REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 123 of 2011

(Appeal from the judgment of Hon. J. K. Ng'arng'ar Principal Magistrate in Bungoma Civil Case no.422 of 2010)

ABBAS A. ROBIE.....1ST APPELLANT
EMILY AUMA MOLA.....2ND APPELLANT

VRS

CHARLES NYATI WALIUBA.....RESPONDENT

JUDGMENT

INTRODUCTION

[1] The Appellants were dissatisfied by the judgment of Honourable J. K. Ng'arng'ar, Principal Magistrate delivered on 19/10/2011 in Bungoma CMCC No.422 of 2010 (hereafter the "Primary Suit)".

[2] By the Memorandum of Appeal dated 9/11/2011 the Appellants contends:

(a) That the learned trial magistrate erred in law and fact in failing to dismiss the Respondent's suit in the lower court as he had not proved his case on a balance of probability.

(b) That the learned trial magistrate erred in law and fact in holding the Appellants 80% liable for the alleged accident when there was no sufficient evidence to that effect.

(c) That the learned trial magistrate erred in law and fact in holding the Respondent only 20% liable for the alleged accident in view of the fact that he was a pedestrian.

(d) That the learned trial magistrate erred in law and fact by failing to evaluate the injuries sustained by the Respondent and on the medical chits and/or reports.

(e) That the learned trial magistrate erred in law and fact in making an award in general damages of Ksh.600,000/= on soft tissue injuries that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the Respondent.

(f) That the learned trial magistrate erred in law and fact in awarding the Respondent special damages of Ksh.59,180/= that were not proved to the required standard in law.

(g) That the learned trial magistrate erred in law and in fact in disregarding relevant evidence on record hence resulting to a wrong decision.

(h) That the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions and legal authorities relied upon in support thereof.

(i) That the learned trial magistrate's decision albeit, a discretionary one was plainly wrong.

Evaluation of Evidence

[3] The Appellant in examination-in-chief testified that he was cutting sugar cane along Mumias-Busia Road when M/V KAK 329 C veered off the road and hit him. In cross-examination he said that he was standing beside the road in company of other people whose identity he did not disclose. The Appellant averred in the Plaint that he was lawfully walking as a pedestrian along Mayoni-Busia road at Matungu area. These inconsistencies muddles up the factual situation of the accident.

The Appellants' case

[5] The 2nd Appellant was the driver of M/v KAK 329 C on the material time. In the absence of evidence to the contrary, I deem her to have been the duly authorized to drive of the vehicle by the 1st Appellant who is the registered owner of the M/v registration No. KAK 329 C. The trial magistrate was therefore right in holding that the 1st Appellant was vicariously liable for the actions of the 2nd Appellant.

[6] According to the 2nd Appellant, visibility was clear on that day. The Respondent suddenly jumped on the road. She tried to avoid hitting him but the Respondent jumped on the bonnet of the vehicle. She therefore blamed the Respondent for the accident. The 2nd Appellant was driving at 30-40 KMPH.

Evaluation of evidence by the trial magistrate

[7] The magistrate in addressing the liability chose to believe the version presented by the Respondent that the 2nd Appellant was over-speeding. The trial magistrate did not make any finding on whether or not the Respondent was standing on the side of the road or was crossing the road. This is the proper path the trial magistrate should have followed, and specifically discount one of the versions of factual situation of the accident and how it happened in order to bring out the circumstances of the accident.

[8] But without expressly laying out the circumstances of the case on solid evaluation of the evidence tendered, the trial magistrate concluded in circumlocution that:-

"I rule that if the 2nd (sic) Defendant was driving 30/40 KMPH as she alleges she would have controlled and/or managed the vehicle and avoid the accident even if the Plaintiff had tried to cross. Indeed she admits the road was clear and visibility clear. This only gives credence to the version by the Plaintiff that the vehicle was on excessive high speed."

The trial magistrate further held that:

"I will also blame the Plaintiff for not taking any steps to avoid the accident. To this end I will apportion liability on 8020 (sic) basis in favour of the Plaintiff against the Defendant."

Liability

[9] It is not in doubt that there was an accident involving M/v KAK 329 C and the Respondent at Matungu on the material time. The only question is where to place blame for the accident. I have re-evaluated the evidence of the parties. From the evidence, there are grave inconsistencies in the evidence of the Respondent, and as I have pointed out earlier, muddles up the factual situation and the manner the accident occurred. I categorically discount it. I am convinced the accident happened on the road and the Respondent was attempting to cross the road.

[10] The driver and pedestrian owes a duty of care to the other as road users. The 2nd Appellant to be

vigilant enough to observe the wider view of the road including any intervention from both sides of the road, and the Respondent to observe the old age traffic practice "look right, look left, look right again" before crossing the road. On that basis, I will apportion a 50/50 liability. This apportionment of the contributory negligence is proper in the circumstances of this case where only the Respondent and the 2nd Appellant testified in the primary case. Police investigator did not testify who I believe could have shed more light on the circumstances of the accident.

[11] I also wish to say that, for purposes of civil liability, it is not necessary that the driver of the motor vehicle should be charged with a traffic offence for the accident in question. Although a conviction for traffic offence on the accident concerned may be tendered and considered as evidence in the civil case. The only requirement is that the plaintiff proves his case on balance of probabilities. I do not therefore consider an apt argument that non-charging of the 2nd Appellant was not charged with any criminal offence absolves her from any negligence in the instant case. But I am glad the Appellants also concede in their submissions to a 50% liability. By these findings, grounds Nos. 1, 2 and 3 of the Memorandum of Appeal are accordingly dealt with.

