



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

CIVIL APPEAL NO. 77 OF 2013

PETER OCHIENG.....1ST APPELLANT

HARJIT SINGH PANDHAL.....2ND APPELLANT

JITIHADA LIMITED.....3RD APPELLANT

VERSUS

SERFINA ATIENO OKWARO.....1ST RESPONDENT

THOMAS OMWENGA.....2ND RESPONDENT

(An Appeal from the Judgment and Decree of the Principle Magistrate Honourable

B. Mosiria (PM), in Kapsabet PMCC No. 35 of 2012, dated and delivered on 7.5.2013)

JUDGMENT

1. This appeal arises from the judgment of the Senior Resident Magistrate's Court at Kapsabet in PMCC NO 35 of 2012. The appellants were the 3rd, 4th and 5th defendants in the lower court while the 1st respondent was the plaintiff. The 2nd respondent was the 2nd defendant.

2. The 1st respondent's claim in the lower court was against the defendants jointly and severally for general and special damages for injuries sustained in a road traffic accident on 18th December, 2011 while travelling as a passenger in motor vehicle Registration number KBB 863F. It was her case that the accident was occasioned by the negligence of the 1st and the 2nd defendant, their agent, driver or servant in the way they drove, managed or controlled the aforesaid motor vehicle which negligence caused a collision with a motor tractor and trailer registration No. KTCA 041B ZB5618.

3. It was also her case that the 3rd defendant who was the driver of the tractor and trailer also negligently contributed to the occurrence of the accident by leaving the tractor and trailer stationary on the road without placing any warning signs to warn other road users of the presence of the trailer on the road.

The particulars of negligence attributed to the 1st, 2nd and 3rd defendants were pleaded at paragraph 8 of the plaint dated 20th January, 2012.

4. The Appellants filed a joint statement of defence on 9th March, 2012 while the 2nd defendant filed a separate statement of defence on 17th May, 2012. They denied all the allegations of negligence made against them by the 1st respondent and put her to strict proof thereof.

In addition, the Appellants pleaded that if the accident occurred which was denied, it was caused or substantially contributed to by the negligence of the 1st respondent and the driver and owner of motor vehicle registration number KBB 863F.

5. After a full trial, the learned trial magistrate entered judgment in favour of the 1st respondent against the appellants and the 2nd respondent jointly and severally. She apportioned liability between the defendants at the ratio of 80: 20 with the appellants bearing 80% while the remaining 20% was to be borne by the 1st defendant and the 2nd respondent. The 1st respondent was awarded a total of Kshs. 121,500 in both general and special damages.

6. The appellants were dissatisfied with the trial magistrate's decision hence the instant appeal. In their memorandum of appeal, they relied on six grounds which I reproduce verbatim as follows;

(i). That the learned trial magistrate erred in Law and in fact by failing to appreciate the weight and bearing of the circumstances admitted and proved both in the witness written statements and the evidence adduced in court and in so doing the trial magistrate arrived in a wrong decision.

(ii). That the learned trial magistrate erred in law and in fact by ignoring the evidence tendered by the police investigating officer in her judgment without ascribing any particular reason in her judgment and in so doing misapprehended the material facts.

(iii). That the learned trial magistrate erred in law and in fact by failing to appreciate the relevant provisions of the Traffic Act and its subsidiary legislations and in so doing delivered a judgment which is based on no law.

(iv). That the learned trial magistrate failed to properly comprehend the cause of the alleged accident and took into account extraneous and irrelevant issues and in so doing arrived at an erroneous decision on the apportionment on liability when the evidence on record did not point any blame to the Appellants.

(v). That the learned trial magistrate also erred in law and in fact by making an award of damages that was manifestly excessive and not in line and/or conformity with the prevailing awards for similar claims.

(vi). That in arriving at her decision the learned trial magistrate did so in a cursory manner and failed to isolate and address the correct issues thereby misdirecting herself by apportioning a greater portion of liability against the appellants when the evidence on record is to the contrary.

7. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. As the first appellate court, I am required to re-evaluate and consider afresh the evidence tendered before the trial court in order to draw my own independent conclusions. In doing so, I should be careful to remember that unlike the trial court, I did not have the advantage of hearing and seeing the witnesses and give allowance for that disadvantage.

See: **Selle V Associated Motor Boat company Ltd (1968) EA 123; Williamson Diamond Ltd V Brown (1970)EA 1.**

8. I have considered the grounds of appeal, the pleadings in the lower court, the evidence adduced before the trial court, the written submissions filed by counsel for the respective parties and the authorities cited.

