



REPUBLIC OF KENYA



KENYA LAW
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**Juma v Jubilee Clearing and Forwarding (Civil Appeal 72 of 2019)
[2024] KEHC 17210 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 17210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 72 OF 2019
TM MATHEKA, J
JUNE 21, 2024**

BETWEEN

MUYINDA JUMA APPELLANT

AND

JUBILEE CLEARING AND FORWARDING RESPONDENT

JUDGMENT

1. On 7/6/2017 at around 4:00am the plaintiff/appellant was a passenger in motor vehicle Registration No. SSD 089C/ZC 9354- driven by the 2nd defendant – Salim Muhamed. He was also described as a director of the 1st defendant – who was stated in the amended plaint filed on 14/2/2019 – as the beneficial user of the said motor vehicle.
2. The plaintiff's claim was that the 2nd defendant so negligently drove the said motor vehicle that it veered off the road at Mlima Maliwa area along Nairobi-Mombasa road within Makueni County and rolled in a self-involving accident.
3. The plaintiff/appellant Muyinda James sustained injury – mid-shaft fracture of the left humerus – which was held with plates and screws and as at the time of filing of the suit on 27/4/2018 he was still in pain at the fracture site.
4. The plaintiff/appellant blamed the 2nd defendant/respondent for the accident and sought general, special damages, costs of the suit and future medical expenses from the two defendants.
5. The suit was undefended and after the plaintiff testified the plaintiff's case was closed, counsel filed submissions.
6. On 12/9/2019, the Hon. E. M Muiru SRM delivered her judgment – she dismissed the suit where she found that there was nothing on record to show why the defendants were sued as no nexus was



established between them and the said motor vehicle – that despite the pleading that the 2nd defendant was a director and driver of the 1st defendant no evidence was led to that effect.

7. On general damages she found that in her view Ksh. 300,000/= would have sufficed as general damages for pain and suffering if she had found the defendants liable.
8. Aggrieved with her findings, the plaintiff filed this appeal through the Memorandum of Appeal filed on 25/9/2019 – contending that;

The learned trial magistrate erred in law and in fact in making a finding that there was no evidence linking 1st and 2nd respondents to the subject vehicle lorry registration No. SSD 089C contrary to the police abstract produced in court.

The learned trial magistrate erred in law and in fact in determining that the 1st and 2nd respondents were not liable for the accident despite having entered an interlocutory judgment against the said defendants on the 4th day of July 2019.

The learned trial magistrate erred in law and in fact in proceeding to determine matters that were not up for determination at hearing of the suit.

The learned trial magistrate erred in law and in fact in proposing an award of Ksh. 300,000/= as general damages which amount is low taking into account the injuries sustained by the appellant.

The learned trial magistrate erred in fact and law in dismissing the appellant's suit against the 1st and 2nd respondents despite having been supplied with sufficient evidence to warrant a finding of liability on a balance of probabilities.

14. Counsel filed submissions which I have considered.
15. The only issue for determination is whether the learned trial magistrate was in error in dismissing the plaintiffs suit.
16. It was argued that the court erred on the issue of liability by dwelling on the issue of ownership of the motor vehicle and not on the control of the motor vehicle. that the 2nd defendant was the driver of the motor vehicle and was blamed for the accident and that the evidence that he was the driver was not contested; That the court ought to have entered judgment against the driver if nothing else.
17. On quantum of damages the appellant relies on the submissions before the lower court – to the effect that;

The doctor also stated that the plaintiff complained of recurrent pain at the fracture site especially when cold. He further stated that the plaintiff's injuries at the time of examination were healing and would leave a permanent scar and residual pain which would increase in years to come. The doctor further stated that the plaintiff would develop osteoarthritis of the fractured bone in the future and classified the injuries sustained by the plaintiff as grievous bodily harm.

For the injuries sustained by the plaintiff, counsel submitted that an amount of Ksh. 800,000/= as general damages and future medical expenses would suffice as adequate compensation.

In arriving at the proposed amount, counsel submitted reliance on HCCA No. 01 of 2017, Alphonse Wothaya Warutu & Another –vs- Joseph Muema where the High Court at Makueni confirmed the lower court award of an amount of Kshs. 800,000 as adequate



compensations for injuries almost similar to the ones sustained by the plaintiff. It was also submitted that the effluxion of time since the said award was made was considered. In total it was submitted that the award of General damages compensation to the plaintiff for pain and suffering ought to be Kshs. 800,000/=. The plaintiff also sought interest on the award at court rates and costs of the suit.

18. In determining the issue, the question is whether the plaintiff/appellant established that liability against the defendant/respondent/and whether there is reason to interfere with the award of general damages.

19. The court is required to reconsider the evidence and draw its own conclusion. Any interference with the award on general damages must be based on the laid down principles:

that the same was either inordinately too high, too low or bereft of any reasonable ground, based on wrong principles or against the public policy.

20. The plaintiff testified before the subordinate court and stated as follows: -

“my name is Muyinda Juma. I live in Sultan Hamud. I am a driver. I am a plaintiff herein. I recorded a statement filed in court on 30/4/2018 which I adopt as my evidence in chief. I was treated at Sultan Hamud Hospital after accident. Treatment notes PExhb No. 1. I was also treated at Makindu Hospital. Discharge summary PExhb No. 2. I was issued with a police abstract and P3 form PExhb No. 3 and 4 medical report by Dr. Mwendwa PExhb No. 5. Demand letter PExhb No. 6. I pray for compensation for injuries sustained.”

