REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 96 of 2011

1. JALDESSA DIBA T/A DIKUS TRANSPORTERS

2. HUSSEIN HASSAN ……..…. APPELLANTS

VERSUS

JOSEPH MBITHI ISIKA …..……..……. RESPONDENT

(Being an appeal from the judgment and of the Senior Resident Magistrate's Court at Kilungu of Hon H. Nyakweba SRM in Senior Resident Magistrate Case No. 74 of 2010 dated 15th June 2011)

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(Before B. Thuranira Jaden J)

J U D G M E N T

The Respondent, **Joseph Mbithi Isika** filed a suit against the appellant **Jaldessa Diba T/A Dikus Transporters** and the 2nd appellant, **Hussein Hassan** seeking to be paid damages on account of the injuries he alleged to have suffered on 9/5/2010 when motor vehicle KAW 833 V was involved in an accident with motor vehicle KBJ 103 R ZD 1688.

The 1st appellant was sued as the owner of motor vehicle KBJ 103 R ZD 1688 while the 2nd appellant was sued as the driver, servant and/or agent thereof. The respondent who was the driver of motor vehicle KAW 833 V blamed the driver of motor vehicle KBJ 103 R ZD 1688 for being negligent in the manner in which he drove the motor vehicle.

The 1st and 2nd appellant filed a joint statement of defence in which they denied the respondent's claim. The appellants blamed the accident on the respondent's negligence and went ahead to give the particulars of the respondent's negligence. There was no reply to the defence. After hearing the suit, the trial magistrate apportioned liability at 10% against the respondent and 90% against the appellants. General damages were assessed at Kshs.350,000 and special damages at Kshs. 2,200/= less 10% contribution. The total came to Kshs. 316,980/= plus costs.

The appellants were aggrieved by the judgment and appealed to this court on the following grounds:-

1. "THAT the Honourable Magistrate erred in law in awarding general damages much higher than had been sought for by the Respondent.

2. THAT the Honourable Magistrate erred in law in awarding damages that were too high in the circumstances taking into account the alleged injuries of the Respondent.

3. THAT the Honourable Magistrate erred in fact in failing to take into account the evidence adduced by the Appellants on how the accident arose.

4. THAT the Honourable Magistrate erred in law in failing to make a finding on the issue of liability based on the evidence adduced by all parties but relied heavily on the Respondent's evidence.

5. THAT the Honourable Magistrate erred in fact in failing to make a finding on the evidence adduced by the Police Officer as to who was liable for causing the accident.

6. THAT the Honourable Magistrate erred in fact and in law in relying solely on the evidence of the plaintiff which was not corroborated.

7. THAT the Honourable Magistrate erred in fact and law in failing to take into account the police accident report and Police Abstract produced as Defence Exhibits 1 and 2 respectively which concluded that the Respondent was to blame for the accident".

The appellants sought the following orders:-

1. "THAT the judgment delivered on the 15th day of June 2011 and the decree issued pursuant thereto at KILUNGU LAW COURTS in SRMCC NUMBER 74 OF 2010 be set aside in its entirety.

2. THAT the Honourable Court does determine the case finally.

3. THAT in the alternative, the Honourable Court does order a new trial in the matter.

4. THAT the Respondent does bear the costs of this Appeal and of the Subordinate Court".

The appeal proceeded by way of written submissions. Ms E. Muigai Advocates appeared for the appellants. Their submissions essentially expound on the grounds of appeal. **Sila & Company Advocates** for the Respondent in his submissions supported the judgment of the trial magistrate and submitted that it was clear from the Memorandum of Appeal that what was challenged was the finding on liability and not the finding on quantum. As held in **Selle & Another v. Associated Motor Boat Company Ltd. & Others (1968) EA**:-

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally ***(Abdul Hameed Saif vs Ali Mohamed Sholan (1955), 22 E.A.C.A. 270".***

The Respondent, PW1 **Joseph Mbithi Isika** testified that on the material date, he was driving motor vehicle KAW 833 Mitsubishi canter from **Salama** to **Machakos**. When he reached **Kwa Muia Wa Kalii** area along the **Mombasa – Nairobi** road, he sensed a problem with his rear right tyres. The respondent who was driving on the left lane as one faces **Nairobi** direction decided to get off the road to check the tyres. The respondent put on his right side indicators and after giving way to the oncoming motor vehicles, he drove off the road to his right, about 5 metres off the tarmac. While the respondent was in the process of applying brakes to bring his motor vehicle to a stop, he was hit from behind by the appellants' motor vehicle. The respondent was injured on the back and right shoulder. He was treated at **Bishop**

Kioko Hospital where he was admitted for five days. The respondent received further treatment at **Machakos General Hospital.** The respondent blamed the appellants for the accident. The respondent produced a P3 form which was duly filled by a doctor. He also produced the treatment notes, the discharge summary and the medical report by **Dr J Kimuyu** as exhibits.

The respondent also produced the copy of records from the Registrar of Motor vehicles. The copy of records confirmed that the 1st appellant was jointly registered with **National Industrial Credit Bank Ltd** as the owners of motor vehicle KBJ 103 R and further that the 1st appellant was the owner of the trailer 2D 1688. He produced the receipts for Ksh. 500/= each for carrying out the search with the Registrar of Motor Vehicles.

The 2nd appellant, **Hussein Hassan** (DW1) the driver of motor vehicle KBJ 103 R 2D 1688 in his evidence blamed the respondent for turning suddenly as if to make a U-turn on the highway, hence the accident.

The 2nd respondent in his evidence stated that there was a deep gully on the left therefore he swerved to the right and went off the road and the two vehicles collided. The 2nd respondent produced a police abstract which reflected that the case was still pending under investigations. The police abstract did not blame any of the drivers for causing the accident.

