



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.10 OF 2014

STEPHEN N. WANZOFUAPPELLANT

VERSUS

MULTIPLE HAULIERS (EA) LTDRESPONDENT

(An Appeal arising of the judgment of T.W. Cherere C.M. delivered on 10th April 2013 in Busia civil case no.146 of 2012)

J U D G M E N T

1. The claim by Stephen N. Wanzofu (**the Appellant**) against Multiple Hauliers (EA) Ltd (**the Respondent**) for Damages in respect to injuries he suffered in a road traffic accident that occurred on 22nd January 2010 was dismissed by the Trial Court. The Appellant is aggrieved by that decision.
2. In a plaint dated 14th May 2012, the Claimant averred that on 22nd January 2010 he was knocked down along Kisumu-Busia road by motor vehicle registration KAY 407B belonging to the Respondent. The Plaintiff suffered injuries which included blunt trauma to his head, neck, chest, left shoulder, hip and left leg. He blamed the accident on the negligence on the part of the Respondents driver.
3. In response to that claim the Respondent filed a Statement of Defence on 19th June 2012. The Respondent denied almost everything. The ownership of motor vehicle KAY 407B, that the accident occurred and that if it did, that the Respondent's driver was to blame, or that the Claimant was injured. In addition the Respondent blamed the Claimant wholly or partly for the accident.
4. The Appellant told the Trial Court that on 22nd October 2010 he was along Busia-Kisumu road when at a place called Esikoma he was knocked down by a trailer from behind. Although at one time he said that he was cycling, at another he testified that he was pushing his bicycle uphill. That he was off the road when this happened and he blamed the driver of motor vehicle KAY 407B. That as a result of the accident he suffered injuries on his head, shoulder, neck, and hip. In addition he suffered a fracture of the right scapula. He sought medical help at Busia District Hospital where, according to Sammy Obukhuma (PW1), the Claimant was admitted from 22nd January 2010 to 26th January 2010. That witness also completed a P3 Form in respect to the victim. On 26th April 2010, Dr Aluda examined him and prepared a medico legal report on his injuries (P Exh 5 (a)).
5. The third witness for the claim was CIP Wilson Omwega (PW3). At the time of his testimony, he was the in charge of Traffic section at Busia Police Station. The Police officer gave evidence by referring to the Police file in respect to the Accident. He also produced the relevant Police abstract. He also told Court that the accident was investigated by PC Tambora.
6. As neither the Respondent nor their Counsel was present in Court at the hearing of 27th March

- 2014, the Court closed the Defence case and reserved judgment for 10th April 2014.
7. In the judgment, that is the subject matter of this Appeal, the Trial Court found that the Claimant had failed to prove its case on a balance of probability. On quantum that Learned Magistrate was of the opinion that General Damages of ksh.200,000/= would have been sufficient had the claim been proved.
 8. The Appeal assails the said judgment on the following grounds:
 1. **The Learned Trial Magistrate erred in law and in fact to find that Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=) would have been adequate compensation in view of the submissions made.**
 2. **The learned Trial Magistrate erred in law and fact to find on balance of probability the case had not been proved and the respondent ws(sic) not liable 100%.**
 3. **The Learned Trial Magistrate erred in law and fact to find that it was an absolute necessity for eye witness to testify.**
 4. **The Learned Trial Magistrate erred in law and fact by failing to find the driver of the motor vehicle acknowledged having caused an accident in his witness statement filed in court.**
 5. **The Learned Trial Magistrate erred in law and fact not to find by fact the defence never tendered any evidence to disapprove causing the accident were deemed to have admitted.**
 6. **The Learned Trial Magistrate erred in law and fact to find that by the fact police never preferred any charges against eye witness Wandera for providing false report. His statement still had probative value.**
 9. This Court has given regard to all the evidence tendered in support of the claim. The evidence by the Claimant was that he was knocked by a vehicle which he did not see as he pushed his bicycle off the road. He did not see the vehicle as he was hit from behind. But that would not support what he averred in paragraph 3 of the Plaintiff; that he was knocked down while he was “**lawfully cycling.**” Cycling means riding a bicycle. That, perhaps, would be an immaterial inconsistency if there was other evidence on how the accident occurred.
 10. PW3 sought to provide that other evidence. He did not investigate the accident and so his narration of how the accident occurred was an account of the investigation carried out by PC Tambora. He was merely reporting what is said to be the findings of the investigating officer. That narration was hearsay and the Trial Court, correctly, held that it was inadmissible.
 11. During the hearing of the Appeal, this Court was urged to give weight to the Respondents drivers witness statement filed alongside the Respondents Statement of Defence. That Statement was filed in compliance with the provisions of Order 7 Rule 5 of The Civil Procedure Rules. In it, the Driver Elijah Kennedy Shavanga states, in respect to the occurrence of the accident,

“I do recall very well that on the 22nd day of January 2010 I was involved in a road traffic accident. I was driving along the Kisumu-Busia road. On reaching the Suo Bridge I noticed a third party cyclist who was riding his bicycle at the left verge of the road. while crossing up near his location, the said cyclist suddenly veered and joined the main road abruptly. I hooted while braking but due to the proximity and truck of my weight of my truck, I ended up hitting the said cyclist.”

The Appellant submitted that the Trial Court should not have turned a blind eye to this written statement as it forms part of the Court pleadings. The Appellant was literally arguing that the written Statement was evidence.

- 12) Section 3 of The Evidence Act says this about the meaning of Evidence:

“evidence” denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity;”

A witness Statement under Order 7 Rule 5, and indeed the Statement under consideration, was not

made under oath and would not be a means by which an alleged matter of fact is proved or disproved. It would not amount to evidence.

13. There may, however, be an argument that where a witness statement is an admission to a claim then a trial Court cannot ignore it. This however, may not be occasion to make a finding on that argument not only because the parties never rendered themselves deeply on the matter but also because such a determination does not affect the outcome of the matter at hand. I say so because the witness statement of the Driver (set out in paragraph 11 of this decision) does not admit the claim. In fact, it blames the Plaintiff wholly for the accident.

14. That only evidence on liability left is that of the Claimant himself. But as pointed out earlier, the Claimant was not consistent on how the accident occurred. That inconsistency has turned out to be material because of lack of further evidence. I would for those reasons uphold the Learned Magistrate's finding on liability.

15. On quantum the Appellants had prayed for ksh.250,000/= as General Damages. I would agree with the claimants advocate that damages of ksh.250,000/= would have been more appropriate given that the Claimants Counsel had drawn the attention of the Trial Court to the Decision in **KISII CA NO.218/2009 H Young & Co EA Ltd -vs- Elmelda Nyobike Zakayo** where the High Court upheld an award of General Damages of ksh.250,000/= for remarkably similar injuries. That said I am not certain that an award of ksh.200,000/= can be said to be so manifestly lower than ksh.250,000/= as to warrant its setting aside.

16. But for reasons already given the entire Appeal is dismissed with costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 30TH DAY OF OCTOBER 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

JUMBA.....FOR APPELLANT

N/A.....FOR RESPONDENT