



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO.22 OF 2013

ONTWEKA NYANGAU.....APPELLANT

VERSUS

AUGUSTINE KIRUI.....RESPONDENT

(Being an Appeal from the Judgment and Order of Miss.Shimenga, Resident Magistrate

in Kericho C.M.C.C No.25 of 2011)

JUDGMENT

Ontweka Nyangau, the Appellant herein, filed a suit before the Kericho Chief Magistrate's Court claiming for damages for the injuries he sustained when he was knocked down by motor vehicle registration no.KAU 485U on 2/12/2010 along Kapsongoi-Saramek road. The aforesaid motor vehicle is said to belong or was driver under the authority of **Augustine Kirui**, the Respondent herein. The case was heard by Hon. Shimenga, learned Resident Magistrate who on 17th September, 2013 awarded the appellant Kshs.45,000 as general and special damages plus costs. Being dissatisfied with the aforesaid decision, the Appellant preferred this appeal and put forward the following grounds:

1. **THAT the learned Resident Magistrate erred in law and in fact in arriving at a determination on liability that the Respondent was not wholly to blame for the accident without apportioning the liability between the Appellant and Respondent.**
2. **THAT the learned Resident Magistrate erred in law in failing to follow the laid down procedure of writing a judgment.**
3. **THAT the Resident Magistrate erred in law and in fact in applying the wrong principles in assessing general damages, and therefor awarding an inordinately low amount as general damages.**
4. **THAT the learned Resident Magistrate erred in law and in fact in failing to consider the submissions of the Appellant.**
5. **THAT the learned Resident Magistrate delivered a judgment beyond the requisite Sixty (60) Days period, making the judgment illegal and void.**
6. **THAT the decision of the learned Resident Magistrate was completely against basic legal principles in a case of this nature.**

When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the same disposed of by written submissions. Though the appellant listed six main grounds in his memorandum, those grounds may be summarised to three: **First**, that learned Resident Magistrate erred when she failed to apportion liability. **Secondly**, that the award on damages was inordinately low. **Thirdly**, that the judgment did not satisfy the provisions of **Order 21(4)** of the **Civil Procedure Rules**.

In my humble view, I think this appeal should be determined by the first and third grounds hereinabove. In the first ground, it is argued by the appellant that the learned Resident Magistrate failed to apportion liability. The Respondent on the other hand is of the view that the trial Magistrate condemned the Appellant to shoulder Wholly Liability. The record shows that the learned Resident Magistrate held in her judgment that the defendant (now Respondent) was not 100% liable for the accident. A critical examination of the aforesaid holding will reveal that the learned Resident Magistrate meant to apportion liability but she instead left it for the parties to interpret. In essence, there is no conclusive findings on liability. She did not assign any reasons to support her findings. The Respondent is forgiven for believing that the Respondent was wholly absolved from liability. If the learned Resident Magistrate had indeed found the Appellant to be wholly to blame for the accident, then it does not make sense to make an award of damages in favour of the party who allegedly caused the accident. With respect, I am convinced this ground is enough to upset the decision.

The second ground is to the effect that the judgment does comply with the provisions of **Order 21(4)** of the **Civil Procedure Rules**. The Respondent's advocate did not address his mind to this submission. I have examined the provisions of **Order 21(4)** of the **Civil Procedure Rules** and it is expressly stated that in defended suits judgment shall contain the following:

- i. **A concise statement of the case.**
- ii. **Points for determination.**
- iii. **Decision thereon**
- iv. **Reasons for the decision.**

There is no doubt that the case before the trial court was defended. The judgment did not meet the above stated requirements. It cannot therefore be said to be a competent judgment. I have intentionally avoided considering the merits of the case because of the orders I intend to make hereinafter. I am aware that the appellant has in the middle of his submissions in the second page purported to abandon grounds 1,2 and 5 of the grounds of appeal. There is no evidence that the Respondent was served with the appellant's submissions. A critical perusal of the Respondent's submission will reveal that the Respondent may not have noticed that the appellant has cleverly withdrawn the 1st, 2nd and 5th grounds of appeal. Being the first appellate court, I am entitled to re-evaluate the case that was before the trial court. I will ignore the purported act of withdrawal, because the Respondent had no notice of the same hence it is prejudicial to his case.

After a careful consideration of the appeal, I am satisfied that the same should be allowed and that the appropriate order in the circumstances is to order for a retrial. The appeal is allowed. I hereby set aside the judgment and decree. I order that the case be remitted for re-trial before another magistrate of competent jurisdiction other than Hon. Shimenga. A fair order on costs in the circumstances is to order which I hereby do that each party meets his own costs.

Dated, Signed and delivered in open court this 24th day of July, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Boyon holding brief for Mr. Rono for Appellant

N/A Kibichy for Respondent