



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
(CORAM: CHERERE-J)

CIVIL APPEAL NO. 45 OF 2020

BETWEEN

JULIUS KAILIKIA..... 1ST APPELLANT

JAMES MUTEMBEL.....2ND APPELLANT

AND

TARICISIO GITUMA MÍTHIRINGI.....1ST RESPONDENT

OBRAIN SUPER MOTORS.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree in MERU CMCC No. 80 of 2012 by Hon. E. Mbicha (PM) on 21st November, 2018)

JUDGMENT

Background

1. On 03rd December, 2010, an accident involving motor vehicle **KBM 188U (accident motor vehicle)** occurred along Meru-Mikinduri road as a result of which the Respondent who was a fare paying passenger suffered bodily injuries.

The trial

2. Respondent blamed the 2nd Appellant for driving negligently and the 1st Appellant who was in actual physical *control* and use of the accident motor vehicle for the negligent acts of the 2nd Appellant.

3. In his testimony, the 2nd Appellant confirmed that the accident motor vehicle was involved in an accident on 03.12.2010. He blamed the accident on a tyre burst. He conceded that the 1st Respondent was injured in the accident.

4. 1st Appellant confirmed that the accident motor vehicle which he was buying on hire purchase was being driven by his driver, the 2nd Appellant at the material time. 2nd Respondent did not tender any evidence.

5. At the conclusion of the trial, the learned trial magistrate found the accident motor vehicle was driven negligently and found both Appellants and the 2nd Respondent jointly liable at 100% and proceeded to award damages as follows:

- | | | |
|--------------------|-------|-----------|
| 1. General damages | Kshs. | 600,000/- |
| 2. Special damages | Kshs. | 750/- |

The Appeal

6. The Appellants dissatisfied with the lower court's decision preferred this appeal on both on liability and quantum.

Analysis and Determination

7. I have considered the evidence on record and written submissions filed by the parties and the authorities cited. This is a first appeal and this Court is empowered to review and analyze the evidence on record and arrive at its independent conclusions. (See Selle & another vs. Associated Motor Boat Co.Ltd. & others (1968) EA 123). Sir Kenneth O'Connor of the Court of Appeal for Eastern Africa in Peters vs. Sunday Post Limited [1958] EA 424 stated as follows:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

Liability

8. From the evidence on record, it is not disputed that the 1st Appellant had purchased the accident motor from the 2nd Respondent at the time of the accident. The said vehicle was in actual physical control and use by the 1st Appellant and was being driven by the 2nd Appellant at the behest of the 1st Appellant. The question is whether the 1st Appellant who had not yet fully paid for the accident motor vehicle and who was not the insured could be held liable for the said accident. Whilst it is true that the accident motor vehicle was not registered in the name of the 1st Appellant who had the voluntary actual possession and use of the accident motor means cannot avoid liability for the reason that the property and risk in the said vehicle had passed the transfer to the 1st Appellant notwithstanding.

9. On vicarious liability, the evidence by both Appellants disclose that 2nd Appellant was driving the accident motor vehicle at the behest of the 1st Appellant. Regarding this issue, 1st Respondent's Counsel cited the decision in John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 others [2015] eKLR where the Court of Appeal stated:

“Vicarious liability is not pegged on legal ownership (of a vehicle) but on employer/employee or agent/principal relationship with particular emphasis on who employed and controlled the tortfeasor.”

10. In the case of Anyanzwa & 2 others vs. Luigi De Casper & another [1981] eKLR 10, the court held that vicarious liability depends not on ownership but on the delegation of tasks or duty.

11. From the foregoing, I reiterate that the 1st Appellant's liability is not pegged on legal ownership the accident motor vehicle but on the fact that he had employed the 2nd Appellant to drive the vehicle when the accident occurred.

12. Consequently, I find that the Appellant's were rightly found liable at 100%. On the other hand, I find that the 2nd Respondent bears no liability and judgment on liability against it is set aside.

Quantum

13. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See MBOGO v SHAH (1968) EA 93 and Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor, No. 2 [1987] KLR 30).

14. The Court of Appeal in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR settled the principles to be applied in assessing damages and stated that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases. (Emphasis added).

15. The 1st Respondent medical report prepared by Dr. John Macharia on 12.05.2011 reveals that he suffered an intertrochanteric left femur fracture which resulted to permanent shortening of the left leg and fracture of right clavicle which also healed with a slight abnormality in contour. He was treated as an inpatient for 28 days. As at the time of examination which was 5 months after the accident, the 1st Respondent was still on crutches.

16. At the hearing, the Respondent prayed for Kshs. 5,000,000 and cited Sabina Nyakenya Mwanga vs. Patrick Kagoro & another (2015) eKLR, where the Court awarded general damages at Kshs. 3,000, 000.00 on 22nd January 2015, for fractures of the humerus, pelvis, right knee, condyle femur, bruises on the face, severe retroperitoneal hemorrhage and multiple soft tissue injuries.

17. Appellants offered Kshs. 300,000/- and placed reliance on David Mutisya Kisui v Anastasia Wagiciengo Civil Appeal No. 170 of 1998 where Kshs. 200,000/- was awarded for fracture of the left femur with angulation and shortening of left leg and cerebral concussion; Peter Kirumba Munyingi vs Wynack Enterprises HCCC 26 of 2001 where Kshs. 150,000/- fracture of right femur, right cuneiform, right malleolus and blunt injury right knee and Joseph Mutua Kinuthai v David Kamande Kinuthia HCC 621 of 1998 where the plaintiff sustained compound fracture of right tibia and fibula, fracture of femur and midshaft, fracture of left tibia and fibula bones and laceration wounds and the court awarded Kshs. 120,000/-.

18. Looking at the cases considered in the trial court, those that most closely compare to the present case is the more recent case of **Sabina Nyakenga Mwanga case** cited by the Respondents, although it has slightly more serious injuries. The authorities cited by the Appellants are fairly old cases decided 20 years ago. Factoring in the issues of inflation, and the age of the authorities, I find that the award of the trial court was reasonable in the circumstances.

19. In conclusion, I find that the appeal has no merit and disallowed in the following terms:

- 1. Liability is confirmed at 100% against the 1st and 2nd Appellants jointly and severally**
- 2. Judgment on liability against the 2nd Respondent is set aside**
- 3. The award of general damages in the sum of Kshs. 650,000/- in favour of the 1st Respondent is confirmed**
- 4. Appellants shall bear the costs of this appeal**

DATED AT MERU THIS 02ND DAY OF DECEMBER, 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For the Appellants - N/A for Kaberia Arimba & Co Advocates

For the 1st Respondent - Mr. Otieno for Otieno .C & Co Advocates

For the 2nd Respondent - N/A