



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 76 OF 2017

COMPLY INDUSTRIES LIMITED.....APPELLANT

=VERSUS=

AHMED SHARIF MUKTAR.....RESPONDENT

(Being an appeal against the judgment and decree in Nakuru Chief Magistrate's

Civil Case Number 602 of 2013 by Hon. J. M. Omido (Principal Magistrate)

dated 25th May, 2017)

J U D G M E N T

1. On 1st November 2011 a collision occurred between Motor Vehicle registration number KAV 411R – ZC 4239 and KBB 388A along the Eldoret Nakuru Road Molo River Bridge. The driver of KAV 411 R/ZC 4239 sustained injuries and filed on 3rd July 2013 Nakuru CMCC 602/2012 against the registered owner of KBB 388A.

2. The claim was denied by the defendant vide their defence filed on 26th July 2013. The defendant also lay blame on the plaintiff and sought the dismissal of the plaintiff's suit.

3. In the judgment delivered on 25th May 2017, the trial court found that the defendant was 100% liable for the accident, and assessed General Damages and Special Damages at Kshs. 4,884,100/= plus costs and interest. The defendant was aggrieved and filed this appeal on the following grounds.

1. *That the Learned Trial Magistrate erred in law and in fact in failing to make a concise statement of law and framing of issues.*
2. *That the Learned Trial Magistrate erred in law and in fact in finding the Appellant 100% liable contrary to the overwhelming evidence on record against the Respondent.*
3. *That the Learned Trial Magistrate erred in law and in fact in failing to consider that both the Appellant's motor vehicle's drivers blamed each other in their evidence.*
4. *That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent was 100% liable for the occurrence of the accident.*
5. *That the Learned Trial Magistrate erred in law and in fact in making a finding and arriving at an award of damages which is inordinately too high as to represent an erroneous estimate of the damages payable.*
6. *That the Learned Trial Magistrate erred in law and in fact in failing to consider and/or misapprehended the Appellants submissions and hence arrived at a wrong award and/or liability and further failed to take into account relevant facts viz a viz awarding loss of earnings in addition to General Damages.*

Seeking orders;

- (a) *That the finding of the Trial Magistrate on liability and quantum be set aside, be reviewed and/or revised and/or be substituted*

with the judgement of this Honourable Court.

(b) That this Honourable Court do make such further orders as it may deem fit.

(c) That this Appeal be allowed with costs to the Appellant.

4. The respondent abandoned his cross appeal. The appeal was canvassed by way of written submissions. From the grounds of appeal, the issues for determination are;

a) **Whether the Learned Trial Magistrate erred in law and in fact in finding the Appellant 100% liable for the accident which occurred on 1st November, 2011.**

b) **Whether the award for General Damages was inordinately high to warrant interference by this honourable court.**

c) **Whether the Learned Trial Magistrate failed to consider the defendant's submissions in determining liability and the award of damages for loss of earning capacity.**

5. In his judgment the trial magistrate found and relied on that finding that the evidence of PW3 was that of an independent witness; and that the defendant's witness had contradicted himself on how the road traffic accident happened. On this basis he found that the defendant was 100%liable for the accident.

6. It was argued for the defendant that PW3 was neither a witness nor an independent witness but a person who had been brought to simply support the plaintiff's case, and that the record would show that there was no contradiction in DW1's testimony.

7. In his testimony the plaintiff said:

"I was driving motor vehicle KAB 411R belonging to Motrex. At Salгаа area near Molo Bridge while driving towards Nakuru, an accident occurred. I was driving downhill and another vehicle came from the opposite direction, uphill. He was overtaking. I flashed my lights and slowed down. I braked emergency and engaged the hand brake. The vehicle hit my vehicle. They collided on the sides."

8. He blamed the other driver, saying that the other driver drove on the wrong lane and overtook where there was a continuous yellow line. He told the court how he applied brakes, engaged handbrake, flashed lights, to avoid the accident and because of a steep descent to his left he could not swerve off. On cross examination he maintained he was not overtaking, and that it was the other driver who hit him.

9. PW3 on his part testified;

"I am Omar Tayari Bakari. I reside at Samburu. I work at Motrix as a turn boy. On 1/11/2011 we were from Kampala with Ahmed Shariff Muktar as driver of motor vehicle KAV 411R. When we got to Molo Bridge as heading towards Nakuru. We were going downhill. A lorry KBB 388 A from the opposite direction overtook a Nissan. The prime mover swerved but the vehicle hit ours with the trailer. Our prime mover turned and faced the other way. I blame the other driver who was speeding and overtaking. Our driver flashed lights, hooted and braked."

