



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 69 OF 2008

1.JEREMIAH MSAKU KINYUMU

2.ABDULAHAIN AHMED SALIM APPELLANTS

VERSUS

ONESMUS MUSYOKA MUATHA RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate's Court at Mwingi of Hon Richard Odenyo SRM in Senior Resident Magistrate Case No. 6 of 1998 dated 12th March 2008)

(Before B. Thurania Jaden J)

J U D G M E N T

The Respondent was involved in an accident on 6/2/1995. On 21/1/98, the Respondent filed a suit in the lower court claiming damages for injuries sustained. The Defendant was one **Said Islam** but following the amendment of the plaint filed in court on 6/4/2001, the said Defendant was substituted with the 1st Appellant, **Jeremiah Masaku Kinyumu** and 2nd Appellant **Abdulahain Ahmed Salim** as the Defendants pursuant to leave granted by the court on 28/4/1999.

The trial magistrate entered judgment for the Respondent against the Appellants for Kshs.600.000/= on a 100% liability basis. The Appellants were dissatisfied with the said judgment and appealed to this court on the following grounds:-

1. **The learned magistrate erred in failing to hold that when the appellants were joined as defendants on 22nd August 2001 the claim against the appellants was barred by limitation. In the circumstances the learned magistrate should have proceeded to dismiss the respondent's claim with costs in favour of the appellants.**
2. **The learned magistrate erred in holding that the appellants or either of them or any servant or agent of the appellants was negligent.**

2A. The learned magistrate has failed to state the reasons for holding that the respondent was knocked by the vehicle or that the vehicle was reversing contrary to Order 20 Rule 4 of the Civil Procedure Rules.

2B. The learned magistrate has failed to examine the evidence on liability and his finding is contrary to the weight of the evidence.

3. **The learned magistrate erred in holding that the respondent was entitled to damages in the sum of Kshs.600,000/= which sum was manifestly excessive.**
4. **The learned magistrate erred in the assessment of costs which costs are manifestly excessive.”**

The appeal was canvassed by way of written submissions which I have duly considered.

This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings.

The Respondent testified as PW1 before the lower court. The evidence of PW1 is that he worked as a Revenue Clerk employed by the **County Council of Mwingi**.

On 6/2/1995 at about 5.30 a.m., the Respondent (PW1) and PW2 **Jones Musyoka Mwalikwa** were carrying out their duties at their employer's **Nguutani** barrier. Motor vehicle KAD 697 stopped at the barrier for checking and PW1 went on board the motor vehicle to check what it was carrying. While PW1 was in the process of alighting, the motor vehicle started reversing. PW1 was knocked down by the motor vehicle and fell under the motor vehicle. PW1 was injured and taken to **Mwingi District Hospital** and thereafter referred to **Embu Provincial Hospital** where he was admitted for three weeks.

PW3 **Dr. Lawrence Wagura** who examined PW1 and made a medical report outlined the injuries sustained by PW1 as follows:-

- **Cut on the left cheek.**
- **Bruises on the right wrist.**
- **Blunt injuries on left shoulder with massive swelling etc.**
- **Bruises on the left leg.**

X-rays taken revealed a dislocation of the left shoulder joint and one fractures left rib.

The Respondent was left with the following permanent abnormalities:-

- **Scar on the left cheek which was circular in shape and measures 3 cm diameter.**
- **Irregularly shaped scar on the right wrist measuring 6cm x 3 cm.**
- **Big 15 cm x 7 cm scar on the left shoulder extending to the left breast.**
- **Total paralyse of the left upper limb which is also wasted.**
- **6cm x 3cm scar on the left leg.**
- **3cm x 2 cm scar on the left ankle joint.**

The doctor's conclusion was that the Respondent suffered severe injuries that permanently crippled his left upper limb. According to the doctor the Respondent suffered 50% irreversible damage.

