



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Appeal 10 of 2002

PAL SINGH HAKAM.....APPELLANT

VS

CLEOPHAS MAKOKHA WAMALWA.....RESPONDENT

(Arising from original BGM SPM CC NO.414 OF 199)

JUDGMENT

The appellant in this case *PAL SINGH HAKAM* was the defendant in SPM No.414 of 1999. He was sued in his capacity as the owner of Motor Tractor Registration Number KUY 580 Ford, which collided with Motor Vehicle Registration No. G.K 803 Mazda which was being driven by the plaintiff/respondent. The particulars of negligence are as enumerated under paragraph 4 of the plaint. Following the collision, the plaintiff is said to have suffered the injuries listed under paragraph 5 of the plaint.

The plaintiff prayed for special damages amounting to Ksh.1,600/=, general damages for pain and suffering and future medical expenses, costs of the suit and interest thereon. In his statement of defence dated 13.8.1999, the defendant through Masinde & Co. Advocates denied liability over the accident. Indeed he pleaded on without prejudice basis in paragraph 6 of the statement of defence that if an accident ever occurred, then the same was solely caused or substantially contributed to due to the negligence of the plaintiff. He went on to enumerate the particulars of negligence on the part of the plaintiff. He also denied that the plaintiff suffered any injuries. He urged the court to dismiss the plaintiff's suit with costs.

At the hearing, the plaintiff testified and called 1 witness. The defendant did not testify but at the close of the case, his counsel filed a written submission. According to the plaintiff, he was driving Motor Vehicle Reg. No. G.K. R 803 on the material night towards Bukembe. He said that he saw a vehicle's lights and then found a tractor at the middle of the road. It was stationary and pulling a trailer which was loaded with sugar cane. He said that he tried to brake but to no avail and so he rammmed into the tractor. He lost consciousness. He sustained several injuries as indicated in the medical report which he produced before the trial court as exhibit. His witness PW2 said he lives near the scene of the accident. He heard a loud bang and went to check what was happening. He would not know how the accident happened but he corroborated the plaintiff's evidence to the effect that the tractor in question was parked at the middle of the road. He also said that it had no reflectors and there were no warning signs at the site. Unlike the plaintiff, he said that it had not rained, and further that there was no other motor vehicle at the scene. He said that although it was dark, there was some moonlight. This witness was not at the scene when the accident happened.

As stated earlier on, the defendant did not testify. His counsel nonetheless filed written submissions on

his behalf. He submitted that the plaintiff had not filed a reply to the defence and so the particulars of contributory negligence on the part of the plaintiff had not been rebutted and were therefore deemed to have been admitted pursuant to Order VI r.9 of the Civil Procedure Rules. I am in agreement with the defendant's counsel on this submission, reason being that the defendant pleaded specific particulars of negligence on the part of the plaintiff. The plaintiff ought to have traversed the same or filed a joinder of issues by way of a reply to the defence. The particulars of negligence as pleaded in the defence should therefore have been deemed to be admitted.

After hearing the case and considering the submissions by both parties, the learned trial magistrate held the defendant totally liable for the accident. He then went ahead and awarded Ksh.110,000/= as general damages and Ksh.1,600/= as special damages. The defendant was aggrieved by this judgment and award and hence the filing of this appeal. He cited 4 grounds of appeal as hereunder:

1. *That the trial magistrate erred in law and fact by delivering a judgment that was against the weight of evidence on record.*
2. *That the learned trial magistrate erred in law and fact by holding the appellant 100% liable for the accident when evidence on record contradicted this holding and failed to hold the respondent was guilty on non-joinder of parties.*
3. *That the trial magistrate misdirected himself in apportionment of liability between the appellant and the respondent.*
4. *That the trial magistrate erred in law and fact in awarding the respondent excessive damages not commensurate with the degree of injury and medical evidence on record.*

The plaintiff on the other hand filed a counter appeal, basically on the quantum of damages. His ground was that the amount awarded as general damages was inordinately low. He asked the court to dismiss the appeal and that his counter appeal be allowed with costs.

I now have to consider the evidence adduced before the trial court which I have analysed hereinbefore along with the said grounds and the oral submission by counsel and the authorities cited.

On the issue of liability, it is not disputed that the defendant's tractor had been left in the middle of the road and thus causing obstruction. Evidence was led to the effect that the same was loaded with sugar cane, it had no reflectors and that there were no warning signs as one approached the scene. According to the plaintiff, it was dark, it had rained and the road was slippery. This in itself demanded that he drives his motor vehicle at a very slow speed which could be commensurate with the poor visibility. From the plaintiff's evidence, he had driven on that road many times and so he knew that such tractors were a common feature on that road. Further, the road was said to have been straight at the scene. This would mean that with reasonable diligence, a prudent driver could have seen an obstacle ahead of him in good time to enable him take evasive action in good time to avoid the accident. The plaintiff also said that he saw the lights at the scene where the tractor was – this was yet another reason as to why he should have slowed down.

In my considered view, taking into account the sum total of all these circumstances, the plaintiff was not totally blameless as far as this accident was concerned. The learned trial magistrate should have apportioned liability. It matters not that the defendant did not testify. His pleadings and also the written submission should have been considered. Unfortunately, the learned trial magistrate totally ignored the defendant's case and proceeded as if no defence or submissions were ever filed. To that extent, he erred in law. Having re-evaluated the evidence before the trial court, my finding is that the learned trial magistrate should have apportioned liability between the plaintiff and the defendant. I hereby apportion such liability at the ratio of 30:70 for the plaintiff as against the defendant. On the counter petition, I tend to agree that the general damages awarded were inordinately low in the circumstances. Indeed, I note that the defendant's counsel in his submission had conceded an award of Ksh.250,000/=. I am aware of the principle in law that an appellate court should not interfere with an award of damages of the trial court

unless the same is manifestly excessive or inordinately low. In this case, the plaintiff had suffered some serious injuries which included a head injury, loss of a tooth, deformed hip joint etc. An award of Ksh.110,000/= was in my view inordinately low. I will therefore allow both the appeal by the defendant and the counter petition by the plaintiff and make the following orders:

1. *Liability is apportioned at 30:70 in favour of the plaintiff.*
2. *The award of Ksh.110,000/= as general damages is set aside and in its place an award of Ksh.250,000/= (less 30%) equals Ksh.175,000/=.*
3. *Special damages (1,600 less 30%) is Ksh.1,120/=.*
4. *70% costs plus interest at court rates before the Lower Court.*
5. *Each party to bear its own costs of this appeal.*

Orders accordingly.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 9th day of July, 2007. In presence of Mr. Makali for Mr. Masinde and Mr. Wanyama for respondent.