



REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 157 of 2010

JOHN MASINDEAPPELLANT

VERSUS

SKYLAND TRANSPORTERSRESPONDENT

JUDGMENT

The Memorandum of Appeal herein contains eight (8) grounds. The same can be summarized as follows:-

- 1. The appellants suit was dismissed on mere technicalities instead of substance.**
- 2. The trial magistrate misdirected himself on the question of liability and quantum.**

The appellant told the trial court that on 9th August 2008 he was a pillion passenger vide a bicycle which was being ridden by his later brother along Busia Kisumu road.

He told the court that at Choma area they were knocked down by a trailer which was being driven by the defendant's driver, He sustained injuries to his head, groin, left elbow and right knee. He was treated at Busia District Hospital and later at Nambuku Dispensary.

On cross examination he was unsure of his age or when he was born. He told the court that they were knocked from behind. He lost consciousness and his brother was run over by the lorry and died.

PW2 Samson Akuhokwa was a boda boda cyclist. He saw the accident. He said that he saw the lorry hit the bicycle from behind. He said that the plaintiff was ahead of him and thus he was able to see them clearly.

On cross examination however he told the court that had they been careful they would not have been knocked by the trailer.

One **Gachogo Kabathi** testified on behalf of the defendant. He was the lorry driver. He told the court that he saw the bicycle and its riders but they refused to move out of the road. He said that the plaintiff panicked and jumped off the bicycle. He blamed the accident on the cyclist.

This court is enjoined to arrive at an independent finding upon evaluating the evidence afresh. The trial court dismissed the appellants case on the ground that at the time of filing the case the appellant was a minor.

The key statement that swayed the court is found on his testimony on cross examination where the

plaintiff said:-

“I am 18 years old. I cannot remember when I was born. I was 16 years old when I was involved in the accident. I filed this case. My father sued on behalf. My father is called Kanoti Otieno”.

The trial court apparently considered this a preliminary objection and proceeded to uphold this line of argument.

I have read the able submissions by the parties herein. The preliminary objection is an issue if raised will dispose off the matter and the same need not proceed or at all.

The contention herein is the age of the appellant. The only available documentary evidence is the P3 form as well as the medical legal report which shows the age of the appellant to be eighteen (18) years.

I have read the appellant's quoted testimony above and with respect the same does not clearly indicate the age of the appellant. He claims to be eighteen (18) years and on the same breath does not know when he was born. Further he claims that his father one Kanoti Otieno has sued in his behalf yet the plaint clearly shows that he is the one who has filed the suit.

In my thinking this was an issue of fact. It is not a preliminary point of law. Its an issue that arose during hearing and to term it as a preliminary objection is a misnomer.

The now famous case of **Mukisa Biscuit Manufacturing Co Ltd =vs= West End Distributors Ltd (1969) E. A. 696** clearly :-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

The issue of age cannot be a point of law. It needs further adduction of evidence so that it could be ascertained. In any event the closest documentary evidence are the two medical reports which were independently done.

In the premises I do find that the court acted in error. Even if the defence had denied this in their statement of defence, this was a mere denial. This was only in a pleading. Pleadings are not evidence. One needs to go further than pleadings, namely by adducing evidence.

Further more this was a civil suit. The prove as the case is not beyond reasonable doubt but on a balance of probability. The probability here I conclude is that the appellant at the time of filing the suit was around eighteen (18) years and therefore had the capacity to file the case on his own.

The next question to decide is on liability. The plaintiff said that he was hit off the road but the respondent said that he saw the bicycle and out of panic the appellant jumped off the bicycle. He however said that he was told by the turn boy.

I do not fault the trial court on liability. The respondent apparently saw the appellant but he did not try to stop or undertake such steps so as to avoid the accident. The liability of 80% and 20% as found by the trial court was fair and reasonable in the circumstances.

On quantum the appellant sustained the following injuries:-

1. **Injuries on the left temporal region**
2. **Injuries on the right lumber region.**

3. Injuries on the right arm

4. Injury on the right leg hip and foot

This court shall only interfere with the lower court's finding if the same was too low or inordinately too high. The award of Kshs. 300,000 by the court was neither excessive or low. I shall uphold the same.

For the above reasons therefore the appeal succeeds with costs both in the high court and lower court to the appellant.

Dated, signed and delivered at Kisumu this 25th day of March 2013

H.K. CHEMITEI

JUDGE

In the presence of:

.....for appellants

.....for the respondent

HKC/aa0