



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 65 OF 2011

JOSEPH OMONDI ONYANGO APPELLANT

VERSUS

BUSIA OUTGROWERS CO. LTD. RESPONDENT

JUDGMENT

On the 18th November, 2011, the learned Resident Magistrate at Mumias G. O. Oyugi delivered a judgment in SRM court Civil Case No. 491 of 2007. He dismissed the case of the Plaintiff with costs to the defendant. The plaintiff is the present appellant, while the defendant is the present respondent.

Following the said decision, the appellant through counsel Ndinya, Omolo & Company filed this appeal. The grounds of appeal are 10. I reproduce them hereunder. They are as follows -

1. The learned magistrate erred in law and fact by disregarding the weight of the appellant's evidence.
2. The learned magistrate erred in law and fact in finding that the appellant had not established liability of the respondent.
3. The learned magistrate erred in law and fact in finding that the appellant had not proved his case on a balance of probabilities.
4. The learned magistrate erred in law and fact in failing to hold the respondent wholly or substantially liable.
5. The learned magistrate erred in law and fact by considering extraneous issues and matters.
6. The learned magistrate erred in law and fact by failing to make a finding that the respondent's evidence was not credible.
7. The learned magistrate erred in law and fact by disregarding the documentary facts by the appellant which were not controverted or rebutted by the respondent.
8. The learned magistrate erred in law in disregarding the submissions of the appellants.
9. The learned magistrate erred in law in arriving at a decision of dismissing the appellant's suit based on wrong and inapplicable principles of law.
10. The learned magistrate erred in law and fact in finding that the appellant was not a credible witness when he had no benefit of seeing the appellant testifying.

The appellant's counsel during hearing of the appeal, Omollo Esikuri advocates filed written submissions summarising the evidence on record, and raising points in support of the grounds of appeal. The respondent's counsel Manani, Lilan & Company advocates filed written submissions. Mr. Esikuri, who appeared for the appellant and Mr. Odongo who appeared for the respondent at the hearing, relied on the written submissions filed. I have perused the said submissions and authorities cited.

In brief, the facts of the case are that on 27th January 2007, the appellant was driving a motor car

Reg. No. KAL 088T along Mumias-Bungoma road. On reaching a place called Mayoni, he met a police roadblock where spikes were put on the road so that only one vehicle could pass at a time. Ahead of him was a tractor towing a trailer Reg. No. KAT 036H Reg. No. ZB 8420. The tractor had already stopped. The tractor and his vehicle were flagged to drive on. The appellant in proceeding on attempted to overtake the trailer. However, in the face of an oncoming vehicle, he had to give it way. It was his evidence that the trailer reversed and hit his motor vehicle. The defendant's story was that the appellant carelessly overtook the trailer and scratched the side of his vehicle against the metal body of the trailer. The trailer was not damaged.

Though the accident was reported to the police, no charges were preferred against anybody by Mumias Police Station. A police abstract was produced in evidence by the plaintiff. The plaintiff's vehicle was repaired and the plaintiff claimed general damages and damages to recover the cost of repairs and loss of use, as well as costs and interest.

This is a first appeal. As a first appellate court, I am required to consider the evidence afresh and come to my own conclusions and inferences – see the case of *Selle -vs- Associated Boat Co. Ltd. [1968] EA 123.* In considering the evidence on record, I have to take into account that in civil cases, the burden is always on the plaintiff to prove his/her case on the balance of probabilities – see the case of *Kirugi & Ano. Vs. Kabiya & 3 Others [1987] KLR 347.*

I have considered the evidence on record. The evidence as to how the accident occurred is that of the appellant as against that of the driver of the tractor belonging to the respondent. The police officers who were at the scene did not testify. There was no statement recorded by the appellant to the police on how the accident occurred that was produced. Nobody was charged in court for causing the accident. No sketch of the scene was produced.

