



REPUBLIC OF KENYA



KENYA LAW
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**Magari Africa v Pius Odhiambo (Suing as Son and Next Friend of Hellen Atieno Odera)
(Civil Appeal E006 of 2022) [2024] KEHC 1476 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1476 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E006 OF 2022
MS SHARIFF, J
FEBRUARY 15, 2024**

BETWEEN

MAGARI AFRICA APPELLANT

AND

**PIUS ODHIAMBO (SUING AS SON AND NEXT FRIEND OF HELLEN ATIENO
ODERA) RESPONDENT**

*(Being an _____ appeal from the judgment and decree of Hon. S.N Telewa
(SRM) delivered on 27/10/2021 in KISUMU CMCC NO. 140 of 2019)*

JUDGMENT

A. Case Background

1. This appeal arises from the judgment of Hon. S. N. Telewa in which she awarded the Respondent Kshs.200,000/= general damages, Kshs.2,549/= special damages and costs of the suit. In the plaint filed at the magistrates' court the Respondent had sued the Appellant for causing an accident that occasioned her multiple severe injuries. She blamed the Respondent's driver for general, recklessness and failure to follow traffic rules.

B. Evidence

2. In support of her case at the lower court the Respondent called two witnesses. PW1 Pius Odhiambo testified that he was the Respondent's son. He stated that at 7.20 pm on the 25th of December 2017 he received a call informing him that his mother had been involved in an accident. Rushing to the scene at RIAT roundabout he found his mother lying on the ditch on the left side of the road bleeding from the nose and her left hand. This spurred him into action and he immediately took her to Kisumu Specialist Hospital where she was treated and later discharged.



3. PW2 Robert Owino an eyewitness recounted that on the fateful day he was walking along the Kisumu-Kakamega road at 7.20 pm when he witnessed a car moving in a zigzag manner at the RIAT roundabout. It was his testimony that the vehicle veered into the sidewalk hitting the Respondent and another man. He blamed the driver of the vehicle; a Mitsubishi pick up reg no. KCH 507 T for over speeding and failing to hoot and warn pedestrians.
4. In opposition to the Respondent's case at the magistrates' court the Appellant filed a defence and called one witness. In its defence dated 16th April 2019 the Appellant generally denied responsibility for the accident. It further stated that without prejudice to their denial, if an accident occurred then it was solely due to the Respondent's action of walking in the middle of the road, talking on a mobile phone and attempting to commit suicide among other things.
5. DW1 Duncan Nyaranga on his part narrated that on the 25th of December 2017 while in Rwanda he received a phone call informing him that his vehicle had been involved in an accident. He promptly called one Allan Iro under whose custody he had left the vehicle. Allan Iro told him that he had not authorized release of the vehicle. It was his testimony that from Allan's answer he concluded that the vehicle had been stolen, which assertion was later firmed up when he found out that one of the neighbourhood boys was the thief. He acknowledged having been assigned the vehicle by his employer who had rented it from the Appellant.
6. After conclusion of the hearing the magistrate found the Appellant 100% liable for the accident and awarded damages as indicated in paragraph 1.

C. Appeal

7. Feeling aggrieved by this finding the Appellant has now proffered this appeal on the following grounds:
 - i) The Learned magistrate grossly misdirected herself in treating the evidence and submissions on liability superficially thereby arriving at a wrong conclusion.
 - ii) The Learned Magistrate did not in the alternative consider or sufficiently consider the demand for contributory negligence based on the evidence adduced and the submissions filed by the Appellant.
 - iii) The magistrate misdirected herself in treating the evidence and submissions on quantum superficially thereby arriving at a wrong conclusion.
 - iv. The magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.
 - iv) The magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence presented on behalf of the Appellant.
 - v) The magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondent.
 - vi) The magistrate proceeded on wrong principles (if any) when assessing the damages to be awarded to the Respondent and failed to apply precedents and tenets of law applicable.
 - vii) The magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.



- viii. The learned magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
8. When this matter came up for directions on the 21/6/2023 both parties were of the opinion that it should be canvassed by way of written submissions.

