



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.128 OF 2010

BETWEEN

SECURICOR SECURITY SERVICESAPPELLANT

AND

MARK ODHUOCH OYIEKE RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Mrs. R. Ngetich, PM, in Oyugis CMCC No.28 of 2009 dated 18th March 2011).

JUDGMENT

1. The respondent herein, Mark Odhuoch Oyieke, was the plaintiff in Oyugis PM's Court Civil Case Number 20 of 2009 in which he sued the appellant seeking special and general damages for injuries sustained by himself in a road traffic accident which allegedly occurred on 17th September 2008 while he was travelling in motor vehicle Registration Number KAM 392 Z Isuzu Bus along the Kisii-Oyugis road. The respondent blamed the Appellant's driver, agent or authorized driver (sic) for the accident, alleging that the said motor vehicle was driven so negligently that it collided with motor vehicle registration Number KAU 728 D, Mitsubishi van.

2. As a result of the said accident, and according to the plaint, the respondent suffered the following injuries:-

- Tender on the hospital area (sic);
- Tender on the forehead (sic);
- Bruises on the right supra orbital;
- Bruises on the right ear;
- Tender on the right chest wall (sic);
- Tender on the shoulder with limited movement;
- Pain right lower limb.

3. The respondent therefore averred that as a result of the aforesaid injuries, he suffered pain and loss for which he held the appellant liable.

4. The respondent entered appearance on 17th March 2009 and filed defence on 20th March 2009. The appellant denied ownership of motor vehicle registration No. KAU 728 D van and the fact that there was an accident on 17th September 2008 along Kisii-Oyugis road near Nyahera. Instead the appellant averred that the driver of motor vehicle registration No. KAM 392 Z Isuzu Bus was negligent by:-

- ? *Driving the said motor vehicle at an excessive speed in the circumstances;*
- ? *Driving without due care and attention;*
- ? *Failing to see and or heed the presence of motor vehicle registration No. KAU 728 D van/pick up;*
- ? *Failing to adhere to the highway code thereby causing the said accident;*
- ? *Driving in a zig zag manner hence causing the accident;*
- ? *Failing to stop, slow down, brake or in any other way control the said motor vehicle so as to avoid the accident;*
- ? *Ramming onto motor vehicle registration No. KAU 728 D van/pick up.*

1. At the hearing of the case, PW1 was Dr. P.M. Ajuoga, a consultant surgeon based at Awendo. He told the court that he examined the respondent on 1st March 2009 after he had been involved in a road traffic accident on 17th September 2008. PW1 enumerated the respondent's injuries as:-

- *Bruises on fore head;*
- *Cerebral concussion;*
- *Bruises on supra orbital area;*
- *Bruises on right ear;*
- *Bruises on both shoulders;*
- *Bruises on right leg.*

2. PW1 also confirmed that at the time he conducted examination on respondent, he could only see healed scars. He produced a medical report which was marked **Exhibit 1**.

3. On cross examination, PW1 testified that the respondent only sustained soft tissue injuries and that by the time of adducing evidence, the respondent had recovered.

4. PW2 was the respondent. He told the court that on the material day 17th September 2008, he boarded a bus Reg. No. KAM 392 Z at Oyugis and paid Kshs.150/= as fare. He produced a passenger's receipt which was marked **Exhibit 2**. That after passing Oyugis town, he saw a securicor vehicle coming from the opposite direction. It moved on the right side of the road and collided with the bus he was travelling in. As a result of the accident, he sustained the following injuries:-

- *Long cut on the head;*
- *Bruises on the face;*
- *Injury on the left eye and right ear. Glasses entered the left eye and right ear;*
- *Blunt injury on the right lower limb;*
- *Blunt injury to the shoulders.*

5. Subsequently he was treated at Rongo District Hospital and was given a treatment book which

was marked **P. Exhibit 3**. He also reported the accident at Oyugis police station and was given a P3 form which was filled at Rongo District Hospital. The P3 form was marked **P. Exhibit 4**. He also produced a police abstract which was marked **MF1-P5** and a search in respect of motor vehicle KAU 728 D which was marked **P. Exhibit 6**.

6. He blamed the respondent's van for the accident as it swerved onto the lane where the bus was travelling in. He complained that his left eye had not yet recovered, and that since the accident, his eye could not see well and he still felt pain on his chest and lower limbs. He urged the trial court to grant him the reliefs sought in the plaint.

7. On 26th November 2009 a consent order was endorsed by the trial court which had the effect that the evidence of PW3 in SRM's CC No.27 of 2009 be adopted as PW3's evidence in the respondent's case and police abstract produced as **Exhibit P5** in SRM No.27 of 2009 be produced as **Exhibit P5** in this case.

8. The appellant did not adduce any evidence in their defence. In its judgment the trial court assessed liability on the appellant at 80% and respondent at 20%. On quantum the trial court awarded the sum of Kshs.150,000/= as general damages at the ratio of 80:20. In effect, judgment was entered for the respondent as against the appellant for a sum of Kshs.120,000/= plus costs and interest of the suit.

9. The appellant was aggrieved by the judgment of the learned trial magistrate and filed this appeal. In its Memorandum of Appeal the appellant set out the following six grounds:-

? *The learned trial magistrate erred in law and fact in failing to hold that the plaintiff did not prove his case on a balance of probability;*

? *The learned trial magistrate erred in failing to evaluate the evidence tendered judiciously;*

? *The learned trial magistrate erred on all points of fact and law in as far as his decision on the case is concerned;*

? *The learned trial magistrate erred in law and in fact in failing to dismiss the plaintiff's case;*

? *The learned trial magistrate erred in law and in fact in disregarding the formidable defence evidence tendered;*

? *The learned trial magistrate's award of damages and assessment of quantum was erroneous.*

1. The appellant prayed that the judgment and decision of the trial magistrate on liability and quantum in Oyugis SRMCC No.28 of 2009 be set aside and the said case be dismissed by this Honourable Court.