The learned magistrate came to the conclusion that the appellant was not truthful. The appellant on appeal claims that the magistrate did not see him testify to determine his demeanour or credibility. I have perused the record of proceedings. Indeed the appellant testified before S. Atambo, SRM not Mr. G. O Oyugi who delivered judgment. I have also perused the judgment.

In making a finding that the court did not believe the appellant's evidence, the learned magistrate stated in the judgment as follows -

***“The credibility crisis in the plaintiff’s case could have easily (sic) sorted out by the police officers who were at the scene. But none was called. Against the statements written by the plaintiff and the defendants and the police file representing this accident was never produced. All this make the plaintiff's case more doubtful. In effect, I hold that the plaintiff was the cause of the accident, on the balance of probabilities given the evidence on record.*”**

The suit against the defendant therefore fails with costs to the defendant.”

From the above findings of the trial court, the learned magistrate was clearly stating that the appellant did not discharge his burden of proving his case on the balance of probabilities. The unexplained gaps in the plaintiff's evidence meant that he could not be believable. In my view, the attack on the magistrate on basis that he could not determine the credibility of the appellant because he did not see him testify is unjustified and unfounded. I find no misdirection on the part of the learned magistrate. In my view, the finding on credibility by the learned magistrate was justified, and I uphold the same.

The judgment has also been attacked on the basis that the appellant was found 100% negligent by the trial court. From the facts and circumstances of the case on record, I do not fault the learned magistrate's findings of facts. Here again, the only witnesses who could have supported the appellant's case were the police officers on duty at the scene. Since none of them was called to testify, and no explanation was given on the difficulty encountered by the plaintiff in calling them, the reasonable inference to be drawn

is that the appellant was out to hide the truth, or was economist with the truth. That did not help him. He was duty bound to demonstrate the contributory negligence of the respondent. Unfortunately, he failed to do so, even after a strong defence was filed denying his allegations in the plaint, and he filed a reply to defence. He should have known that he was bound to prove on the balance of probabilities his allegations of negligence against the appellant's position in view of the strong defence. He failed to do so. He cannot be heard to blame the trial court. I uphold the finding on liability arrived at by the learned magistrate.

I find no basis for the allegation that the magistrate disregarded the submissions of the appellant or that he considered the strenuous issues and matters. The facts and record do not support such a contention.

On the issue of quantum, The appellant asked in the plaint for general damages, special damages of Kshs.62,600/-, loss of use of the motor vehicle, costs of the suit plus interest."

In the judgment, the learned magistrate found that no general damages were proved. I agree. General damages are meant to cover inconveniences such as pain and suffering and loss of amenities which cannot be easily be verified in monetary terms. General damages were not applicable in the present case. The magistrate found that the documents produced in proof of special damages could only support Kshs.34,200/=. These were search fees, 1000/=, accident assessment costs Kshs.4, 200/=, costs of repairs 29,200/=. In my view, though the appellant asked for compensation for loss of use of the motor vehicle, the same should have been a heading under special damages. This is because as at the time the suit was filed, in June 2007 the expense would have been incurred already, the accident having occurred on 26th January 2007.

The principles that guide an appellate court in handling a complaint on the award of damages are clear and well settled. In the case of ***Butt vs Khan [1977] 1KLR 1***, the Court of Appeal for East Africa stated as follows -

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge (magistrate) proceeded on wrong principles, or that he misapprehended the evidence in some material aspect, and so arrived at a figure which was either inordinately high or low.”

After re-evaluating the evidence on record, I have come to the conclusion that the learned magistrate did not make an erroneous estimate of the damages. Nor did he proceed on wrong principles, or misapprehend the evidence. The magistrate did not award general damages because the same were not applicable. Special damages have to be pleaded and proved. The learned magistrate assessed special damages, had the case succeeded, on the basis of what was pleaded. The magistrate cannot be faulted on his findings. I uphold his findings

In conclusion, I find that this appeal lacks merit and I dismiss the same with costs to the respondent.

It is so ordered.

Dated at Kakamega this 24th day of October, 2013

George Dulu

JUDGE