



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 814 of 2007

SOFTA BOTTLING CO. LITD.....APPELLANT

VERSUS

DANIEL NDEGE MBOI.....RESPONDENT

(Being an appeal from the judgment and decree of the Hon. Ms Mokaya, Senior Resident Magistrate delivered on 4th September, 2007 in CMCC No.5366 of 2005 at Milimani Commercial Courts, Nairobi)

J U D G M E N T

1. This is an appeal and a cross-appeal arising from a judgment delivered in the Chief Magistrate's Court at Milimani. The suit was initiated by plaintiff Ndege Mboi (hereinafter referred to as the appellant). He had sued Softa Bottling Company Limited (hereinafter referred to as the cross-appellant). The appellant's claim against the cross-appellant was for general and special damages for personal injuries suffered by the appellant in an accident involving the cross-appellant's motor vehicle Registration No.KAH 569R. The appellant who was riding a bicycle claimed that he was knocked down by the cross-appellant's motor vehicle as a result of the negligence of the cross-appellant's driver or agent.

2. The cross-respondent filed a defence to the appellant's claim in which the cross-appellant denied the occurrence of the accident or that the accident was caused by the negligence of the appellant's servant or agent.

Without prejudice to that denial, the cross-appellant maintained that if an accident occurred, then the same was wholly or substantially contributed to by the negligence of the appellant. The cross-appellant further denied liability and contended that the appellant's suit was incompetent, wrongly filed and an abuse of the process of the court. The appellant did not file any reply to the cross-appellant's defence.

3. During the trial, three witnesses testified in support of the appellant's case. These were Dr. Washington Wokabi a Consultant Surgeon, Michael Chogaba Macharia, and the appellant. In brief the appellant's case was that on the material day, he was riding a bicycle along Makutano-Embu Road. He was riding off the tarmac on the left hand side when the cross-appellant's motor vehicle came from behind and knocked the appellant. The appellant lost consciousness. He was admitted to hospital where he remained for 3 months. The appellant's injuries included a fracture on the right leg. The appellant was later examined by Dr. Washington Wokabi who produced a medical report detailing the appellant's injuries. The appellant also produced a police abstract report from Wanguru Police Station, as well as a certification from the Registrar of Motor Vehicle confirming that the cross-appellant was the owner of motor vehicle Registration No.KAH 569R.

4. Michael Chogaba Macharia visited the scene of the accident and found the appellant unconscious. He arranged for the appellant to be taken to Embu District Hospital.

5. The cross-appellant testified through Kireithi Kivunja who was at the material time working for the cross-appellant as a loader. The witness testified that he was in the cross-appellant's motor vehicle at the time of the accident. He explained that the appellant was riding his bicycle on the middle of the road. The cross-appellant's driver tried to avoid hitting the cyclist, but the cyclist also tried to avoid the cross-appellant's vehicle and the

two collided. The witness maintained that the cross-appellant's motor vehicle was being driven at a speed of 60 KPH and that the collision took place in the middle of the road.

6. In her judgment the trial magistrate found that the evidence relating to the actual occurrence of the accident was the word of the appellant against the word of the cross-appellant's witness. She found it difficult to determine whose version between the two was correct. Nevertheless the trial magistrate found that the two road users owed each other a duty of care, and that if each took necessary precautions the accident would not have occurred. She therefore apportioned liability at 50:50 against each party.

7. The trial magistrate using the report of Dr. Wokabi and the authorities which were cited to her assessed general damages at Kshs.250,000/= and allowed the special damages of Kshs.27,958/= which she found proved. She therefore gave judgment in favour of the appellant less 50% contribution.

8. Being dissatisfied with that judgment, the appellant filed a memorandum of appeal raising 4 grounds as follows:

- (i) The learned magistrate erred in fact and in law in finding that both the plaintiff and the defendant were equally to blame for the accident thereby apportioning liability between the parties at 50:50 basis.
- (ii) The learned magistrate erred in fact and in law in ignoring and/or disregarding the evidence by Pw3 thereby arriving at the wrong decision that it was not possible to know where the point of impact of the accident was.
- (iii) The learned magistrate erred in law and in fact by failing to appreciate the magnitude of the major injuries sustained by the plaintiff and ignored and/or disregarded submissions by counsel for the plaintiff on quantum thereby awarding general damages, which were inordinately so low.
- (iv) The learned magistrate erred in law and in fact when she failed to make any findings on the claim for future medical

expenses, which was a distinct claim by the plaintiff thereby lumping it up with the claim for general damages as a result of which the award of general damages became more negligible and unjust.