The 1st Appellant, **Jeremiah Masaku Kilumi** the driver of the motor vehicle in question testified as DW1. According to DW1 he was in the company of this turnboy and a lady who was the customer when they stopped at the barrier. The turnboy alighted and put a stone behind the rear while DW1 got out of the motor vehicle and went to relieve himself. The customer also got out of the motor vehicle and went to pay the council levy. DW1 then heard screams and on checking found that the Respondent had fallen off the stationary motor vehicle. The Respondent was rushed to hospital. The Appellant was served with a notice of intended prosecution but he was not charged with any traffic offence.

Two versions of evidence on how the accident occurred emerged from the Plaintiff's case and the Defendant's case. The trial magistrate was convinced that the Plaintiff told the truth and therefore arrived at the conclusion that the motor vehicle was reversing at the time of the accident. The trial magistrate did

not however go ahead to give any reasons why he believed the Plaintiff. I have considered the Plaintiff's evidence. The Plaintiff testified that the motor vehicle started reversing while the Plaintiff was in the process of alighting. The Plaintiff described his position at the time of the accident as having one leg on the ground and the other on the motor vehicle when the motor vehicle started reversing and he was hit by the motor vehicle and lost balance and fell by the kerb side.

PW2 who was working at the barrier with the Plaintiff to a large extent gave evidence that corroborated the Plaintiff's evidence. According to PW2 he was attracted to the scene by the groans let out by the Plaintiff and he saw the motor vehicle stop and the driver took the Plaintiff to hospital. Although PW1 did not witness the Plaintiff being hit by the motor vehicle, he corroborated the Plaintiff's evidence that the motor vehicle was moving at the time he heard the groans. PW2's evidence is that the driver did not have a loader and was only accompanied by the lady customer. The Plaintiff was not sure whether he saw any loader.

The evidence of DW1 is that he had a loader with him and that indeed the loader had put a stone behind the wheel. This was a crucial witness who would have shed light at what stage the stone was removed and the motor vehicle started moving. The loader was however not called to testify. The lady customer was also not called to testify. The evidence of DW1 that the lady customer said **"mzee has fallen, mzee has fallen"** remains mere hearsay. The evidence of DW1 that PW1 fell off the stationary motor vehicle is uncorroborated. DW1's evidence that he was in the thickets where he had gone to take a call of nature when the accident occurred is not believable in view of the corroborative evidence adduced by PW1 and PW2. However, the evidence of PW1 fails to explain the steps he took to ensure that the motor vehicle had come to a stop before he boarded the same and that the motor vehicle was stationary at the time he disembarked and that the driver was aware of his movements. I therefore find the Appellants 80% liable and the Respondent 20% liable for the accident.

I have considered the injuries sustained and the cited case law. I am satisfied the figure of 600,000/= on a 100% basis was neither too low or too high.

As stated by the Court of Appeal in the case of:

Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and another (No.2) (1982-88) L KAR 727 at page 703 that:-

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.

The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

I now turn to the Appellants' first ground of appeal which states that the Appellants were enjoined in the suit on 22/8/2001 when the claim against them was barred by limitation. On 22/8/2001, the application dated 6/4/2001 and filed in court on the same day for the amendment of the plaint was allowed by consent. It is the said amended plaint which brought the 1st and 2nd Defendants and the initial Defendant was dropped. The accident occurred on 6/5/1995. By the time the Respondent filed the application for amendment on 6/4/2001 the three years limitation period had lapsed. The 1st and 2nd Defendant became parties to the suit on 22/8/2001. The cause of action is founded on tort. **Section 4 (2) of the Limitations of Actions Act (Cap 22) Laws of Kenya** stipulates as follows:-

"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued."

Sadly for the Respondent his case was time barred.

I agree with the judgment of **Ringera J** in **Reuben Shikoli Ashikanga –vs- Norman Lidigu & Another – Nbi HCCC 530 of 1989** that the doctrine of relation back of amendments cannot apply to substitution or addition of a person as a defendant to a suit by way of amendment to the plaint.

If the Respondent's case was not time barred, I would have upheld the judgment of the lower court subject to apportionment of liability aforestated.

The appeal is allowed with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 18th day of July 2013.

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B. THURANIRA JADEN

JUDGE