21. In his statement he stated:-

“I Muyunda Juma, a resident of Makueni County and of C/o Post Office box 9818-00200 Nairobi do wish to state as follows:

On 7th June 2017 at around 4:00 am in the morning, the defendant’s driver so negligently drove/handled/controlled motor vehicle SSD 089C and trailer ZC 9354 along Nairobi-Mombasa road at Mlima Maliwa area within Makueni county causing the said motor vehicle to veer off the road and roll in a self-involving accident.

Immediately after the occurrence of the said accident, I was rushed to Sultan Hamud sub-county hospital where I was given first aid and later referred to Makindu sub-county hospital where I was admitted for treatment up to 9th June 2017 when he was discharged.

As a result of the said accident, I sustained serious bodily injuries as enumerated in paragraph 8 of the plaint.

I continue to suffer pains at the fracture site especially when it gets cold.

I have also spent money on treatment and other expenses as a result of the said accident as enumerated in my plaint herein.

I blame the defendant’s driver for the said accident as he drove the defendant’s motor vehicle without due care and attention hence causing the said accident.

I pray that I be compensated for the injuries I sustained. That’s all I wish to state

Muyinda Juma.



22. I looked at the police abstract dated 3/2/2018 it states that the name and address of the owner of SSD 089C is Typical Horizon Gen Trading Box 7134 Juba.
23. Insurance company for SSD 089C is named as NIC General Insurance Co. Ltd
24. With respect to ZC 9354 – the owner is indicated as Fatuma Adanali P. O Box 2809 – 00100 – Nairobi.
25. I have also perused the copy of records from NTSA – Registration No. ZC9354 trailer the owner is indicated as Fatuma Adan Ali.
26. From the lower court record, the police abstract and the statements and evidence of the plaintiff, – I do not see the name of the 2nd defendant, as the driver of the accident motor vehicle. There is also no document to support the claim that the 2nd defendant is a director of the 1st defendant. The plaintiff did not mention the 1st defendant anywhere in his testimony or in his statement. Again there is no evidence or any document on record showing that the 1st defendant was the beneficial owner of the said motor vehicle. The police abstract shows clearly who the registered owner was; Fatuma Adan Ali. The plaintiff also placed before the court the NTSA document showing who the registered owner of the trailer was Fatuma Adan Ali. The abstract shows the owner of the motor vehicle itself. Evidently the learned trial magistrate was right. After amending the pleadings and removing the names of the persons appearing in the police abstract the plaintiff did not give any explanation for adding two new parties – defendant and why they were being sued, why did these two defendants replace the one who had been sued before, and what were their connection to the motor vehicle and the accident. The pleadings simply state one was the driver, the other the beneficial owner but pleadings are not evidence.
27. I have to agree with the learned magistrate that the plaintiff who had the onus to prove his case – failed completely to lay any nexus between the accident and the 1st and 2nd defendants. Hence on liability the plaintiff merely established that a self-involving accident happened, that he sustained injury – but the driver of the motor vehicle was unknown – and the name he gave in the pleadings was not supported by any evidence – the 1st defendant as well does not appear anywhere in the supporting documents.
28. On quantum – the plaintiff relied on Alphonse Wothaya Warutu & Another –vs- Joseph Muema Makueni HCCA 01/2017 (2017) e KLR to support the claim of Ksh. 800,000/=.
29. In that case – the plaintiff had sustained – deep cut wound on the forehead, compound fracture on mid shaft of the right humerus, compound fracture of the right tibia, deep cut wound of the right lower leg with a functional liability of 5%. Evidently, these injuries were more serious than the single injury pleaded by the appellant of “mid shaft fracture of the left humerus”. The Doctor’s opinion was that: Juma sustained fracture of the left humerus. He suffered a lot of physical pain injuries are still in healing process and will leave a permanent scar and residual pain which will increase in years to come. He will develop osteoarthritis of the fracture bone. He suffered grievous bodily harm.
30. The learned trial magistrate in her judgment stated that the plaintiff/appellant had not sustained any permanent incapacity – that the authority relied on presented more serious injuries. I have confirmed the same from the record – and I find that the general damages awarded by the trial court were commensurate with the injuries sustained as demonstrated by the authority cited for her guidance.
31. With respect to future medical expenses- again the same were pleaded. However, no evidence was led to prove the same to enable the court even assess the same. Again, pleadings are not evidence. They set out the claim the party must establish with evidence so as to get the orders sought.
32. I have performed my duty as a 1st appellate court – I have looked at the evidence – analysed the same and drawn my own conclusions which are no different from those of the learned trial magistrate.



33. In the circumstances the appeal fails and is dismissed without any orders as to cost.

DATED SIGNED AND DELIVERED THROUGH UPLOAD ON CTS ON 21/6/2024

MUMBUA T MATHEKA

JUDGE

With the consent of Mr. Webale for the appellant NB paragraphing distorted by system

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-06-22 12:55:31

