



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 72 OF 2017

(An appeal arising from the judgment and decree of the Hon. MI Shimenga, Resident Magistrate (RM), in Butere PMCCC No. 278 of 2013 of 15th June 2017)

HASSAN OMUSIKOYO SAKANA.....APPELLANT

VERSUS

BENSON MBAISI.....RESPONDENT

JUDGMENT

1. The suit at the trial court was initiated by the appellant herein against the respondent, for general and special damages, arising from a motor traffic accident, involving a motorcycle on which he was a pillion passenger and a motor vehicle owned and controlled by the respondent. The respondent entered appearance and filed a defence, in which he denied liability and attributed negligence on the appellant.
2. The trial court heard three witnesses from the appellant's side and none from the respondent's side. The trial court delivered a 112 word judgment, wherein it referred to its decision in Butere PMCCC No. 275 of 2013, the subject of the appeal in Kakamega HCCA No. 71 of 2017, where the court had dismissed the suit for lack of liability on the part of the defendant. The court noted that the appellant ought to have sued the rider of the motorcycle the subject of the accident. The trial court also stated that, if it had found in favour of the appellant, it would have awarded him a sum of Kshs. 350, 000.00 for the injuries that he had suffered.
3. The appellant was aggrieved by the decision and lodged this appeal. His case, according to the memorandum of appeal, is that the trial court erred in finding that he had not proved his case to the required standard, in holding that he was negligent, was not supposed to be on the road, in disregarding the evidence of the police officer who testified, in considering that the appellant was a pillion passenger and in failing to evaluate the evidence tendered to it by the appellant. He avers that the trial court relied on extraneous matter in arriving at its final conclusion, arrived at the wrong conclusions and failed to consider the submissions made by the appellant.
4. The trial court dismissed the suit in Butere PMCCC No. 275 of 2013, and the one the subject of this appeal, on two alternative principal grounds. The first was that the appellant had not proved that he was the person who was riding the motorcycle at the material time, for he did not provide identification documents, when the court gave him time to. The court also took into account the evidence he gave on his hospitalization, where he appeared to be unsure of how long he remained in hospital, how much he incurred there as expenses, among others, to find that he could not possibly have been the rider of the motorcycle. The second was that, even if he was the rider, he did not have a driving license and he had no business being on the road at all.
5. The appellant in the instant appeal told the court that he was a passenger on the motorcycle travelling towards Shianda from Mwitoti, when they were hit by the other vehicle from behind. He stated that he lost consciousness and came to in hospital, where he remained admitted for two days. The testimony of PW3 in Butere PMCCC No. 275 of 2013 was adopted into the record of Butere PMCCC No. 278 of 2013 by consent. A police officer, Corporal Maurice Agoro, who testified that the accident was reported at the station. He stated he did not visit the scene, and investigations were said to be still going on. No evidence was tendered on behalf of the defendant and, therefore, the story given by the appellant was uncontroverted.
6. As noted above, as the respondent did not offer any evidence, the version of events as presented by the appellant was uncontroverted. That meant that his evidence was wholly unchallenged. Given that the case presented by the respondent in Butere PMCCC No. 275 of 2013 was not presented in Butere PMCCC No. 278 of 2013, it was wholly wrong for the trial court to have adopted its findings in Butere PMCCC No. 275 of 2013 to determine Butere PMCCC No. 278 of 2013, as the evidence before the court in the two cases was not similar. As the case by the appellant was unchallenged, the trial ought to have found the respondent 100% liable.
7. On quantum, the trial indicated that it would have awarded Kshs. 350, 000.00 as general damages were it to find the respondent liable. The injuries pleaded were fractures of the right clavicle and the femur, blunt injury to right shoulder and cut wound to the right leg. The said

injuries were lifted from the medical report by Dr. Charles M. Andai, dated 17th September 2013. Dr. Andai also testified at the trial and breathed life to his report. I have ploughed through a trove of authorities on similar injuries. The closest I have come across is *Ndeda Ogaga & another vs. Beatrice Akinyi Cheriba* [2019] eKLR, where damages had been awarded at Kshs. 640, 000.00 for fracture of the right clavicle, two cut wounds on left leg, fractures of tibia distal end of left leg, and dislocation of the right ankle joint. The injuries were a lot more serious but would give an indicator of what the court ought to consider. In *H Young & Company EA Ltd vs. Edward Yumatsi* [2016] eKLR, Kshs. 500, 000.00 was awarded for fracture of the clavicle and deep cut wound on the elbow joint and injuries to wrist, head, chest and right knee. Taking the decisions into account, I am persuaded that the amount of Kshs.350, 000.00 mentioned by the trial court would be adequate compensation. There are receipts on record to support medical expenses at Kshs. 14, 790.00. I shall award general damages at Kshs. 350, 000.00 and Kshs. 14, 790.00 special damages.

8. In the end I shall allow the appeal herein for the reasons given above. Damages are awarded in terms of paragraph 7 above. The appeal herein is allowed to that extent. The appellant shall have the costs here and at the court below.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE