



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 47 of 2004

STURROCK SHIPPING (K) LTDAPPELLANT

VERSUS

MNENGWA MOKA MASELWARESPONDENT

J U D G M E N T

This is an appeal preferred by Sturrock Shipping (K) Ltd (appellant) against the decision of Miss Ngigi, the then Resident Magistrate delivered on 23rd March 2004. The appeal is opposed by Mnengwa Moka Maselwa, the Respondent herein.

Before considering the appeal let me set out the background leading to this appeal. Mnengwa Moka Maselwa (Respondent) filed a plaint before the Resident Magistrate's court in which he prayed for both general and special damages for the injuries he sustained on 27.1.2003 when motor vehicle registration KAM 059K owned by Sturrock Shipping (K) Ltd (Appellant) knocked him down along airport road. The Respondent testified and called one independent witness to support his case before the learned Resident Magistrate. On its part the appellant summoned only the evidence of its driver who drove the aforesaid motor vehicle at the time of the accident. After hearing the case, the learned Resident Magistrate found the appellant 80% liable for the accident. An award of Kshs.180,000/- was given to the Respondent less his contribution of 20%. This is the decision now being challenged by the appellant.

On appeal, Miss Jadeed, learned advocate for the appellant challenged the decision on quantum on the basis that the award of Kshs.180,000/- as general damages was not commensurate with the injuries suffered hence in it was excessive. The learned advocate urged this court to review the award downwards.

In response to this ground, Mr. Sangoro advocate for the Respondent was of the view that the learned Resident Magistrate did not breach any principles governing the award on quantum. He was of the view that the award of Kshs.180,000/- was not excessive. The court of Appeal has set the legal position clear over such matters in many cases over the years. In the case of Tayab =vs= Kinanu [1983] KLR 114: The court of Appeal held interalia:

(a) In awarding damages, the court ought to assess the general picture, the whole circumstances, the effect of the injuries, the particular person concerned and uniformity. The court must be guided by recent awards in comparable cases in the local courts.”

In this case, the medical report produced indicated that the Respondent suffered head injury-concussion; contused wound left side and contusion on the chest and pelvis. When the doctor who examined the

Respondent testified before the trial court he told the trial magistrate that the Respondent did not suffer Permanent injury. The Respondent submitted two cases to guide the trial court in assessment of quantum. The first case was that of **Charles Agoya Mbuya =vs= Fred Okiyo Olande & Another Nairobi H.C.C.C. No. 750 of 1987.**

In this instant case the victim suffered head injury, pain and suffering in the back, broken left lower teeth, injury on the left ear and multiple laceration, bruises on the scalp and over the left elbow. The victim was awarded Kshs.150,000 as general damages. It is obvious that the injuries involved in the above-cited case were more serious than these obtaining in this appeal.

The other case which was cited and relied on is that of **Dorcas Akumu =vs= Lucia & Co. Ltd Mombasa H.C.C.C. No. 466 of 1987.** in which the victim suffered head injury resulting in cerebral concussion, medical evidence of forgetfulness. She was awarded Kshs.130,000/- as general damages. It is clear that the trial magistrate considered this instant authority and correctly came to the right conclusion that the kind of injuries involved were more serious than what was obtaining in the case before her. The appellant however has complained that the learned Resident Magistrate failed to take into account the case of **James Kyalo Ivulya =v=s= Kaydee Construction Co. Ltd. Mombasa H.C.C.C. No. 765 of 1988** in which the victim suffered head injury concussion a cut lacerated wound on scalp and contusion of the left side chest. The injuries healed without any permanent incapacity. The victim was awarded Kshs.26,500 as general damages.

I have carefully considered this last case vis a vis the appeal now before me. What is clear is that the kind of injuries are almost similar. The recorded proceedings shows that the trial magistrate did not take into account the case of **Kyalo Ivulya** despite having been given. I have re-evaluated the evidence and I am convinced that the kind of injuries suffered by the Respondent do not commensurate with the award tendered by the learned Resident Magistrate. I am minded to restate that an appellate court can only disturb an award of damages when the trial court has taken into account a factor it ought not to have taken into account or failed to take into account something it ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate. This legal authority was emphasized by the court of appeal in the case **Bildad Mwangi Gichuki =vs= TM-AM Construction Group (Africa) C.A. No. 152 of 2001.**

In the end I agree that the learned magistrate gave an award which was excessive in the circumstances. The case the learned Resident Magistrate used to guide her was one which had serious injuries. It was a decision of 1987 nearly the same year as that of **James Kyalo Ivulya =vs= Kaydee Construction Co. Ltd** which was decided in 1988.

In the circumstances the award of Kshs.180,000/- must be set aside which I hereby do and substitute it with an award of 60,000/-. In arriving at the above assessment I have taken into account the injuries sustained, past decisions and of course the inflationary rates. In 1988 an award of Kshs.26,500/- was made for similar injuries as general damages. That is a period of 18 years ago. It is only reasonable to double the award to cater for the changing economic times.

It has also been argued that the trial magistrate erred when making her decision on liability. It is the argument of Miss Jadeed that there was no proof on liability. She also pointed out the contradictions appearing in the proceedings. I have re-evaluated the evidence tendered. It is clear that there were some contradictions between the evidence of Respondent (P.W.1) and that of Ali Ngome (P.W.2) in respect of the time when the accident occurred and as to the kind of motor vehicle involved. In my view these contradictions are not fatal. I say so because P.W.2 managed to clarify that there was a clerical mistake when recording the type of Motor Vehicle. The appellant's only witness Abdalla Hussein Almasi (D.W.1) in fact admitted the occurrence of the accident. His only contention is that the Respondent was attempting to cross the road and that he was not avoiding a tractor. D.W.2 claimed he was driving at a speed between 40 and 45 Km/h. the record shows that the trial magistrate considered this evidence and came to the conclusion that the appellant was 80% liable for the accident. After a careful re-assessment of the evidence I am satisfied that the learned Resident Magistrate came to the correct decision on liability. Whichever way one looked at the matter it is clear that whether or not the appellant was

avoiding a tractor or that the Respondent was crossing the road does not matter. What is important is the way the appellant's driver managed the motor vehicle which knocked the Respondent. The evidence clearly show that the appellant's driver was moving at a high speed hence he was unable to control the motor vehicle. The end result is that the trial learned Resident Magistrate cannot be faulted for she never breached the principles governing a finding on liability. On this issue I will conclude by referring to the decision of the court of Appeal in the case of **Jackson Amwoka =vs= Abdulhalim Salyani C.A. No. 288 of 1998** in which the court of Appeal restated:

“In any event, the principles on which an appellate court will interfere with a trial judge's apportionment of liability are now well settled in this court. The court will only interfere where an error of principle by the trial judge is shown (which has not been shown) or where the trial judge has gone plainly wrong or an error of principle must be inferred. None of these factors are present in this case.” _

For the above reasons this appeal partially succeeds. In that the appeal as against liability is dismissed. However the appeal as against quantum is allowed to the extent that the award of Kshs.180,000/- is set aside and substituted with an award of Kshs.60,000/- as general damages. The respondent is awarded half the costs of the appeal. The Respondent is however, given the costs of the suit.

Dated and delivered at Mombasa this 13th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Miss Jadeed for the appellant and Mr. Omollo h/b Mr. Sangoro for the respondent.