DW2 **Ali Baba Ali** who was a turnboy in the appellants' motor vehicle KBJ 103 R ZD 1688 also blamed the respondent's motor vehicle for suddenly swerving to the right and causing the accident. Although the turnbody (DW2) blamed the driver of the respondent's motor vehicle for failing to indicate his intention to turn to the right, it is noted that the driver of the appellant's motor vehicle (DW1) in his evidence made no mention of the indicators yet he was the one driving. The evidence from all the three witnesses from the scene however clearly shows that the respondents' motor vehicle was the one that was ahead and that the collision occurred off the road on the right side.

DW3 **Sgt. Philip Kazungu** produced the OB extract in respect of the accident herein. DW3 is not the Investigating Officer and did not visit the scene. However, the extract was from the OB where entries are made in the normal course of business. Although the OB extract was produced by the appellant's side, the contents of the same differ from the evidence of DW1 and DW2. The said OB extract blames the respondent for indicating left, then slowed down and suddenly turned to the right. DW1 and DW2 who were eye witnesses did not mention that the respondent put on the left side indicators before turning to the right.

The trial magistrate in his judgment blamed the appellants' motor vehicle for failure to keep distance and driving at a high speed and failing to stop in time to avoid the collision. Having re-evaluated the evidence, I am inclined to agree with the trial magistrate. The driver of the respondent was the one who was behind. He ought to have kept a reasonable distance. Although the appellants' case was that the turning of the respondent's motor vehicle was sudden and within a short distance, it does not come out clearly from the driver of the respondent's motor vehicle whether he saw any indicators on the respondent's motor vehicle or not. The evidence of DW1, DW2 and DW3 is contradictory on whether the respondent's motor vehicle gave indicators or not.

The appellants' counsel submitted that the failure by the respondent to file a reply to the particulars of negligence pleaded in the statement of defence amounted to admission of guilt. This is not a correct statement of the law.

In ***Denmus Oigoro OOnge vs Njuca Consolidated Ltd. (2012) e KLR***, the Court of Appeal stated as follows:-

"The proper construction of the Rule 8 (1), in my view, is the one stated in ***Katiba Wholesellers Agency (K) Ltd Vs United Insurance Co. Ltd., Civil Appeal No. 140 of 2002*** where this court stated that:-

"……where a defence contains an allegation of fact, and a reply is filed, …it is necessary for the plaintiff to deny in the reply any allegation in the defence which he intends to dispute. If he fails to do so then he is deemed to have admitted the defence allegations. ***It is only if the plaintiff does not file any reply that there is joinder of issue on the defence which operates as a denial of all allegations contained in the defence."***

In the light of the provisions of ***Order 6 Rules 9 (1)*** *and* ***(10) (1)*** *and this authority, the Appellant having not filed a reply to defence, there was clearly a joinder of issues with the effect that the Appellant denied the negligence alleged against him in the defence just as the Respondent denied the negligence alleged against him in the plaint."*

This court does not find any fault with the trial magistrate's finding on liability. The Respondent's evidence is credible and reflects a more probable scenario than the contradictory evidence led by the appellants.

On general damages, the Court of Appeal in ***P.A Okelo & M.M. t/a Kaburu Okelo & Partners vs Stella Karimi Kobia & 2 Others (2012) e KLR*** **referred to the case of** ***Kemfrom Africa Ltd t/a Meru Express Services (1976) & Another vs Lubia & Another (1978) KLR 3****0* and stated as follows:-

"On general damages the principle is that this court, in deciding whether it is justified in disturbing the quantum of damages awarded by the trial court must be satisfied either that the Judge in assessing the damages took into account an irrelevant factor or left out 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 damages."
The medical evidence by Dr**. J.M. Kimuyu** which was not controvered by any other evidence reflected the injuries sustained by the respondent as follows:-

(i) "Blunt back injury

(ii) Blunt injury right shoulder joint

(iii) Blunt injury right clavicular region with fractured and dislocated right clavicle"

These injuries are also reflected in the P3 form, the treatment notes and the discharge summary. The respondent suffered bone and soft tissue injuries.

The respondent's counsel submitted for an award of Kshs. 300,000/= as General damages. He relied on the following authority:- ***Bernard Oundo odero –vs Johnah Arap Bett Nbi HCCC No. 2314 of 1988.***

Wherein an award of Kshs.150,000/= as general damages was made in the year 1991 for the following injuries:-

ü **Fracture of the clavicle**
ü **Head injury**
ü **Laceration in the scalp**
ü **Laceration of the left knee and shoulder.**

The cited authority is over 20 years old. Inflation has since set in. The appellants in their submissions before the lower court submitted for a sum of Kshs.100,000/= as general damages but did not cite any case law.

I have on my part looked at the following persuasive authorities:-

(i) ***Joseph Kirugi –vs Mwangi Gatete & 3 Others – HCCC No. 4196/1991 (Nbi)*** where a sum of Kshs.300,000/= was awarded in the year 2000 as general damages for a fracture of the right scapula, dislocation of the acromio-clavicular joint and blunt injuries to the chest, head and back.

(ii) ***Jane Wambui Kamau & 4 Others 1999 e KLR*** where general damages was assessed at Kshs.300,000/= in the year 1999 for a fracture of the right collar bone and injuries to the 1st, 2nd and 3rd rib but which were not fractured.

Taking into account the passage of time and inflationary trends, my view is that the sum of Kshs.350,000/= as general damages is reasonable and within the range of awards made for similar injuries. The amount is not so inordinately high to amount to being an erroneous estimate of the damages, the counsels' submissions notwithstanding. I will therefore not interfere with the same.

The appeal has no merits and is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **30th** day of **May** 2013.