D. Submissions

D(i) Appellant's Submissions

9. In their submissions dated 10/7/2023 the Appellant submitted that the Respondent had failed to prove negligence on their part. It averred that PW2's evidence was contradictory. It was the Appellant's contention that the evidence of high visibility at 7.30 pm was incredible. Additionally, it asserted that it was unfathomable how the vehicle would first hit the gentleman who was in front of the lady yet the vehicle was coming from behind.
10. In further support of its case the Appellant stated that the magistrate failed to consider contributory negligence on the Respondent's part.
11. In respect of quantum the Appellant contended that the learned magistrate based her judgment on the wrong principles of law thereby arriving at an inordinately high amount. It argued that an award of Kshs.100,000/= would suffice. In summary it urged the court to make a finding on liability at 50:50 as between the Appellant and the Respondent.

D(ii). Respondent's Submissions

12. In her submissions the Respondent urged this court to uphold the magistrate's judgment based on the fact that causation had been proved. It was her assertion that the vehicle was never stolen as alleged since no police report was produced.
13. On quantum the Respondent urged that it was an exercise of discretion. In support of the magistrate's award she relied on the court of appeal case of *Jane Chelagat Bor vs Andrew Otieno Ondu* [1988-92] 2 KAR 288; [1990-1994] EA where it was held that a court should only interfere with damages awarded if they are based on the wrong principles.

E. Analysis And Determination

14. This being a first appeal it is important to note the court's role of re-evaluating, re-assessing and re-analysing the evidence on record to determine whether the conclusions by the trial magistrate should stand or not and to give reasons for either decision.
15. PW2 was the only eyewitness of the accident. He testified that on the fateful day at 7.30 pm he saw the Appellant's vehicle hitting the Respondent. The police abstract indeed indicates that an accident occurred involving the Appellant's vehicle and the Respondent. The Appellant on its part acknowledges the accident but avers that at the time of the accident the vehicle had been stolen. They further state that PW1's narration of how the accident occurred was implausible, as it was inconceivable how the vehicle that was coming from behind the Respondent would first hit the gentleman who was in front of the her.
16. In finding the Appellant 100% liable the magistrate stated that DW1 had failed to prove that the vehicle had been stolen. I am inclined to agree with the magistrate's finding. In as much as the eyewitness's testimony was inconsistent, it is not in dispute that the accident occurred involving the Appellant's vehicle and the Respondent. PW1's testimony was largely uncontroverted. The Appellants for instance



did not lead any evidence to show that the vehicle was stolen or that the Respondent contributed to the accident by walking in the middle of the road.

17. In view of the foregoing I find no reason to interfere with the learned magistrate's finding on liability.
18. Turning to the issue of quantum it is trite law that an appellate court can only interfere with the trial court's finding on damages; if the finding was arrived at by mistake of law, through disregard of principles, or, where the trial court took into account irrelevant matters or failed to take into account relevant matters, or where the trial court acted under a misapprehension of facts, or where injustice would result if the appellate court does not interfere; and, where the amount awarded is either ridiculously low or ridiculously high that it amounts to an erroneous estimate of the damage.
19. In the case of *Ken Odondi & 2 Others v James Okoth Omburah t/a Okoth Omburah & Company Advocates* the Court of Appeal stated as follows:-

“We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled.”

20. In making an award of Kshs.200,000/= the learned magistrate considered the injuries suffered by the Respondent and the authorities provided by both parties. The Appellant has not demonstrated how the magistrate relied on the wrong principles or considered irrelevant factors in making that finding. I find nothing to suggest that the trial Magistrate improperly exercised her discretion or arrived at the wrong award, nor is the award inordinately high or low. The upshot is that this appeal fails. I dismiss it with costs to the Respondent.
21. Orders accordingly

DELIVERED, DATED AND SIGNED AT KISUMU THIS 15TH DAY OF FEBRUARY, 2024.

MWANAISHA. S. SHARIFF

JUDGE

In the presence of:

Mr Lewis Fundi for the Appellant

The firm of Yonga Odhiambo & Associates on record for the Respondent - absent

