



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Appeal 239 of 2010

MAKARIO MAKONE MONYANCHA..... APPELLANT

-VERSUS-

GEORGE MOKUA MAMBOLEO..... 1ST RESPONDENT

JAMES BICHANGA KENYARIRI..... 2ND RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Oyugis, Hon. R. Ng'etich in SRMCC No. 18 of 2007 dated 14th October, 2010)

The 1st respondent in this appeal sued the appellant in the Senior Resident Magistrate's Court at Oyugis. He sued to recover damages for personal injuries he claimed to have sustained in a road traffic accident on 16th January, 2006, involving motor vehicle registration number KAS 377H which collided with motor vehicle registration number KWX 963. In its judgment, the lower court found 100% liability against the appellant and awarded the 1st respondent a sum of Kshs. 433,885/- general and special damages. Aggrieved with the lower court's decision, the Appellant lodged this appeal raising 14 grounds, and prayed for orders that the judgment and decree in Civil Case No. 18 of 2007 be set aside and the 1st respondent's suit be dismissed. Secondly, that this Honourable court makes its own independent assessment on liability and quantum of damages.

By consent of the parties, filed on 5th April 2011, it was agreed that the appeal be canvassed by way of written submissions, to be filed and exchanged, together with authorities within 45 days from the date of the consent. I have read the submissions and considered the authorities filed by the parties.

It is settled that being the first appellate court, it is my duty to re-appraise and re-evaluate the evidence offered at the trial by parties involved so as to reach my own independent decision as to whether the judgment and decree can stand.

According to the Amended Complaint dated 17th September, 2008 and filed in court on 25th September, 2008, the 1st Respondent averred that on the material day along Kisii – Migori near Daraja Mbili area, the defendant's driver, servant or agent while driving motor vehicle registration number KWX 963 so negligently drove, managed or controlled the said motor vehicle causing the same to violently collide with motor vehicle registration number KAS 377H in which the 1st respondent was lawfully travelling, as a consequence of which he suffered loss and damage.

The 1st respondent particularized his personal injuries as; fracture of right humerus, blunt trauma to the chest, and continuing effects being pain in the chest and left arm. The Appellant filed an Amended Defence dated 7/10/2008 which was filed on 17th October, 2008. He denied ownership of the motor vehicle registration number KWX 963 and all the particulars of negligence attributed to him. He also denied the occurrence of the accident and the injuries the 1st respondent claimed to have sustained. He further stated that if the accident occurred as alleged, the same was wholly occasioned or substantially contributed by the negligence of owner or driver of motor vehicle registration number KAS 377H.

At the trial, only the 1st respondent and a Police Constable from Kisii Police Station testified. No evidence was led by the defence neither did the 2nd respondent enter appearance nor file a defence against the 1st Respondent's claim. The 1st respondent testified that he was travelling in motor vehicle KAS 377H which was heading to Kisii town when it was involved in a head on collision near Daraja Mbilli market with motor vehicle Nissan Matatu KWX 963, which was overtaking a trailer at a corner/bend. He sustained injuries – blunt trauma to the chest, and fracture on the right humerus. He was taken to Kisii hospital where he was admitted for 4 days and a further 3 days at Kijabe Hospital; He reported to the Police blaming the appellant for causing the accident. On cross-examination, the 1st respondent stated that he was a passenger in the vehicle (KAS 377H) seated at the front passenger seat and there was another passenger in the same car, seated behind him, who had passed on. He further stated that he knew the 2nd respondent who was his workmate, and that the accident herein involved the 2nd respondent's motor vehicle, which is KAS 377H. Finally, he stated that he did not sue the 2nd Respondent for the accident.

By consent of parties, the medical records of the 1st Respondent that were marked for identification were produced as exhibits, as follows;

- (i) Kisii District Hospital treatment chit - Exhibit 1(a)
- (ii) Discharge from Kijabe Hospital – Exhibit 1(b)
- (iii) Dr. Ajuoga's medical report – Exhibit 5
- (iv) Dr. Nicholas Tinega's medical report – Defence Exhibit 1

Police Constable No. 75026 Nathan Mwea testified as PW2. He testified that an accident did occur on 16/1/2006 at 4:00pm at Daraja Mbili along Kisumu/Migori road. It involved motor vehicle KAS 377H and KWX 963 Nissan Matatu. He stated that as per the police file, both vehicles were to blame for the accident. He produced Police Abstract No. 11/06 marked as Exhibit 2. On cross examination, he stated that the investigating officer – Corporal **Morris Otango** had been transferred, and hence he relied on the police file to give evidence. The police abstract produced (Exhibit 2) had the name of the 1st respondent as the person injured and the nature of the injuries as serious.

The 1st & 2nd respondents and Corporal **Morris Otango** were listed as witnesses. On being shown a Police Abstract and proceedings in Civil Case No. 781 of 2006, PW2 stated that he was not aware that the 2nd respondent filed suit in Kisii and that there was one **Christopher Matoke** who died in the accident. These proceedings were produced by consent of both counsels and marked as defence exhibit 2.

