

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 3 OF 2008

A.O. BAYUSUF & SONS LIMITED APPELLANTS
VERSUS
OJALLE ABDULLAHI BULLE RESPONDENT

JUDGEMENT

This is an appeal against the judgement of the Senior Resident Magistrate in Chief Magistrate's Court, Civil Case No. 4939 of 2003 OJALLE ABDULLAHI BULLE –V- A.O. BAYUSUF & SONS LIMITED delivered on 11th December, 2007.

The respondent had sued the Defendant for special damages in the sum of Kshs.82,380/=, General Damages, Costs and Interest in respect of an accident that took place on 8th August, 2001, along Naivasha –Mai Mahiu Road. The respondent who was the plaintiff in the said suit claims that on the material day he was a passenger in motor vehicle registration number SOM 54779 while the Defendant was the registered and/or the beneficial owner of the motor vehicle registration number 556R ZB 7844. That on the said date the defendants' motor vehicle was so negligently/carelessly/recklessly controlled managed driven by the Defendant's agent/servant/driver that the same collided with the motor vehicle number SOM 54779 in which the Plaintiff was lawfully travelling and as a result he sustained serious physical injuries and has suffered loss and damages.

The plaintiff, now the present Respondent claimed that he suffered the following injuries: -

- (a) Compound fractures of tibia-fibula, lower 1/3 of right leg.
- (b) Wounds on left eyebrow, upper arm and right foot with loss of 4th toe.

He pleaded special damages in the sum of Kshs.82,380/= made up as follows: -

- (a) Medical Report Kshs. 3,000/=
 - (b) Police Abstract Kshs. 100/=
 - (c) P3 Form Kshs. 200/=
 - (d) Medical Expenses Kshs.79,080/=
- TOTAL Kshs.82,380/=

The Defendant denied liability and blamed the accident on the negligence of the vehicle in which the Plaintiff was travelling. Neither the Plaintiff nor the Defendant joined the owner/driver of the said vehicle as a driver.

The plaintiff testified on oath. He called 2 other witnesses, a doctor who examined him and made the medical report relied upon and a Police Inspector (PW3) attached to Traffic Department, and in-charge of Investigations at Mombasa. He produced the Police abstract Report. The Defendant called one witness, the turn boy in the Defendant's vehicle at the time of the accident.

The trial court delivered its judgement in which it found in favour of the Plaintiff as follows: -

Liability: - Apportioned liability in the ratio of 50% - 50%.

Special Damages: - Kshs.5,100/=

General Damages; - Kshs.450,000/=

The total amount to be Kshs.455,100/=.

The Plaintiff was therefore to receive 50% of this sum, together with costs and interest.

Being aggrieved, the defendant appealed on the following grounds: -

1. The Learned trial Magistrate erred both in fact and in law in holding the Defendant in the suit either wholly or partially liable without proof towards that end.

2. The Learned trial magistrate erred both in fact and in law in holding the appellant either wholly or partially liable despite failure by the Respondent and/or his witnesses to prove that the Appellant was to blame for the accident.
3. The trial Magistrate erred both in fact and in law in disregarding the evidence of the appellant's witness without any lawful justification or excuse.
4. The Learned trial Magistrate erred in fact and in law in considering hearsay, irrelevant and/or immaterial evidence in finding the appellant wholly or partially liable in the said suit.
5. The Learned trial Magistrate erred in fact and in law in awarding the Respondent excessive damages in total disregard of the principles of assessing damages.

However, at the hearing of the Appeal, counsel for the Appellant, Mr. Abubakar prosecuted the ground on liability only. The Respondent acted in person.

I have considered the Memorandum of Appeal and grounds thereof, the entire record of appeal and the submissions.

Counsel for the appellant argued that there was no evidence on record to warrant the trial Magistrate to find the appellant liable to the extent of 50% on question of liability. The trial court decided this question of liability in the following manner: -

“.....

According to the Plaintiff motor vehicle SOM 54779 was ascending a hill while KAL 556R was descending. Motor vehicle KAL 556R left its lane and swerved to the lane of other colliding with the other on its side. Defendant's witness stated the opposite.

Only two eye witnesses, the Plaintiff herein and DW.1 on the part of the Defence adduced evidence. I am unable based on the evidence on record to blame any of the two parties solely. I therefore apportion liability at 50 – 50 as against the two drivers of the two vehicles. Unfortunately in this case, Plaintiff only sued one of the drivers. He can therefore only recover ½ his damages.
.....”

Counsel for the appellant criticized the decision in the manner it was done and its effect. He held the view that in fact the trial court was unable to positively make a finding. That it was its duty to make a positive finding and that the analysis was wrong. He submitted further that the issue of blame must be certain. He relied on the provisions of Sections 107, 108 and 109 of the Evidence Act, Cap. 80, Laws of Kenya. I have carefully further considered the submissions above. It is clear that the language and framing of the judgment was not quite as one would expect of a properly drafted or constructed judgment. With respect it is brief and not detailed or elaborate. The language is not flowing and unattractive.

However, what is certain to me is the true construction of the aforesaid words and decision. The meaning and effect of the said words and its effect is clear to my mind and I think to any other person with legal training.

The trial Magistrate heard both PW.1 and DW.1. She dealt with their credibility or demeanor. Their veracity was testing by cross-examination in her presence. In the case of MWANGI –V- WAMBUGU 1984; KLR. 453 at P. 468: - It was held: -

“... The Law on this used to be that there should be no interference by this court with the findings of fact about the contribution to an accident by two or more negligent drivers, save in exceptional circumstances, because this is an individual choice or exercise and a discretion Where the trial Judge has found however, that there is no contribution, this court should not interfere unless satisfied he was wrong, but if satisfied that this court has a duty to interfere and it is not restricted to exceptional cases.

A member of an appellate court is not bound to accept the Learned Judge's findings of fact, if it appears either that (a) he has clearly failed on some point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. ...”

In this case, the trial Magistrate considered the differing versions of the evidence/testimonies of PW.1 and DW.1 both eye witnesses in the respective vehicles. The effect of the decision is that the trial Magistrate could not place the entire blame on one side as each side must have been to blame. The use of words was unfortunate but she did make a finding. She apportioned blame on the basis of 50 – 50 liability on negligence. The Plaintiff did not sue the owner of the vehicle he was travelling in and therefore he obtained only 50% of the amount payable.

It should be noted that the apportionment of liability and culpability was between the owners of the two vehicles and not the Plaintiff and the Defendant. The Plaintiff and DW.1 were only passengers in the two vehicles respectively.

As a result, I do not accept the submissions by the appellant and do uphold the decision on liability. I therefore do hereby dismiss the Appeal with costs to the Respondent. Orders accordingly.

Dated and delivered at Mombasa this 3rd day of November 2010

M.K. IBRAHIM

JUDGE

3.11.2010

3.11.2010

Coram

Ibrahim J.

Court Clerk – Kazungu

Mr. Abubakar for the Appellant

Appellant is in person

Judgement delivered in their presence.

M.K. IBRAHIM

JUDGE