9. The cross-respondent was also dissatisfied with the judgment. A memorandum of cross-appeal was lodged by the cross-appellant raising 6 grounds as follows:

- (i) That the learned magistrate erred in law and in fact by failing to dismiss the plaintiff's case on the ground that the plaintiff did not file a reply to defence to traverse the particulars of negligence in the defendant's defence. In this respect the learned magistrate failed to uphold the provisions of Order VI rule 9 of the Civil Procedure Rules.
- (ii) That the learned magistrate erred in law and in fact by failing to consider the defendant's authority to the effect that the plaintiff's suit ought to have been dismissed for failure to file a reply to defence.
- (iii) That without prejudice to the foregoing, the learned magistrate erred in law and in fact by failing to consider the defendant's authorities on injuries similar to the one's allegedly suffered by the plaintiff, and therefore awarded an inordinately high amount of general damages.
- (iv) That the learned magistrate erred in law and in fact by awarding the plaintiff special damages namely doctor's attendance fees of kshs.5,000/= yet the plaintiff did not issue a notice to admit under Order 12 of the Civil procedure Rules and was thus not entitled to the cost of proving the medical report.
- (v) That the learned magistrate erred in law and in fact by awarding liability equally between both parties instead of dismissing the suit.
- (vi) That the learned magistrate erred in law and in fact by failing to consider the submissions of the plaintiff in their entirety.

10. Following an agreement by the parties written submissions were duly exchanged and filed and the court is invited to determine the appeal

and cross-appeal based on these submissions.

11. I have carefully considered and evaluated the evidence which was adduced before the trial magistrate. I have also considered the judgment of the trial magistrate, the grounds raised in the appeal and cross-appeal as well as the submissions made by the parties' counsel. The first issue that arises is whether the failure by the appellant to file a reply to the cross-appellant's defence meant that the negligence attributed to the appellant was admitted.

12. I find it clear that having failed to deny the allegations of negligence the appellant must be deemed to have admitted that he was negligent. The question is should the appellant's claim then fail? I do not think so. The defence merely raised the issue of negligence as the cause or contributory factor to the accident. It was therefore for the trial court to determine on the evidence the degree of the negligence. In this case the trial magistrate apportioned negligence at 50:50%. The element of contributory negligence which was pleaded and not controverted was therefore covered. Nothing therefore turns on that ground of cross-appeal.

13. On the issue of apportionment of liability, the trial magistrate who saw and assessed the demeanour of the witness found it difficult to determine who was telling the truth, but concluded that both parties must have contributed to the accident. Having examined the accident, I cannot but agree. Even if one was to accept the evidence of the cross-appellant that the appellant was riding his bicycle in the middle of the road, it is evident that the cross-appellant's motor vehicle was being driven very fast and that was why the driver was unable to take evasive action to avoid the accident. I cannot therefore fault the apportionment of liability by the trial magistrate. The evidence of PW3 was not of much assistance to the court in this regard as the witness was not an eye-witness to the accident.

14. On the issue of assessment of damages, the circumstances in

which an appellate Court can interfere with the assessment by the trial magistrate are well stated in *Kemfrom Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No.2) [1988] KLR 30*, where it was held as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either that judge in assessing the damages took into account an irrelevant factor or left out of account 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 damage.”

15. In this case the trial magistrate may not have specifically referred to the cases which were cited to her on quantum. However, there is no doubt that she took the same into account. Neither the appellant nor the cross-appellant has established that the award made by the trial magistrate was too low or excessive, or based on wrong consideration or took into account irrelevant factors. On the special damages Dr. Wokabi did testify and produced the medical report in evidence. It was only fair that his attendance fees be allowed.

16. For the above reasons, I find no justification to interfere with the judgment of the trial magistrate. Accordingly, both the appeal and cross-appeal are dismissed. Each party shall bear his own costs.

Orders accordingly.

Dated and delivered this 30th day of September, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the cross-appellant absent

Ngumbi H/B for Gichachi for the appellant

Kosgei - Court clerk