The defence despite having the matter adjourned severally did not tender any evidence, and on 22nd July, 2010, the defence case was closed on submission of counsel for the appellant.

In his submissions, the appellant stated that it was not in contention that an accident occurred. However, he urged the court to find that the 1st Respondent was not in the motor vehicle at the time of the accident, for two reasons. First, that the evidence of the police could not confirm the presence of the 1st respondent in the said vehicle at the time of the accident. Secondly, that the proceedings at Kisii CMCC No. 781 of 2006 (defence exhibit 2) only stated that the driver (the 2nd respondent herein) was accompanied by one

Christopher Matoke who died in the accident. Counsel further submitted that even if the court would be inclined to think otherwise, that liability be apportioned in terms of the proceedings in Kisii CMCC No. 781 of 2006 which was recorded as 70%: 30%.

I now address the issue of liability. In submissions filed before court, the appellant admits that the accident occurred. He however disputes that the 1st respondent was in the motor vehicle at the time of the accident. With respect to his presence in the motor vehicle, the 1st respondent gave a sworn statement that he was in the motor vehicle as a passenger at the time of the accident. He produced medical records from Kisii Hospital (Exhibit 1(a)) which show that the date of the accident was 16/1/2006. He also produced the police abstract (exhibit 2) which stated that he was a passenger in the motor vehicle (KAS 377H) and that he sustained serious injuries in the accident on the date and location aforementioned.

The appellant did not testify in the trial to rebut the 1st respondent's testimony. He however produced proceedings in the Kisii Civil Case No. 781 of 2006 (defence exhibit 2) which show that the 2nd respondent was the plaintiff and the appellant was the defendant. In that trial, the plaintiff testified that, "*I had a passenger Christopher Matoke who died in the accident*".

Evidently, the accident referred to in the proceedings marked defence exhibit 2 and the accident subject matter of this appeal, is one and the same. In view of the evidence in the proceedings – defence exhibit 2, was the 1st Respondent in the motor vehicle at the time of the accident? This question was not interrogated thoroughly by the trial court. The 1st respondent claimed to have been in the said motor vehicle and he produced a police abstract that showed his name as a passenger of that vehicle on the material date. The 1st respondent also produced a medical report from Kisii Hospital which indicated that the date of the accident was 16th January, 2006.

PW2 though not the investigating officer, confirmed that the 1st respondent was injured in the accident. PW2 based his testimony on the police file. The appellant did not testify, and also did not call the 2nd respondent to settle whether the 1st respondent was in the motor vehicle. Notably, the appellant subjected the 1st respondent to a 2nd medical opinion by **Dr. Tinega**. The medical opinion was produced in evidence and marked defence exhibit 1. In its conclusion this report stated that, "*This is a victim of RTA who sustained blunt chest injuries and fracture right humerus.....*". In view of this, and without sufficient evidence by the appellant to the contrary, this court finds that the 1st respondent has proved on a balance of probability that he was in the vehicle (KAS 377H) at the time of the accident.

With respect to events leading to the accident, the appellant as is evident on record did not give testimony to show contributory negligence of the driver of vehicle in which the 1st Respondent's was a passenger. In the case of **Nderitu –vs- Ropkoi and Another (2005) 1 E. A 334**, the Court held, "*...The burden of proof was with the plaintiff to discharge. There was however also the evidential burden cast upon both parties to prove any particular fact which they desired the court to believe in its existence....*" Nothing therefore stopped the appellant from calling such evidence.

The appellant however produced proceedings defence exhibit 2 wherein the 2nd Respondent who was the Plaintiff therein, entered into a consent with the appellant with respect to liability at 70%: 30% in favour of the plaintiff. The question is whether such proceedings will be applicable in the suit, subject matter of this appeal. The court finds that the proceedings (defence exhibit 2) were not relevant in the suit for 2 reasons. First, Kisii CMCC No. 781 of 2006 was not a test suit whose determination would have an effect on related suits such as this.

Secondly, and more importantly, from the proceedings (defence exhibit 2), liability was consented between the parties, which means that the consent on liability was a compromise. In effect, therefore, the court did not have an opportunity to address itself on the issue of liability. It did not articulate any issue in order to come up with the afore-stated ratio. Had the trial court, being a court of competent jurisdiction, dealt with the issue of liability, and had that suit been tried as a test suit, then it would follow that the ratio derived by that court would be applicable to other related suits. In that instance, the parties negotiated and

recorded the consent in court, which later adopted the same as its order, and therefore as to how the parties arrived at that ratio, was not within the knowledge and doing of the court. I therefore hesitate to disturb the trial court's finding on liability.

I now consider the issue of third party proceedings, which appears to be a backbone in the appellant's appeal. Prior to the commencement of the trial, the appellant filed an application dated 18th April, 2008 to take out a third party notice upon **James Bichange Kenyariri** – the 2nd respondent herein, on grounds that the 2nd respondent was the owner and/or driver of motor vehicle registration number KAS 377H which due to negligence caused, substantially contributed to the accident that occurred on 16th January, 2006. The appellant contended that the accident was caused by the negligence on the part of the Intended Third Party.

