



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL APPEAL NO 3 OF 2020

1. CHARLES MWANGI GIKONYO

2. KENYA HORTICULTURAL

EXPORTERS (1977) LTD.....APPELLANTS

VERSUS

LAWRENCE MUKUMBU WAMBUI.....RESPONDENT

(Appeal from original Decree dated 13/02/2020 in

Nanyuki CM Civil Case No 20 of 2019 – L Mutai, CM)

J U D G M E N T

1. This is an appeal from the decree of the trial court by which the Appellants (who were the defendants) were found liable to the Respondent (plaintiff) at 90% in negligence. The Respondent suffered injuries in a road accident involving a motor vehicle (driven by the 1st Appellant and owned by the 2nd Appellant) and an unknown motor cycle upon which the Respondent was riding as a pillion passenger. The trial court attributed 10% liability to the unknown driver of the motor cycle.

2. The trial court assessed general damages for pain and suffering at KShs 1,100,000/00, further medical expenses at KShs 250,000/00 and awarded special damages of KShs 117,440/00 (a grand total of KShs 1,467,440/00). The court entered judgment for the Respondent in the sum of KShs 1,320,696/00 (90% of the grand total).

3. The memorandum of appeal disclosed the following grounds –

(i) That the trial court's apportionment of liability to the Appellants at 90% was erroneous in law and fact.

(ii) That the trial court did not properly assess the testimony of the only eye-witness to the accident who testified and was a passenger in the Appellants' motor vehicle.

(iii) That the trial court did not take into account the disability of the driver of the motor cycle which "was the major cause of the accident".

(iv) That the trial court did not take into account the testimony of the police officer who investigated the accident, and who stated that "investigations were still pending to establish (who was to blame for) the accident."

(v) That the decision of the trial court on liability was against the weight of evidence as "neither the (1st Appellant)...nor the (motor cycle) driver (testified)..."

(vi) That the award of KShs 1,320,696/00 was "manifestly on the high side and not commensurate with the injury sustained by the Respondent".

4. I have read through the record of trial court in order to evaluate the evidence placed there and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. In doing so however, I have given due allowance for the fact that I did not hear and see the witnesses myself.

5. I have also considered the written submissions filed for the parties by their learned counsels, including the cases cited.

6. The Respondent (plaintiff) testified as PW2. He called two witnesses, DR. GITHENYA (PW1) and CPL ADAM SULEIMAN (PW3). PW1 medically examined the Respondent and produced in evidence a medical report on him setting out his various serious injuries. PW3 was a police officer who was mandated to investigate the accident after it was reported to the police. He visited the scene of the accident where he found the Appellants' motor vehicle. The motor cycle which had been involved in the accident with the Appellants' motor vehicle was not at the scene. He was also unable to trace the driver of the motor cycle in order to take his statement. Apparently he never recorded any witness statement. However, PW3 stated that the 1st Appellant (who was the driver of the motor vehicle involved in the accident) was to blame for the accident as he entered a major road from a minor one without stopping or giving way to the motor cycle which was on the major road.

7. The Respondent's (plaintiff's) testimony was that he was a pillion passenger on the motor cycle; that the Appellants' motor vehicle (a bus) entered the major road from a side road without stopping at the junction, thereby causing the motor cycle, which was on the major road, to ram into the rear section of the bus. The Respondent received serious injuries that required hospitalization. Those injuries were verified by the medical evidence produced by the doctor (PW1).

8. The 1st Appellant, who was driving the bus, did not testify at the hearing of the case. No explanation was offered why he did not testify. As the driver of one of the vehicles involved in the accident, his testimony as to how the accident happened would have been useful.

9. Two witnesses testified for the 2nd Appellant (2nd defendant). PAMELA KATHAMBI (DW1) was a passenger in the bus. Her testimony was that as the bus entered the major road, the motor cycle, which was on the major road, came from the right and hit the rear of the bus. She did not testify that the bus had first stopped before entering the major road, or that it gave way to the motor cycle to first pass before it (the bus) entered the major road. She however blamed the driver of the motor cycle for the accident, stating that he had an artificial right leg and was speeding.

10. The second witness for the 2nd Appellant was FRANCIS MWAURA (DW2), an insurance investigator. He also blamed the driver of the motor cycle for the accident, saying in effect that he could have effectively applied the brakes of the motor cycle with the artificial leg. He did not however state that the bus driver had taken the precaution of stopping at the junction before joining the major road, or giving way to traffic already on the major road before joining the road.

11. The following facts appear to be clear and not in dispute –

(i) The Appellants' motor vehicle (the bus) joined a major road from a minor road.

(ii) The motor cycle was already driving on the major road from the right hand side of the bus.

(iii) There is no evidence at all that the bus first stopped at the junction, as it should have done, before joining the major road.

(iv) There is also no evidence that the driver of the bus (the 1st Appellant) checked to see if there was already traffic on the major road which he must give way to before joining the road; if he had he would have seen the motor cycle and would then have stopped or yielded to it to pass first before he joined the road.

(v) The available evidence shows that the bus entered the major road from a minor road without applying the usual precautions, thus causing the motor cycle, which was too near already, to ram into it.

12. Upon my own evaluation of the evidence placed before the trial court, the 1st Appellant (who was the driver of the 2nd Appellant's bus) was largely to blame for the accident. The driver of the motor cycle upon which the Respondent was a pillion passenger may have contributed to the accident, though there was no clear evidence of the extent of that contribution. I hold that the trial court properly apportioned liability between the two drivers at 90% to 10% against the 1st Appellant.

13. The accident occurred apparently in the course of the 1st Appellant's duty with the 2nd Appellant. He was driving the 2nd Appellant's bus which apparently was ferrying its workers to or from work. The 2nd Appellant was vicariously liable for the tort committed by the 1st Appellant in the course of his employment.

14. The Respondent (plaintiff) thus proved his case on a balance of probabilities, and there is no merit in the appeal on liability.

15. Regarding quantum, the Appellants appear to challenge the award on general damages. The injuries suffered by the Respondent were serious and were fully verified by the medical evidence produced by PW1. In their written submissions the Appellants have not demonstrated what error the trial court may have committed in assessing general damages. I do not find on the record any such error. In fact the general damages awarded appear a bit on the lower side considering the injuries suffered by the Respondent. I do not find any merit in the appeal on quantum.

16. In the result the Appellants' appeal is hereby dismissed with costs in its entirety. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 2ND DAY OF FEBRUARY 2022

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 3RD DAY OF FEBRUARY 2022