2. When the matter came for hearing of the appeal on 16th May 2012, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged and I have read them.

3. This Court being conscious of its role as the first appellate court as stated in **Selle -vs- Associated Motor Boat Co. Ltd. [1965] E.A. 123**, has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter. This court must, however bear in mind the fact that it neither saw nor heard the witnesses and to make due allowance for that.

4. Looking at the six grounds raised by the appellant in his memorandum of appeal, the same can be narrowed down into 2 grounds:-

? *Did the respondent prove during the trial court that the appellant was responsible for the accident?*

? Did the trial court error in the amount it awarded to the respondent as damages?

1. On the issue of proof of injuries suffered by the respondent, PW1 who examined the respondent testified that at the time he examined the respondent he could only see healed scars. He stated that the respondent had suffered injuries, *inter alia*,

- Bruises on fore head;
- cerebral concussion;
- Bruises on supra orbital area;
- Bruises on right ear;
- Bruises on both shoulders;
- Bruises on right leg.

2. PW1 denied a suggestion that the respondent only sustained soft tissue injuries and by the time he adduced evidence, the respondent had recovered.

3. PW2 the respondent gave a detailed account of how he was travelling in a bus Reg. No. KAM 392 Z at Oyugis when he saw a securicor vehicle moving from the opposite side of the road and it then swerved onto their lane after which both motor vehicles collided. In support of his evidence, he produced a bus ticket, treatment book from Rongo Hospital, P3 form, police abstract which by consent was adopted as PW3's evidence. PW2 also produced a motor vehicle search in respect of motor vehicle KAU 728 D which established the fact that the motor vehicle was owned by the appellants as on the day of the accident. Since the appellant did not adduce viva voce evidence at the trial, the evidence of the respondent remained unchallenged. The trial court fully endorsed the evidence adduced by the respondent as to how the accident occurred.

4. In Kipkebe Limited -vs- Moses Kauni Masaki – Civil Appeal No.127 of 2004 (unreported), Musinga J (as he was then) held:-

“Where a defendant wishes to contest evidence of a plaintiff, the defendant is under an obligation to adduce such evidence as would be sufficient to controvert that of the plaintiff. The appellant, having failed to do so, the trial court was right in holding that the appellant was fully liable for the occurrence of the accident. I hold that on a balance of probabilities the respondent proved the first limb of his case.”

5. In the instant case, the appellant merely filed their defence and did not bother to call any witnesses on their part to explain to the trial court the events leading up to the accident on the material day. The respondent on the other hand, produced exhibits that clearly showed he was involved in a road traffic accident he suffered body injuries and further that persons who were responsible were driving the appellant's motor vehicle. All this evidence was never controverted by the appellant. Therefore the trial court was right in holding the appellant's responsible for the accident that caused injury to the respondent. The trial court did explain how it arrived at apportioning liability at 80:20 as against the appellant. In my humble view and after considering carefully the evidence of PW2 (the respondent), in as much as the appellant's motor vehicle left its lane and came to the lane where the respondent's bus was, the respondent did not adduce any evidence to indicate that the driver in the bus he was travelling in made efforts to swerve to the other side. Therefore the liability ratio given by the trial court was proper.

6. Regarding quantum of damages, the learned trial magistrate considered injuries sustained by respondent compared with injuries suffered by victims in the cited authorities and entered judgment for

plaintiff against defendant for a sum of Kshs.120,000/= plus costs and interests.

7. In the **Kipkebe Limited case** (supra) Musinga J. (as he then was) held:-

“It is trite law that award of general damages is an exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award, must, however, be reasonable and neither extravagant nor oppressive. The trial court has to be guided by such factors as previous awards for similar injuries and such other relevant factors.”

8. In **Sosphinaf Company Limited & another -vs- Daniel Ngang'a Kanyi – Civil Appeal No.315 of 2001 at Nakuru** (unreported), the Court of appeal expressed itself thus on assessment of damages for personal injuries:-

“The assessment of damages for personal injuries is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous awards for similar injuries and the principles developed by the courts, ultimately, what is a reasonable award is an exercise of discretion by the trial judge and will invariably depend on the peculiar facts of each case.”

I entirely agree that assessment of damages for personal injuries is a matter of judicial discretion.

9. Furthermore, the principles which must be observed by an appellate court in an appeal against an award of general damages were stated in the case of **Kemfro Africa Ltd. T/a Meru Express and another -vs- A.M. Lubia and another (No.2) [1987] KLR 30** where it was held as follows:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former Court of Eastern Africa to be that it must be satisfied that either the judge, in assessing damages, took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

10. In the instant case, the appellants have not demonstrated how the award of Kshs.120,000/= as general damages was inordinately high neither has it been shown that the learned trial magistrate took into account an irrelevant factor in her assessment of damages. Thus this court will not interfere with the exercise of discretion by the learned trial magistrate and consequently this appeal stands dismissed with an award of costs to the respondents.

Dated and delivered at Kisii this 24th day of September, 2014

R.N. SITATI

JUDGE.

Mr. Moracha for Kibichiy for Appellant

Mr. Ojala (present) for Respondent

Mr. Bibu - Court Assistant