



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 22 OF 2002

KENYA BUS SERVICE LTD APPELLANT

VS

ALFAYO MANGO RESPONDENT

J U D G M E N T

Alfayo Mango (herein-after referred as the Respondent) sued Kenya Bus Services Ltd (hereinafter referred as the appellant) and another in the Senior Resident Magistrate's court Busia to recover damages for personal injuries he sustained on 28th November 1997, when Motor registration No. KAG 373 H, owned by the appellant and driven by its agent hit the Respondent who was lawfully cycling along Busia - Kisumu Road.

The appellant put forward two main grounds of appeal. The first ground is that the evidence on record did not proof negligence on the part of the appellant.

Secondly, it is also said that the award made is exorbitant and excessive in the circumstances of this case.

The brief facts of the case before the trial court is that the Respondent's case was supported by the evidence of three witnesses. It was the evidence of the Respondent that he was cycling along Busia – Kisumu Road when he was hit from behind by Motor vehicle registration KAG 373 H owned by the appellant. As a result of the accident he sustained a head injury, laceration on the shoulder, broken teeth, cut wound on the upper lip and bruises on the hand. The Respondent produced a medical report prepared by Dr. Anthony Mubisi who had examined him.

The report confirmed the fact that the Respondent had sustained the injuries pleaded in the plaint.

The record also reveal the fact that the police file which contained the information on the accident was produced in evidence.

The appellant relied on the evidence of its driver, who was sued as the 2nd defendant who admits having hit the Respondent but blames him for attempting to cross the road which made him to apply emergency brakes and that it is that process that the Respondent fell into the ditch. He denied having damaged the Respondent's bicycle.

At the end, the learned Senior Resident Magistrate found the appellant 90% liable for the accident and 10% contribution by the Respondent. An award of 120,000/= as general damages was made less 10% contribution. Being dissatisfied the appellant now challenges the trial Magistrate's court's decision.

It is said that the Respondent did not call eye witnesses to establish how the accident occurred because he was hit from behind and therefore had not seen the bus before it hit him. The appellant claimed that the Respondent's evidence contradicted that of Dr. Anthony Mubisi who denied having seen the treatment notes produced in court. The appellant blamed the Respondent for the cause of accident on the ration of 50% contribution.

I have perused the record of appeal and examined and evaluated the evidence tendered by both the appellant and the Respondent and his two witnesses. What comes out clearly is that the Respondent was hit on the left hand side of the road. There was evidence that indicated that the road was a straight stretch. The evidence of the 2nd defendant Johnson Luke Okonji and that of the Respondent agree on one thing that the Respondent was injured on the forehead as a result of the accident. There is evidence by the Respondent that he was riding on the left hand side where he was hit. It is not in dispute that the Respondent was injured as pleaded in the plaint. The Respondent's testimony was corroborated by the evidence of the Medical doctor, Dr. Anthony Mubisi. The appellant said that there was material contradiction in the evidence of the Doctor and the Respondent on the treatment notes produced in court. It should be noted that the medical report which was produced in evidence by the Doctor was not challenged neither was it objected to. I think there was no major contradiction in the evidence of the Respondent and the Doctor. In fact the Respondent said in his evidence chief:

“The medical report you have shown me relates to me. The report indic ates the injuries I sustained. I went to Dr. Mubisi with my Medical chits and he examined and compiled a report. I had my medical chits and I gave Dr. Mubisi and he looked at them and he examined”.

In his testimony, Dr. Mubisi says “ *I examined the plai ntiff and looked at the treatment notes*”

The ground of appeal against liability in my humble view lacks merit. The same is dismissed.

The second ground which is in respect of the quantum awarded by the trial court. The appellant complains that the award of Ksh.120,000 less 10% contribution is excessive. The record reveals that the trial Senior Resident Magistrate considered the submissions of both parties and the authorities cited to guide him on quantum relating to injuries similar to those suffered by the respondent. The trial magistrate appears to have also considered the medical report produced by the Respondent.

In the case of **KEMFRO AFRICA LTD VS A.M. LUBIA & ANOTHER (1988) 1 K.A.R. 727.** , the court of appeal stated that 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 court are whether it took into account an irrelevant factor or left out a relevant factor or that the amount is inordinately low or high that it must be wholly erroneous estimates of the damage.

In this case I am not convinced that I should disturb the award. Nothing material has been pointed out to justify me interfere with the trial court's discretion on the award of damages. The trial court applied the correct principles when assessing damages.

Accordingly, this appeal fails and is dismissed with costs.

DATED AND DELIVERED THIS 4th DAY OF June 2004

J.K. SERGON

JUDGE