Quantum

[12] Having found on liability, I now proceed to determine grounds 4, 5, 8 and 9 together as they relate to the assessment of quantum of damages in the sum of Ksh.600,000/=. First of all, I find the trial magistrate considered all the authorities on quantum of damages which had been filed by the Appellants, and the Respondent. The Appellant cited only an extract of **NBI HCCC NO.3974 OF 1988 RAPHAEL MWANIKI KIBOI ~VRS~ JOSEPH NJOGU KINYUA.** The extract did not say much as it is a severely restricted summary of the case. Nonetheless, the trial magistrate considered it and concluded:

"I have looked at the authorities cited. The Plaintiff's case was of much a serious nature than the one herein. On the other hand the authority cited by the defence was way below the Plaintiff's injuries herein. I find both the authorities not to be of any assistance."

Therefore Ground 8 of the Appeal fails to that extent.

The assessment

[13] The trial magistrate evaluated the nature of the injuries sustained by the Plaintiff as pleaded and as supported by the medical report dated 10/2/2010 prepared by Dr. Mulianga Ekesa, M.B. Ch.B, Medi. (Surg) NBI. A. O. Fell (Trauma) FLK – Austria, specialist General & Trauma Surgeon.

[14] According to the said medical report, the Respondent sustained the following injuries:

HEAD AND NECK

i) Contusion

ii) Cut wounds on the scalp

TRUNK
i) Chest pain and cut wound

ii) Back pains

iii) Laceration on left buttock

LIMBS
i) Painful swollen knee joints

The doctor opined that the Respondent suffered:

i) Severe head injury

(ii) Soft tissue injuries

(iii) Psychological trauma

[15] The doctor concludes that the head injuries have contributed to the Respondent's post memory loss lapses and uncoordinated speech. The overall effects of the injuries to the Respondent's are negative and he is not able to continue with his work. There was no second medical report by another doctor.

Award of damage – Discretionary

[16] Assessment of damages for personal injuries is purely at the discretion of the trial court and can only be disturbed by the appellate court if it is satisfied that the trial court in assessing the damages:-

(a) *Took into account an irrelevant factor or*

(b) *Left out of account a relevant factor or*

(c) *The amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.*

[17] The principles were set out in the earlier cases decided by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya and have become and been applied as house hold names which do not require any or further elucidation. See the cases of:-

1) **ILANGA V. MANYOKA [1961] EA 705, 709, 713,**

2) LUKENYA RANCHING AND FARMING CO-OPERATIVE SOCIETY LTD VRS KAVOLOTO [1979] EA 414, 418, 419,

3) KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE AND ANOTHER V A. M. LUBIA & ANOTHER (1982-88) 1 KAR 727,

4) COURT OF APPEAL CIVIL APPEAL NO.66 OF 1982 ZABLON MANGA V MORRIS W. MUSILA (unreported).

Applying the test

[18] As I said earlier, the trial magistrate fully considered the injuries sustained by the Respondent in accordance with the Medical Report tendered before trial court and concluded that:-

"The injuries were severe soft tissue and also let (sic) to poor memory due to bleeds on and in the brains as per the report for (sic) Dr. Mulianga Ekesa. It has led to poor memory and uncoordinated (sic) speech. This followed as the Plaintiff gave his evidence in court."

[19] Accordingly, rejection by the trial court of the authorities cited by the Appellant was therefore justified. The injuries sustained by the Respondent are serious as they have contributed to the Respondent's poor memory and uncoordinated speech. Such resultant effects invariably affect the amount of damages awardable for such injuries. They are not therefore purely soft tissue injuries that would attract low awards for soft tissue injuries without any serious post-accident effects. The gravity of the injuries sustained by the Respondent was a necessary factor and he took it into account in the exercise of his discretion in assessing the amount of damages. Although he did not quote any authorities to support his conclusions, the trial magistrate did not apply or fail to apply any of the principles on the assessment as to invite the court to disturb the assessment and I uphold the award of Ksh.600,000/= for general damages.

On Special Damages

[20] The receipts produced offend the provisions of the Stamp Duty Act and the Evidence Act as they do not bear a stamp for stamp duty as by the law required. As such they are inadmissible as proof of special damages claimed. The claim for Ksh.59, 180/= as special damages has not been proved specifically as it should and it fails.

DECISION

[21] I enter judgment on liability on a 50/50 basis, i.e. the Appellants to bear 50% and the Respondent 50% of the liability. The award for Ksh, 600,000/= as general damages remain undisturbed ad is upheld. The Respondent therefore is entitled to Ksh.300, 000/= being the 50% the liability apportioned. I also award costs on the mount payable. The award for Ksh.59, 180/= as special damages is set aside.

Dated, signed and delivered in open court at Bungoma this 30th day of January, 2013.

F. GIKONYO

JUDGE

30/1/2013

Before: Gikonyo, Judge

Alusa: Court Assistant

Njalale for Situma for the Respondent

Omwenja for Applicant – Onkangi holding brief.

Court: Judgment read in open court

F. GIKONYO
JUDGE

Onkangi for Omwenga – I pray for stay for 30 days.

Njalale: I do not object.

Court: Stay for 30 days granted.

F. GIKONYO
JUDGE