Having done so, I find that it is not disputed that an accident involving the aforesaid motor vehicles

occurred on 18th December, 2011 in which the 1st respondent who was travelling as a fare paying passenger in motor vehicle registration No. KBB 863F sustained some injuries.

It is also not contested that the 1st and 2nd appellants were the driver and owner of tractor registration No. KTCA 041 B respectively while the 3rd appellant was the registered owner of the trailer registration No. 2B 5618 which was attached to the tractor.

The fact that the 2nd respondent was the owner of motor vehicle registration number KBB 863F whose driver died in the accident is also not contested.

9. What is seriously disputed is the learned trial magistrate's apportionment of liability between the appellants and the 2nd respondent. It is the appellant's contention that the trial court's finding on liability was wrong given the manner in which the accident occurred. In their view, the 2nd respondent's driver was more to blame for the accident and the 2nd respondent therefore ought to have shouldered a larger extent of liability not the 20% apportioned by the trial court.

It is also worth noting that though this appeal is both on liability and quantum, the appellants in their submissions concentrated more on their appeal against liability and appear to have abandoned their appeal on quantum of damages awarded to the 1st Respondent.

10. From the evidence tendered before the trial court, there is no doubt that the accident occurred when motor vehicle registration number KBB 863F (the matatu) rammed into the rear of the trailer which together with the tractor had stalled in the middle of the road near a blind corner as one proceeds towards Chemelil direction. According to the evidence of PW2 who investigated the cause of the accident and DW3 who was the tractor's driver, the tractor stalled after the trailer's right tyre got a puncture.

11. The facts relating to how the accident occurred are not contested. The matatu driver had been driving at high speed; the tractor and trailer had stalled on a corner on the lane he was using thus blocking his path. On coming across them, he attempted to overtake them but was unsuccessful since there was an oncoming lorry. In a bid to avoid a head on collision with the lorry, he went back to his lane and then rammed into the rear of the trailer.

12. According to two witnesses who witnessed the accident, that is, the 1st respondent (PW1) and the matatu conductor (DW1), the appellant's driver had not placed a life saver, twigs or any sign on the road to warn other motorists of the danger posed by the presence of the stationary tractor and trailer ahead of them. This claim was denied by DW2, the driver of the tractor who testified that he had in fact placed twigs 100 metres behind and 50 metres ahead of the stalled tractor which the police allegedly found when they visited the scene of the accident. The investigating officer however contradicted this claim in her evidence when she said that when she got to the scene shortly after the accident, she did not find any leaves or twigs at the scene.

13. After analysing the evidence presented before her, the learned trial magistrate in arriving at her decision on liability stated as follows:

“On this issue of speed the court agrees that the matatu may have been on high speed hence failing to slow as it approached the corner and also failing to stop in good time on seeing the oncoming motor vehicle before trying to overtake and I do find that the 1st and 2nd defendant have to shoulder liability for the driver having been at high speed especially at the place which was a corner. The plaintiff can't be blamed for accident.....I do find that 3rd, 4th and 5th defendant are majorly to blame for the accident in this case. They left a stationary tractor on the road with no due care or regard to other road users. The tractor was at a corner not visible to other road users. The 3rd defendant failed to warn other road users of the presence of the stationary tractor never put life savers or their equivalent which can be twigs or leaves. I will also find 4th and 5th defendant vicariously liable for actions of the 3rd defendant. I do find the

3rd, 4th and 5th defendants 80% liable for the accident while the 1st defendant and 2nd defendant will shoulder 20%”.

14. Having carefully re-evaluated the evidence on record, I find myself concurring with the learned trial magistrate that the main cause of the accident was the presence of the stationary tractor and trailer on a blind corner without any warning signs having been placed on the road within a reasonable distance to warn approaching motorists that there was a stationary vehicle ahead so that they could take reasonable steps to avoid ramming into it. I am unable to fault the finding of the learned trial magistrate that the 3rd defendant failed to exercise his duty of care to other road users by placing a life saver, twigs or any other sign on the road to alert them of the danger ahead. DW2's claim that he had placed twigs in front and behind the tractor must be false because had he done so, the investigating officer who visited the scene about 30 minutes after the accident would have found at least a few twigs scattered at the scene.

15. I with respect disagree with the appellant's submissions that the learned trial magistrate erred in failing to appreciate that it is the matatu driver who caused the accident by failing to keep a safe distance, slow down or stop his vehicle before attempting to overtake the stationary tractor and by disregarding the provisions of **Section 73** of the **Traffic Act** which prescribes situations in which drivers are prohibited from overtaking other vehicles on the road.

