prove that the appellant was injured in the said accident and as such there is no basis upon which damages would have been assessed.

22. For the above reasons the appellants appeal is find lacking in merit on all the grounds. The same is therefore dismissed but with no order as to costs

It is so ordered.

RUTH N. SITATI

JUDGE

Judgment delivered dated and signed in open court at Kakamega this 24th day of September 2015

In the presence of

Mr. Musomba (absent) for Appellant

Mr.Elungata for Otieno (present) for Respondent

Mr. Lagat - Court Assistant