



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.31 OF 2009

MATHEW O. NYAKOLITA.....1ST APPELLANT/DEFENDANT

EDWARD ADERO KOBE.....2ND APPELLANT/DEFENDANT

VERSUS

SIPRA AKOTH ABOKA.....RESPONDENT/PLAINTIFF

[Appeal from the judgment in WINAM SRMCC No.302 of 2007 delivered by: P.C. BIWOTT]

J U D G E M E N T

On the 17th of August, 2007 the Respondent (then plaintiff) one **Sifra Akoth Aboka** sued the Appellants (then defendants) **Mathew O. Nyakolita** and **Edward Adero Kobe** for damages both General and Special arising from an Accident that occurred on or about the 3rd of December, 2006. The case filed was SRMCC No.302 of 2007. Judgment was delivered in favour of the Respondent (plaintiff) on the 19th of February 2009.

The Appellants (defendants) being aggrieved by the judgment of the Senior Resident Magistrate on both liability and quantum preferred this appeal. In a memorandum of appeal lodged in court on the 3rd of March 2009 the appellants cited the following grounds:

- 1. That the learned trial Magistrate erred in law and fact in holding the appellants wholly liable for the accident when there was no sufficient evidence to support that finding.**
- 2. That the learned trial magistrate erred in law and fact in failing to dismiss the suit against the appellants.**
- 3. That the learned trial magistrate erred in law and fact in overly relying upon the evidence of the respondent, which was not proved when awarding damages.**
- 4. That the learned trial magistrate erred in law and fact in making award on general damages of kshs.400,000/= that was so excessive as to amount to an erroneous estimate of loss or damages suffered by the Respondent.**
- 5. That the learned trial magistrate erred in law and fact by failing to evaluate the injuries sustained and on the medical chits and/or reports.**
- 6. That the learned trial magistrate erred in law and fact in making an award on special damages of Kshs.2000/= which was not proven.**
- 7. That the learned trial magistrate erred in law and fact by failing to consider the appellants submission and legal authorities relied upon in support thereto.**

8. That the learned trial magistrate's decision albeit a discretionary one was plainly wrong.

At the hearing of the appeal the Appellants counsel abandoned ground 6 of the appeal which in essence means that the award on special damages is not challenged.

Grounds 2, 3, of the grounds of appeal was also abandoned.

It was argued for the appellants that there was no evidence on record to show that the appellants were wholly liable for the accident. Further that the evidence was at variance with the pleadings. Also that the learned trial magistrate failed to consider the submissions and authorities by the appellants thus awarding an excessive award for injuries sustained.

In opposing the appeal learned counsel for the Respondent submitted that there was no evidence adduced by the appellants to rebut that of the Respondent. Further that the evidence of **PW2** and **PW3** was in support of the issue of liability. Further that the issue of ownership was proved. It was his submission that the award was not excessive and was justifiable.

In determining the issue of liability and quantum this being the first appellate court the court will consider, evaluate and analyse the evidence on record in order to arrive at an independent decision.

In her plaint, the Respondent stated that she was a fare paying passenger in motor vehicle Registration number **KAM 525** which vehicle was registered in the name of the 2nd appellant and being driven by the first appellant (in the plaint they are described as 1st and 2nd defendants). It was her contention that the said vehicle was so carelessly, negligently and/or recklessly driven and/or managed that it was involved in a self-involving accident, meaning that no other vehicle was involved in the accident.

In paragraph 6 of the plaint the Respondent gave particulars of injuries as:

(a) injury to the chest and lumber region;

(b) injury to the left arm;

(c) fracture of the pelvis;

She gave particulars of special damages as:

(a) medical report Kshs.1,500/=

(b) filing P3 forms Kshs. 500/=

(c) fees on official search Kshs. 500/=

Total Kshs. 2,500/=

In her evidence the respondent (plaintiff) stated that she boarded the vehicle subject matter on the 3rd of December 2006 at Obambo along Kisumu/Bondo road. She stated that the vehicle stopped then reversed. The driver lost control of the same, it left the road and rolled. In cross-examination she denied contributing to the accident.

The first plaintiff's witness (**PW1**) was **Dr. Olima** who examined the Respondent and prepared a medical report which he produced in evidence.

(PW3) was **P. C. Samson**. He produced the abstract form giving details of the accident.

(PW5) Bitel Kadebi produced a search certificate and receipt thereof.

The defence did not adduce any evidence.

The Respondent's counsel **Mr. Njoga of Ouma Njoga & Company Advocates** filed his submissions on the 12th of January, 2009 whereas the respondents' counsel **Mr. Magut of Omwenga & Company Advocates** filed his on 13th of January, 2009.

Having summarized the case as above and having considered the evidence before court and authorities cited both at the trial level and at the hearing of the appeal the question for consideration is whether this court has good grounds to interfere with the findings of the trial court and the award of general damages.

The evidence before the trial court of how the accident occurred was that of the plaintiff. On the issue of ownership and injuries sustained similarly what was before the trial court was what the plaintiff and her witnesses brought forth.

The defendants indeed filed a statement of defence on the 30th of October, 2007 but that in the absence of evidence in support remains mere allegation and of no evidential value to the court. See case of.....

The evidence therefore before court was that the Respondent (Plaintiff) was a fare paying passenger in motor vehicle Registration number **KAH 525Q**. an abstract form was produced to support the allegation and that of **Mathew Nyakolita** being the driver. A copy of records was produced in support of ownership. **Edward Adero Kobe** was given as the registered owner.

There was no evidence to rebut the allegations of negligence attributed to the driver by the plaintiff and her evidence therefore remains. This court is in total agreement with the trial court that the issue of liability was proved on a balance of probability that the 1st appellant (1st defendant) was negligent and therefore both the 1st and 2nd appellant are liable. This court therefore has no basis to interfere with the trial court's finding to the contrary the same is affirmed.

On the issue of quantum the Respondent's (plaintiff's) counsel submitted and urged for an award of Kshs.800,000/= whereas the appellants (defendants') counsel urged for kshs.120,000/=.

It has been held severally that an appellate court should not interfere with an award of damages unless the same is so inordinately high or inordinately low and that the Judge proceeded on wrong principles. See the case of **Baston Ahmed Butt versus Umais Ahmed Khan [1982-88] 1KAR.**

Based on the authorities cited by both parties both at the trial and on appeal on this issue this court finds that in view of the injuries suffered and the effects and deformity the injuries left on the respondent that the sum of Kshs.400,000/= awarded by the learned trial magistrate is reasonable and consequently the court will not interfere with the same.

From the foregoing therefore the appeal is hereby dismissed with costs to the respondent.

Dated and delivered at Kisumu this 26th day of November, 2010

ALI-ARONI

J U D G E

In the presence of:

.....**Counsel for appellants**

.....**counsel for respondent**