



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL 84 OF 2007

MAURICE OUMA NYAKINYA.....APPELLANTS

VERSUS

MIRSIT SAW MILLS.....RESPONDENT

(Appeal from the Judgment of Chief Magistrates Court at Eldoret (the Hon. M. K. Nyakundi (SRM),

CMCC No. 736 of 2005 dated on 27th June 2007)

JUDGMENT

This is an Appeal from the Judgment of the Hon. M.K. Nyakundi Chief Magistrates at Eldoret CMCC No. 736 of 2005 delivered on 27th June 2007. This appeal is against the quantum of damages and liability.

In the said case, the Appellant/Plaintiff claimed special & general damages in respect of injuries sustained in a road traffic accident involving his bicycle and a motor vehicles registration number KAG 480C along Eldoret – Kapsabet road on 11th March 2005. That the Plaintiff, while riding on a bicycle, was hit from behind by the motor vehicle owned by the Respondent and driven by the Respondent’s/Defendant’s agent or driver and due to his employee’s negligence, the Plaintiff suffered severe injuries that led to loss and damage.

The injuries that the Plaintiff claimed to have sustained was deep cut wound injuries in several parts of his body including chest, abdomen, sacral region and the right elbow. He also complained of swollen & tenderness, reduced right side chest expansion, reduced flexion & extension. The Appellant further complained to have sustained blunt trauma in the right hip and right knee which was swollen and tender with restricted joint movement. The driver was not made party to suit which is necessary in normal circumstances.

This is usually important because the driver whose action or omission brings in blames should pass the same to his principal. There was no certificate of official search presented to the lower court. Although, the defendant denied the accident in his defence, it turned out from the trial that indeed the accident occurred and that the driver was convicted under the Traffic Act. On the basis of this conviction, the learned Magistrate found the defendant liable. He also found the plaintiff partially liable on his own testimony. In the words of the Honourable Learned Magistrate described the evidence in a more clear language as follows:-

“On the other hand the plaintiff testified that he saw the lorry coming from behind before he was knocked. I do find the plaintiff also liable to an extent that he could have moved to the rough road after he had seen the lorry coming from behind. I do find the plaintiff partially liable”.

The Learned Magistrate having made the above findings proceeded to apportion liability 70/30 in favour of the Plaintiff and made the award in her judgement.

It is this judgment that prompted the present appeal. The appellant contended in his Amended Memorandum of Appeal dated 10th March 2008 as follows:

- 1. The Trial Magistrate erred in law and in fact in awarding the sum of Kshs. 50,000/= and relying on old authorities which are not comparable.**
- 2. The Trial Magistrate erred in law and in fact by failing to consider that, in nature, were serious and occasioned admission of the plaintiff for 5 days.**
- 3. The award of damages is manifestly too low as to represent an erroneous estimate of damages.**
- 4. The Learned Trial Magistrate erred in failing to consider the age of the authorities relied on and the fact of inflation.**
- 5. The learned trial magistrate erred in her finding on liability, more particularly on contributory negligence without considering that the plaintiff was hit from the rear when riding his bicycle.**

The Appellant prays in his Appeal that the judgement on quantum of damages be set aside and proper assessment be made.

At the hearing of this appeal on 10th march 2008 both parties were represented by counsels. Counsel for appellant submitted in support of the appeal that the award was very low and it is clear that the trial magistrate took into account irrelevant factors. He contended that the plaintiff/appellant had the right to use the road. The evidence did not support the evindence. In his view, due to his negligence, the driver of the lorry was charged, convicted and sbsequently fined. He contended that this shows that contributory negligence cannot arise in the circumstance of this case.

The Learned Counsel urged the court to set aside the judgement on quantum and to assess damages afresh. There is no proposed figures in the memorandum of appeal but the learned counsel suggested a sum of Kenya Shillings Two Hundred Thousand (Khs. 200,000/-) as being fair assessment of quantum of damages to be awarded to the Appellant. He referred to the decision of this court in **SISTER MARGARET CHEGE & ANOTHER –VS- PRISCILLAH J. KURGAT** in which an award of Kenya Shillings Two Hundred Twenty Thousand (Khs. 220,000/) as general damages for pain & suffering was given.

The Respondent opposed the appeal. Counsel for the Respondent submitted that the decision by the Learned Magistrate was proper. He contended that the magistrate did not apply wrong principles. She did not take into account irrelevant factors. There is no reason to interfere with the decision of the magistrate as there is nothing to warrant that. The Learned Counsel urged the court that the appeal be dismissed with costs.

I have considered the submissions by the learned able counsels. I have also considered the evidence on record. It is the duty of this court as an appeal court of first instance to reconsider the evidence and reach its own conclusions giving allowance to the fact that it did not see the demeanor of witnesses. However, the facts of this matter are quite clear. The question raised in the appeal is the quantum of damages awarded for the injuries sustained. On that issue, counsel for the Appellant submitted that an award of Kshs. 200,000/- would have been reasonable. In my view, the Learned Magistrate was wrong to hold the plaintiff partially liable for the accident mere because the plaintiff testified the he saw the lorry coming from behind before the accident occurred. The right consideration was to determine as to who between the plaintiff the driver of the lorry had right of way. who was in breach of the traffic rules? The Learned Magistrtae erred in law and fact because she failed to determine this issue. The admitted conviction of the driver of the lorry by a court of law is clear evidence showing that the accident occurred as a result of his

negligence. The Appellant could have not been culpable of contributory negligence in the circumstances of this case..

Considering the above, I find that the Learned Magistrate was not correct in her assessment of quantum of damages. The learned magistrate was not correct in apportioning liability 70/30 between the parties. The Appellant was blameless. The Learned Magistrate did not base her findings & determination on the evidence before her.

Taking into account the nature of the injuries sustained by the Appellant, the attendant cost of drugs and hospital visitation, award was, in my view, unfair and unreasonable. I find and hold that the Learned Magistrate did not sufficiently consider the evidence of the Appellant.

In the circumstance, I do hereby hold that the award of Kenya Shillings fifty Thousand (Kshs. 50,000/- as general damages was improper in law and in fact. This is set aside. I would substitute the award with a sum of Kenya Shillings One Hundred Thousand (Ksh. 100,000/-). There was no contributory negligence proved against the plaintiff. I therefore set aside the holding of the Learned Magistrate to that effect. The total award shall be adjusted as follows:

General damages	Kshs.100,000/-
Special damages	<u>Kshs. 2,000/-</u>
Total	<u>Kshs. 102,000/-</u>

I do hereby enter judgement for the Plaintiff (Applicant) in the sum of Kenya Shillings One Hundred Two Shillings (**Kshs. 102,000/-**) together with costs to be agreed or taxed. It is so ordered.

Dated AND signed at Nairobi on this 21st day of AUGUST 2012.

M. K. Ibrahim

Judge

DATED AND Delivered at Eldoret on this 19TH day of SEPTEMBER 2012.

F. AZANGALALA

Judge

In the presence of : Mr. Kiplimo holding brief for Mr. Okoth for the appellant .