



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO.61 OF 2019

NDAMBUKI PAUL JIMMIE..... APPELLANT

-VERSUS-

JOHN MATIVO MUTUNE.....RESPONDENT

(Being an appeal from the Judgment of Honourable Mwaniki J. N. CM delivered on 31st July 2019 in Makueni CMCC No. 103 of 2015).

JUDGMENT

1. This appeal arises from the judgment in the magistrates' court at Makueni in which the trial magistrate entered judgment for the respondent, who was the plaintiff in the following terms –

“20. In the end the court enters judgment for the plaintiff against the defendant for –

i. General damages Kshs.350,000/=

ii. Special damages Kshs. 500/=

Kshs. 350,500/=

(Three hundred and fifty thousand, five hundred only.

21. The plaintiff is also awarded the cost of the suit plus interest thereon”.

2. Dissatisfied with the judgment of the trial court, the appellant, who was the defendant in the trial court, filed the present appeal through counsel L.N Ngolya & Company, on the following grounds –

1) The trial court erred both in law and fact for finding the appellant vicariously liable notwithstanding the

fact that the respondent miserably failed to prove negligence against the driver of motor vehicle registration number KAT 455E.

2) The trial court erred both in law and fact by failing to find and hold that the testimony of the respondent as well as that of the police officer (Pw2) exonerated the driver of motor vehicle registration number KAT 455E from blame.

3) The trial court erred both in law and fact by failing to attach weight to the contents of the appellant's documentary exhibit namely a statement the respondent recorded with the police which statement clearly placed blame on the doorstep of a third party.

4) The trial court erred both in law and fact by giving an inordinately high award of general damages for minor soft tissue injuries and for which no liability had been proved against the appellant.

3. The appeal proceeded by way of filing written submissions. I have perused and considered the submissions of counsel for the appellant M/s A. N Ngolya and those of the respondent's counsel M/s. O. N. Makau & Mulei. I note that both counsel relied on decided case authorities.

4. This being a first appeal, I have to start by stating that as a first appellate court, I have to be guided by the legal principle explained in the case of **Selle –vs- Associated Motor Boat Co.**

Ltd (1969) E.A 123 in which the Court of Appeal for East Africa held that a first appellate court has a duty to evaluate the evidence tendered before the trial court, analyse the same and come to its own conclusions, but in so doing bear in mind that it did not have the opportunity to see witnesses testify to determine their demeanor, and give due allowance for that.

5. At the hearing of the case before the trial court, the respondent called 3 witnesses, while the appellant testified in person but did not call any additional witnesses.

6. From the evidence on record from witnesses on both sides, the motor vehicle KAT 445E – Toyota Surf belonged to the appellant PAUL JIMMY NDAMBUKI, and was driven by a person whom he knew, whom he described as his mechanic, who died as a result of the accident giving rise to the claim. The respondent, from the evidence, was a worker at the appellant’s hotel at Wote, whom the appellant described as a labourer.

7. From his evidence, the appellant denied that he gave permission for the subject vehicle to be driven, and as such according to him, he could not be vicariously liable. He also stated that the respondent blamed a third party and another vehicle driver for the accident, as such the appellant’s vehicle and its driver could not thus be negligent.

8. Having perused the evidence, I note that the respondent, who testified as Pw1 as follows before the trial court –

“I left to buy meat in motor vehicle No. KAT 455E along Makueni Machakos road. I saw an oncoming lorry from Machakos and a matatu behind it. The matatu overtook the lorry. Our driver swerved to avoid an accident but was unable to control the vehicle back to the roadthe motor vehicle was speeding ...”

9. With the above evidence of both the appellant and the respondent, in my view, the respondent proved his case on the balance of probability. With regard to the contention of the appellant on the status of the subject motor vehicle and whether it was in the custody of a mechanic, in my view, that could only be believable evidence if the people from Le Panda hotel belonging to the appellant testified. In any case, the respondent could not be blamed if the vehicle was driven by a mechanic. The appellant also does not say that the senior employees of his hotel, could not order the respondent to get involved in that kind of work, of going to buy meat for the hotel business.

10. With regard to whether a third party and third party vehicle was negligent, in my view, the respondent being an employee of the appellant, was perfectly correct in relying on the fact of high speed, to allege negligence because as an employee, the respondent was under an obligation to ride in that vehicle, to execute his duties for the day, otherwise he would as well as be sacked and be out of job.

11. I thus find just like the trial magistrate, that negligence of the driver of KAT 455E and vicarious liability of the appellant was proved by the respondent on the balance of probabilities.

12. With regard to quantum of damages, I note that the appellant did not attempt to produce any contrary medical report to that of the respondent. I also note that in submissions before the trial court, his counsel did not suggest any figure of damages to the trial court, but merely dwelt on liability. On appeal also counsel for the appellant has not suggested any figure of damages, but has argued on liability, irrespective of the fact that ground 4 of appeal is specifically on inordinately high award of general damages.

13. In those circumstances, I find that the appellant has abandoned his appeal on quantum of damages, and I will not address that issue further.

14. To conclude, I find no merits in the appeal and dismiss the same, with costs to the respondent.

DELIVERED, SIGNED & DATED THIS 6TH DAY OF OCTOBER, 2021, IN OPEN COURT AT MAKUENI.

.....

GEORGE DULU

JUDGE