



REPUBLIC OF KENYA



KENYA LAW
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Hersi v Kahuthu alias Jeremiah Kahotho & another (Civil Appeal E059 of 2021) [2024] KEHC 5543 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E059 OF 2021
SM GITHINJI, J
MAY 9, 2024**

BETWEEN

ABDI RASHID ABSHIR HERSI APPELLANT

AND

**JEREMIAH WAMBOO KAHUTHU ALIAS JEREMIAH KAHOTHO 1ST
RESPONDENT**

MCBC LIMITED 2ND RESPONDENT

JUDGMENT

Representation:

M/s Mungai Advocate for the Respondent Present

Mr Onyango for the Appellant

Miss Mawungi for the 2nd Respondent

- 1 By this appeal, the appellant herein challenges part of the judgment and decree of Hon. N.C Adalo – SRM delivered in Mariakani SRMCC 223 of 2021 delivered on 8th June 2021 wherein judgment was entered in the following terms;
 - a. Liability at 80% against the 1st defendant and 20% against the 2nd defendant
 - b. General damages for pain and suffering Kshs 300,000
 - c. Special damages Kshs 2,080
 - d. Costs of the suit
- 2 Aggrieved by the judgment, the appellant brought the instant appeal on the following grounds;



1. The learned trial magistrate erred in law and in fact in holding that the Appellant was 20% liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.
2. The learned trial magistrate erred in law and in fact and misdirected herself by proceeding on wrong principles when assessing damages to be awarded to the 1st respondent if any and failed to apply precedents and tenets of the law applicable.
3. The learned trial magistrate erred and misdirected herself by awarding a sum in respect of damages which was inordinately high and excessive in the circumstances occasioning miscarriage of justice.
4. The learned magistrate erred in law and in fact by failing to adequately evaluate the evidence and the appellant's submissions and thereby arrived at a decision unsustainable in law.

Evidence at Trial

- 3 PW1 Jeremiah Kahotho the plaintiff adopted his witness statement as part of his evidence in chief. He added that the accident happened on 28/2/2018 at about 7.30pm. He testified that he was a fare paying passenger in motor vehicle registration number KBJ 728X. He further testified that they were from Mariakani heading to Mombasa when a lorry KBJ 788K ZC 0662 emerged from the left side joining the main road when it hit the matatu causing the accident and as a result he sustained injuries. He blamed the driver of the matatu for the occurrence of the accident. He also blamed the owner of the lorry for the accident.
- 4 PW2 Dr. Stephen K. Ndegwa testified that on 13/02/2018 he examined the plaintiff whose findings are in the medical report dated 13/08/2018 produced as PEX 5.
- 5 PW3 Number 67571 PC Julius Nkumum of Mariakani police station told the court that on 28/02/2018 there was an accident along Mombasa- Nairobi road involving motor vehicles registration number KBJ 728J a Nissan Matatu and KBJ 758K/ ZC 0662 Scania lorry. He told the court that the lorry had not given the matatu the right of way as it was joining the main road from the feeder road.
- 6 Both the 1st and 2nd defendants did not call any witnesses and closed their cases.

Analysis and Determination

- 7 The appeal was canvassed by way of written submissions. I have considered this appeal and the grounds set upon, submissions by parties and the authorities relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal, the parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record in order to reach its own conclusions on the evidence. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.
- 8 From the grounds of appeal on the amended memorandum of appeal there are two issues arising for me to determine;
 1. Whether the trial court erred in determining that the 1st defendant was 20% liable for the accident.
 2. Whether damages awarded by the trial court were excessive.



Liability

- 9 As held by the Court of Appeal in *Micheal Hubert Kloss & another v David Seroney & 5 others* [2009] eKLR:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd (2)* (1953) A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it... The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...”

- 10 From the evidence of PW1, the plaintiff, he blamed both the driver of the matatu and the lorry for the occurrence of the accident. PW3 the police officer told the court that indeed the driver of the lorry was to blame for the accident for joining the main road from the feeder road without giving the matatu the right of way. I have considered the evidence adduced at the trial court. I have also considered the circumstances explained as to how the accident occurred. In my view, the driver of the lorry was greatly to blame for the occurrence of the accident. That notwithstanding, the driver of the matatu was also to blame for failing to take any precaution to avert the said accident or lessen its effect. Accordingly, I cannot interfere with the trial court’s attribution of partial liability to the appellant.

On Award of General Damages

- 11 The parameters under which an appellate court will interfere with an award in general damages was stated by the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR as follows:

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”

- 12 Further, the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* (2016) eKLR stated that “comparable injuries should attract comparable awards”.

From the medical report dated 13/8/2018 by Dr. S.K Ndegwa, the respondent’s injuries were listed as follows;

- a. Blunt head trauma on the occipital area
- b. Blunt injury and lacerations on both legs
- c. Blunt injury to the left eye



- d. Blunt injury to both forearms
 - e. Blunt injury to the chest
 - f. Blunt injury to the neck and lower back
- 13 The medical report additionally opines that the respondent is expected to heal fully with no permanent disability.
- 14 I am alive to the fact that an award of general damages is always at the discretion of the trial court. That discretion must however be exercised judiciously in accordance with the law. The mandate of an appellate Court to interfere with damages awarded by a trial court is not unlimited. It is confined to certain circumstances.
- 15 I have reviewed the authorities availed by the parties to the trial Court supporting their respective proposals on quantum. I note that the injuries sustained by the Respondent were soft tissue in nature expected to heal with no residual disability. I further note that learned trial magistrate in her judgment clearly indicated that she had considered the submissions made by each of the parties, the nature of the injuries sustained and cost of inflation in awarding Kshs 300,000/= general damages.
- 16 Given the evidence on record, I find no reason to fault the learned trial magistrate's award for general damages, considering the injuries that were suffered by the Respondent in the instant case. It is my considered view that the finding of the Learned Magistrate was well within the acceptable limits that reflected the nature and degree of the injuries suffered by the Respondent.
- 17 In the end, the appeal fails for lack of merit and the same is hereby dismissed with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9TH DAY OF MAY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Githinji holding brief for Mr Onyango for the Appellant
2. Ms Munyari for the 1st Respondent
3. Firm of Kimondo Gachoka are for the 2nd Respondent – Mr Ndolo is present

Ms Githinji; - We pray for 30 days stay.

Court; -30 days stay of execution is granted.

