



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
(CORAM: CHERERE-J)
CIVIL APPEAL NO. 132 OF 2019

BETWEEN

JACOB KINOTI.....APPELLANT

AND

SHADRACK KIURA.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Meru CMCC NO.330 of 2010

by Hon. M.A.Odhiambo (RM) delivered on 08th October, 2019)

1. **SHADRACK KIURA (Respondent)** sued **JACOB KINOTI (Appellant)** and 2 others in the lower court claiming damages for personal injuries he suffered when Appellant's M/V KAW 457Q that was he was travelling in was driven negligently that it collided with M/V KXV 449 due to the negligence of the Appellant's driver.
2. The Respondent's claim was denied and court was urged to dismiss it with costs.
3. In a judgment delivered on **08th October, 2019**, the Learned Trial Magistrate found the Appellant and his driver jointly and severally liable at 100% and awarded the Respondent Kshs. 1,200,000/- in general damages, Kshs. 1800,000/- for loss of earnings, Kshs. 120,913/- special damages, costs and interest.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision on quantum preferred this appeal by way of the Memorandum of Appeal filed on 24th October, 2019 setting out grounds that:

- 1) **There was no prove that Appellant was owner of M/V KAW 457Q**
- 2) **The court erred in failing to apportion liability to 3rd Defendant owner of M/V KXV 449**
- 3) **The award of general damages ignored applicable principles in award of damages**
- 4) **Loss of damages ought not to have been awarded since no life was lost**
- 5) **Special damages were not proved**

SUBMISSIONS BY THE PARTIES

5. On 27th July,2020, this court directed that the appeal be canvassed by way of written submission which the parties dutifully filed.

Appellant's submissions

6. Appellant holds the view that the Respondent did not prove that M/V KAW 457Q belonged to the Appellant further that the court did not explain how it arrived at liability at 100%, that special damages were not proved and that the sum of Kshs. 1,800,00/- was outrageous.

Respondent's submissions

7. The respondent submitted that the police abstract proved on a balance of probability that the Appellant was the owner of M/V KAW 457Q. It was contended that the Respondent's evidence that M/V KAW 457Q was driven carelessly and rammed onto M/V KXV 449 was not controverted for the reason that neither the Appellant nor his driver tendered any evidence to the contrary. Reliance was placed on **Embu Public Road Services Ltd. v.Rimi (1968) EA 22.**

8. Further to the foregoing, the Respondent contends that the Appellant cannot on appeal challenge receipts and medical report whose admission was not challenged at the trial. Reliance was placed on **David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] Eklr. Ian Chiungu Irungu & Another v John Githira Chege [2015] eKLR** and **T.S.S. Company Limited v Isaac Hero Matatia [2018] eKLR**

9. It is also the Respondent's case that Appellant cannot on appeal raise the issue of whether M/V KXV 449 was being driven or parked for the reason that that issue did not arise at the hearing. Reliance was placed on **David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another (above).**

10. The Respondent contends that there is no justification for this court to interfere with the discretion of the Learned Trial Magistrate and placed reliance on **Swiss Contact Ltd & Peter Munguti Kieti v Esther another [2019] eKLR.**

(a) Analysis and Determination

11. The Appellant challenges both liability and quantum. I have considered the evidence on record and submissions for both parties. I will endeavour to address the grounds of appeal as hereunder.

Is there prove that Appellant was owner of M/V KAW 457Q

12. Appellant challenges the contents of the Police Abstract as prove of ownership of motor vehicle M/V KAW 457Q.

13. In the case of **Joel Muga Opija -Vs- East Africa Sea Food Ltd [2013] eKLR**, the Court of Appeal held as follows in relation to contents of a Police Abstract: -

“We agree that the best way to prove ownership would be to produce to the court a document from the registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.” (Emphasis added)

14. Flowing from the foregoing decision, I find that the Appellant having not raised any objection to the production of the Police Abstract, which shows that he was the owner of the vehicle that the Respondent was travelling in is estopped from denying the contents of the said Police Abstract

(b) Liability

15. It is trite law that "whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** states as follows:

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

16. Further **Section 109** in narrowing down to proof of particular facts stipulates:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

17. The foregoing provisions of the law were restated by the Court of Appeal in the case of **Kirugi & Another – Vs – Kabiya & 3 Others [1987] KLR 347** where it held thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

18. In his pleading and testimony, the Respondent was categorical that M/V KAW 457Q. that he was travelling in was driven carelessly as a result of which it rammed onto M/V KXV 449. With this kind of evidence, there was no basis to apportion liability but to find as did the Learned Trial Magistrate that Appellant's driver was careless and the Appellant vicariously liable for the negligent acts of his driver.

(c) General damages

19. It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise. Such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. Where the trial court has violated legal principles, the appellate court will interfere with the exercise of discretion by the trial court. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were set out by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by the Court of Appeal in several cases among them; **Kanga v Manyoka [1961] EA 705**, **Lukenya Ranching and Farming Co-op. Society Ltd v Kavoloto [1979] E. A. 414**, **Butt v Khan [1981] KLR 349**, **Kemfro Africa t/a Meru Express & Another v. A. M. Lubia & Another [1982 – 88] 1 KAR 72** and **Mariga v Musila [1984] KLR 257**.

20. In **Harun Muyoma Boge v Daniel Otieno Agulo MGR HCCA No. 7 of 2015 [2015] eKLR**, D.S Majanja J. expressed himself thus: -

“The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”

21. The Respondent suffered deep cut on left leg and mangled left leg and foot below the knee which resulted in amputation of the left leg below the knee. The trial court awarded Kshs. 1,200,000/-. Respondent had asked for Kshs. 3,500,000/- and had cited **Simon Ano Mua v Kioga Mukwano (t/a Kioga Mukwano Transporters) & 2 others [2013] eKLR** and **Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another [2014] eKLR** where a sum of Kshs. 2,500,000/- and Kshs. 2,000,000/- respectively was awarded for an injuries similar to the ones suffered by Respondent.

22. From the foregoing, I find that the award of general damages was guided by applicable principles in award of damages and I have no reason to interfere with the discretion of the trial magistrate.

(d) Lost earnings

23. The loss of one lower limb may not necessarily lead to total incapacity to work. A person can lead a useful life with only one leg, depending of course on what their profession or trade might be. But there is no doubt in the present case that the Plaintiff lost a significant portion of his earning capacity on account of his permanent disability. The Respondent was a hawker at the time of the accident. The job required walking around and it is doubtful that he will ever be able to engage in a similar job.

24. From the fact that Respondent can still lead a useful life, I assess that he lost about one-half of his earning capacity. Consequently, the award of lost earning is reduced by half to Kshs. 900,000/-.

(e) Special damages

25. I am persuaded that Appellant cannot on appeal challenge receipts whose admission was not challenged at the trial. I am therefore not persuaded to interfere with special damages as awarded by the Learned Trial Magistrate.

26. In the end, the appeal partially succeeds on the award of lost earnings of Kshs. 1,800,000/- which is hereby set aside and substituted with an award for Kshs. 900,000/-.

27. Costs shall be in the cause.

DATED AT MERU THIS 15TH DAY OF APRIL 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Appellants - N/A for Basilio Gitonga & Co. Advocates

For Respondent -Ms.Masamba for M/S Murango Mwenda & Co Advocates