In the supporting affidavit sworn by **Francis Tuiyott**, Advocate (as he then was) deponed that in a related matter, the 2nd respondent recorded a liability of 70%: 30%. This application was allowed by consent of both the 1st respondent and the appellant on 11th September, 2008, and subsequently thereafter on 17th October, 2008 the appellant filed a third party notice against the 2nd respondent. There is an affidavit on record sworn by **Fredrick Owino** dated 19th January, 2009 that the third party notice was served upon the 2nd Respondent at his work place, which he accepted but declined to acknowledge receipt.

Order 1 rule 15 of the **Civil Procedure Rules** makes provisions for notice to third and subsequent parties. Rule 15 (2) requires that service of the notice upon the third party shall be effected according to the rules relating to service of summons. The third party in this instance was an individual, thus Rule 8 of the Order 5 is applicable. Sub-rule (1) requires that service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient. Where the notice has been served upon the third party in accordance with Rule 8 aforementioned, Rule 13 provides that the person served shall be required to endorse an acknowledgment of service on the original summons. Rule 13 has a proviso which envisages a situation where the person served refuses to endorse an acknowledgement. In such a situation, the court has discretion, where it has satisfied itself, to declare that service has been duly effected.

Rule 15 thereto requires that the serving officer shall swear an affidavit detailing; the time when and the manner in which service was effected, and the name and address of the person served identifying the person served and witnessing or delivery or tender of summons (in the instant case third party notice). The rule also requires that the serving officer shall annex or cause to be annexed to the original summons (in the instant case third party notice) on the affidavit of service. As is seen from the record, the appellant claims to have served the third party notice upon the 2nd respondent who refused to endorse acknowledgement.

Where a third party is served with a third party notice and fails to enter appearance, then under Order 1 Rule 17 of the **Civil Procedure Rules**, such third party is deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice. Now that it is established that the third party in default of appearance is deemed to have admitted liability, judgment against such third party may be entered. The question therefore is how such judgment can be entered against such a third party. The answer lies in Order 1 Rule 19 of the **Civil Procedure Rules**, which reads;

*“Where a third party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled, after causing the satisfaction of the decree against himself to be entered upon the record, to judgment against the third party to the extent claimed in the third-party notice; **the court may upon the application of the defendant pass such judgment against the third party** before such defendant has satisfied the decree passed against him:*

Provided that it shall be lawful for the court to set aside or vary any judgment passed under this rule upon such terms as may seem just.” (Emphasis added).

It is observable from the record that there was no such application made by the Appellant, and therefore the learned magistrate having not had such an application before her, could not enter judgment against the third party in default, even though under Rule 17 it is deemed that such third party admitted liability. The appellant's grounds of appeal with respect to the failure of the trial court to enter judgment against the 3rd party must therefore fail.

The appellant has urged this court to interfere with the award of damages made by the trial court. The learned magistrate awarded a sum of Kshs. 433,885/- being general and special damages as thus;

General Damages

Kshs. 350,000/-

Special Damages

Kshs. 50,000/- – Future Treatment

Kshs. 27,385/- - Treatment Expenses

Kshs. 6,500/- - Medical Report

The principles to be followed by an appellant court in looking at quantum have succinctly been captured in the case of **Butler - Vs – Butler, Civil Appeal No. 49 of 1983 (1984) KLR**, wherein the Court of Appeal held:

“8. In awarding damages, a court should consider the general picture of all the prevailing circumstances and effect of the injuries on the claimant but some degree of uniformity is to be sought in the awards, so regard should be paid to recent awards in comparable cases in local courts. 9. The fall in the value of money generally, and the leveling up and down of the rate of exchange between the currencies of Kenya and of the country from which comparable cases derived, must be taken into account. 10. The assessment of damages is more likely an exercise of discretion by the trial Judge and an appellate court should be slow to reverse the Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision”. I am guided by these principles.

Having evaluated the pleadings, the evidence adduced and the conclusions reached by the learned magistrate, I would observe that she did not take into account irrelevant factors or left out of account a relevant one when she awarded the plaintiff 350,000/= as general damages. The authority (**Mwanthi – Vs – Mbwana Construction Company Limited**) 1991 KLR, 190 referred by the appellant is somewhat, too old. An award of (Kshs. 93,000/-) in 1991 cannot be appropriate today. The 2nd authority, **Dinesh Kanthihaz Barkiaria Arrow Cars Limited – Vs – Joseph Njaji Gagau, 2004 eKLR** where the court awarded Kshs. 200,000/- as adequate compensation, is closer home. Guided by the Butler case with respect to prevailing value of money, I find that an award of Kshs. 350,000/- by the learned magistrate in the suit leading to this appeal was neither so excessive nor so little as to warrant my interference.

The end result of this appeal is that it lacks merit and is accordingly dismissed with costs to the 1st respondent.

Orders accordingly.

Judgment dated, signed and delivered at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for appellant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE