



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 130 OF 2011

KAMENJU CHARLES APPELLANT/DEFENDANT

VERSUS

GIDEON MUIA MUTISYA RESPONDENT/PLAINTIFF

(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Kilungu of Hon H. Nyakweba (S.R.M) Civil Case No. 106 of 2010 dated 10th August 2011)

(Before B. Thurania Jaden J)

J U D G M E N T

1. The Respondent, Gideon **Muia Mutisya** filed a suit in the lower court claiming to have been injured on 29/9/2010 when the motor vehicle registration No. KBH 958 U was involved in an accident with motor vehicle registration No. KAZ 593 Z/ZC 7675. The Respondent sued the Applicant as the owner of motor vehicle KBH 958 U which motor vehicle the Respondent blamed for negligence.
2. The Applicant denied the claim and blamed the accident solely or substantially on the Respondent or the driver of motor vehicle KAZ 593 Z/ZC 7675.
3. The Respondent filed a reply to the defence and denied any negligence on his part.
4. The case proceeded to a full hearing. The Respondent (PW1) in his evidence blamed the driver of the Appellant's motor vehicle for attempting to overtake when there was an oncoming bus, hence the accident. The Respondent produced a copy of records from **Kenya Revenue Authority** to prove that the Appellant was the owner of motor vehicle KBH 958 U. He testified that the driver of the Appellant's motor vehicle was charged with the offence of careless driving in **Makindu PMC Traffic Case No. 2055/2010** and pleaded guilty and was fined Kshs.2,000/=. The Respondent produced the proceedings of the traffic case and the police abstract in support of that assertion.
5. The injuries sustained by the Plaintiff were enumerated by **Dr Judith Kimuyu** (PW2) as follows:-
 - i. **“Blunt injury to the right shoulder.**
 - ii. **Cut wound to the right thumb.**
 - iii. **Bruises of right hand 4 fingers.**

iv. Blunt injury to the left ankle with dislocation.”

6. On the day set for the hearing of the defence case, the Appellant applied for adjournment. The trial magistrate found no merits in the application and rejected the same. The Appellant closed his case. Thereafter the parties filed written submissions. The trial court delivered a judgment in favour of the Respondent against the Applicant on a 100% liability, General Damages Kshs.170,000/= and Special Damages at Kshs.4,500/=.

7. The Appellant was dissatisfied with the judgment of the lower court and appealed on five grounds as follows:-

1. “The learned trial magistrate erred in law and in fact in injudiciously, arbitrary and exorbitantly apportioning and awarding the Plaintiff the quantum of Kshs.174,500/= plus costs at the court’s rates which quantum does not commensurate with the nature of injuries sustained.

2. The learned trial magistrate erred in law and fact in finding that the Plaintiff suffered soft tissue injuries but proceeded to award damages for a dislocation injury.

3. The learned trial magistrate erred in law and in fact in basing his findings on irrelevant issues not supported by evidence adduced or the applicable law, as clearly captured in his judgment.

4. The learned trial magistrate’s decision is against the weight of evidence.

5. The learned trial magistrate erred in law and in fact in denying the Appellant his Constitutional right to a fair hearing by unreasonably, unfairly, injudiciously denying the Appellant/Defendant an adjournment to call his witnesses.”

8. The appeal was canvassed by way of written submissions which I have duly considered.

9. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. *See for example Selle –vs- Associated Boat Co. Ltd (1968) EA 123.*

10. As stated by the Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) L KAR 727 at page 703** that:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.

The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

11. On the question of liability, the Respondent’s evidence on how the accident occurred remained uncontroverted and was supported by documentary evidence which included the traffic case proceedings in which the Appellant’s driver was convicted for the offence of careless driving. A conviction for the offence of careless driving does not connote 100% liability (*See for example, Unga Ltd –vs- USA Co. 20014 e KLR*).

12. The Appellant's side did not adduce any evidence. There is therefore no evidence to support the averments in the defence relating to the particulars of negligence attributed to the Respondent or to the other motor vehicle.

13. The copy of records and the police abstract clearly established that the Appellant was the registered owner of the motor vehicle. The Appellant is therefore vicariously liable. (See for example, **Lake Flowers –vs- Cila Franklyn Onyango Ngonga & Ano. 2008 e KLR** case).

14. The record shows that the Appellant's side was given the opportunity to ventilate their defence on two occasions but failed to avail their witnesses. The trial magistrate exercised his discretion, and rightly so in my view, to reject any further applications for adjournment. The Respondent's evidence was therefore not controverted.

15. According to the medical report, the Respondent's injuries included a dislocation of the left ankle. Contrary to the submissions made by the Appellant, the trial magistrate did not make an award of General Damages which was against the weight of the evidence or which took into account any factor which he ought not to have taken into account.

16. I have considered the injuries sustained by the Respondent and also considered comparable awards. The Appellant referred to the case of **Timsales Ltd –vs- Peninah Achieng Omondi 2011 (e KLR)** where the Plaintiff was awarded Kshs.60,000/= as General Damages for soft tissue injuries to the index figure. However, the injuries in the case at hand are more severe.

17. The Respondent referred the court to the following authorities:-

a. **Joseph Njoroge Kariuki –vs- Mary Nyambura – Machakos H.C. C. A 42 of 2009** where an award of Kshs.400,000/= General Damages was approved for the following injuries:-

- **Concussion of the brain.**
- **Blunt injury to the head.**
- **Blunt injury to the chest.**
- **Blunt injury to the left elbow.**
- **Blunt injury with swelling and tenderness to the left arm.**
- **Blunt injury to the left hip joint.**

The injuries in the said authority are however more severe than in the present case.

b. **George O. Obare & Another –vs- Francisca Tavitha Mbuvi - Machakos H.C.C.A 89/2007** where an award of General Damages of Kshs.200,000/= was approved for multiple soft tissue injuries which included cut wounds, blunt injuries and bruises.

c. **Munza Investment Co. Ltd –vs- Makau Mwonewa – Machakos HCCA 2070/2009** where the Plaintiff who had sustained blunt injuries to the neck, lower neck and right shoulder was awarded Kshs.200,000/=.

18. The latter two authorities bear injuries which are comparable to the Respondents herein. The award of General Damages herein is not inordinately high. There is therefore no reason for the court to interfere with the assessment of General Damages at Kshs.170,000/= on a 100% basis of liability. The Special Damages of Kshs.4,500/= prayed for were strictly proved. The appeal has merits and is dismissed with costs.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **29th** day of **September** 2014.

.....

B. THURANIRA JADEN

JUDGE