16. The above submission is untenable because it flies against the evidence on record. The evidence clearly shows that the two vehicles were not in motion travelling towards the same direction and that the matatu driver caused the accident by negligently overtaking the tractor when there was an oncoming lorry or when it was not safe to do so. The evidence is that the matatu driver suddenly came across the stalled tractor at a corner and that as he was at high speed, he was unable to avoid the accident as there was an oncoming lorry and he was unable to stop the vehicle in time to avoid ramming into the trailer.

17. The action of attempting to overtake the tractor was not done in the normal course of driving in the situations prohibited by the law but was one which was necessitated by the sudden appearance of a stalled vehicle in the middle of the road. It is therefore my finding that **Section 73** of the **Traffic Act** was not applicable in the instance case.

18. In their submissions, the appellants relied on the case of **John Wanaina Kagwe V Hussein Diary Limited Mombasa HCC No. 110 of 2014 (2010) eKLR** in which Hon. Odero J following the decision of Hon. Wambiliangah J in **Dorine Mkanjala & another V United Touring Company & 3 others Civil Suit No. 624 and 625 of 1983** held a driver who had rammed into the rear of a stationary vehicle 100% liable for the accident.

19. The facts of the instant case are however distinguishable from the facts in that case. In the **John Wanaina Kagwe** case, the stationary lorry had been on a straight, well lit road. It had four chevrons at its rear which were supposed to illuminate its rear to warn other road users of its presence on the road. The lorry was therefore quite visible to oncoming motorists and besides, its driver had placed branches on the road to serve as a warning of its presence to approaching road users. The trailer had also been moved off the road. The facts of the instant case are completely the opposite. The tractor was in the middle of the road not off the road as in the other case. It was also not visible to approaching motorists since it was behind a corner which was bushy. DW3 in his evidence on cross examination put it very clearly as follows **“the corner was bushy, driver couldn't see our tractor”**. If the tractor was not visible to approaching motorists including the matatu driver and DW3 had not taken any steps to warn other road users of its presence on the road, the matatu driver cannot be expected to have foreseen the danger ahead and taken steps to avoid ramming into the stationary vehicle. His only fault was driving at a high speed while approaching a corner with the result that after turning the bend and seeing the stationary trailer, he was unable to stop his vehicle in time before ramming into it.

20. In view of the foregoing, I have come to the same conclusion as the learned trial magistrate that the driver of the tractor and trailer was substantially to blame for the occurrence of the accident. It is my finding that the trial court's apportionment of liability at the ratio of 80% : 20% with the appellants shouldering the greater percentage of 80% was fair and well supported by the evidence presented before

the court.

21. The unfortunate comments by the learned trial magistrate regarding the Kshs.10,000 cash bail allegedly paid by DW3 at the police station though irrelevant to the issues that fell for determination before her did not affect the validity of the trial courts finding on liability since they did not form the basis of the trial court's decision.

22. On quantum of damages, as stated earlier, the same were not seriously contested by the appellants.

The record shows that the 1st respondent sustained the following injuries;

- i. Blunt trauma to the neck which was tender.
- ii. Bruises on the right thigh which was swollen and tender.

The injuries were confirmed by the medical report by *Dr. S.I Aluda* produced as exhibit P 4 (a) by consent of the parties.

23. It is now settled that as a general rule, an appellate court should not interfere with an award of damages by a trial court unless it is satisfied that the trial court exercised its discretion wrongly in awarding the damages by either misapprehending the facts before it or applying the wrong principles. The award will also be overturned on appeal if it was either too high or too low as to lead to a reasonable inference that it was erroneous.

In *Maraga V Musila (1984) 1 KLR 251*, the Court of Appeal when addressing its mind to this issue expressed itself thus;

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower judge acted on the wrong principles”.

See also – *Butt V Khan Court of Appeal No. 40 of 1977 (1981) KLR 349; Shabani V City Council of Nairobi Court of Appeal No. 52 of 1984 (1985) KLR 516.*

24. In assessing general damages in this case, the learned trial magistrate took into account the injuries sustained by the 1st respondent and the authorities cited by the parties in their submissions. I have not come across any indication from the record that the award was based on a misapprehension of the evidence before the court or application of any wrong legal principle. I cannot also say that the award was too low or too high or that it was arbitrary. The special damages of Kshs.1,500 were specifically pleaded and proved. I therefore find no reason for interfering with the trial court's decision on the award of damages.

25. For all the foregoing reasons, it is my finding that this appeal is not merited. It is consequently dismissed with costs to the respondents.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 22nd day of December, 2015

In the presence of:

Mr. Maritim for the 2nd Respondent and holding brief for Mr. Mumo for the appellants.

Mr. Z.K Yego for the 1st Respondent.

Ms. Naomi Chonde Court Clerk.