On cross examination he corroborated PW1's testimony, and stated that there was a sharp descent to their left, that the lorry that hit them was overtaking a Nissan and it hit theirs on the driver's side.

10. DW1 on his part testified;

"I was driving KBB 388A from Nakuru towards Eldoret. I was alone. I was driving on the left side. Near Salгаа at Molo River, an accident occurred. I was on the left side. It occurred 100 metres before the bridge. The road has a slight bend. There were 2 matatus behind my vehicle. There was a trailer about 50 metres ahead of me. Motor vehicle KAV 411R which had a trailer came from the opposite direction. The trailer came and I moved to my left side. It hit my vehicle on the right side. The cabin hit my vehicle. The accident occurred on the left side as one faces Eldoret. The other trailer was speeding. My vehicle stopped on the left, off the road. The vehicle on the other side was damaged and the driver was injured. I went and pulled him out of the vehicle. He was alone."

On cross examination he denied overtaking the motor vehicle ahead of him, that it is the plaintiff who lost control of his motor vehicle because he was speeding and encroached his side of the road. That he saw this happen when he was 40 meters away. That there was another lorry with trailer 50m ahead but plaintiff did not hit it. He blamed the other driver, the plaintiff, he said the plaintiff was on a descent. That he DW1 tried to avoid the accident by swerving to his left.

11. The trial court said of his evidence;

"DW1 initially told the court that he was ascending before the accident occurred. However, upon cross examination, he stated that he was in fact right before Molo Bridge when the accident occurred, adding that before the bridge, one descends. He thus contradicted his evidence in chief on how the accident occurred."

12. From the foregoing it is evident that the trial court misapprehended the evidence.

13. DW1 I did not state in his evidence in chief that he was ascending. He said that it was the other driver who was on a descend. On cross examination he said there was a river, and one had to descend to get to the river. He never said he was ascending. Hence, there was no contradiction in the DW1's testimony.

14. Regarding PW3, the record will show that none of the issues raised about him in the submissions were put to him, he was not questioned about his employment to confirm that he was there to defend his employer as claimed, neither cross examined on his credibility as a witness. His testimony on oath was not challenged by the defence that he was with the plaintiff, that he witnessed the how the accident happened. The defence's submissions that he was just a witness brought in to support the plaintiff's claim are not supported by the record.

15. It is not correct as submitted by the appellant that the trial court's only reason for finding that the defendant was wholly to blame for the accident was the alleged contradiction in the evidence of the DW1. The trial magistrate also found the plaintiff's evidence and that of PW3 to be consistent. The question that begs is whether the PW3 was an independent witness?

16. PW3 was the turn boy, he was travelling in the same motor vehicle as the plaintiff. Can he be deemed to be an independent witness? I would be hesitant to find that he was indeed an independent witness because he was travelling inside one of the accident motor vehicles and therefore his story and that of the plaintiff would not have been expected to be different, considering that he too sustained injuries. He was not an eye witness standing on the side of the road seeing the road traffic accident happen, he was one of those who was involved in the road traffic accident hence his testimony went on to support the testimony of the plaintiff.

17. That left the trial court with two competing stories, with each side blaming the other for the road traffic accident. Without the alleged inconsistency of DW1's testimony, does the trial courts finding still stand?

18. From the plaintiff's testimony he did everything to avoid the accident, the DW1 on his part said he did not hoot but swerved to his side to avoid the accident.

19. The Plaintiff's version of the manner in which the accident happened, the evidence of PW3, though not an independent witness, as presented was consistent and corroborative and on a balance of probability, weighed heavily against that of the DW1.

20. In the circumstances of this evidence it cannot be said that the defendant was wholly to blame for the accident. to have contributed to the accident to some extent. Having found that there was no contradiction in the DW1's testimony, and agreeing with the trial magistrate that the plaintiff's testimony was corroborated by that of the PW3, and that the DW1 made a little effort to also avoid the accident, I would hold the plaintiff 10% liable for the accident, and defendant 90% liable.

21. On the award of damages, the plaintiff sustained the following injuries;

a) Crush injury of the right leg leading to amputation above the knee.

b) Compound fracture of the left distal fibula.

c) Compound fracture of the left distal tibia.

d) Massive loss of blood leading to hemorrhagic shock.

e) Cut wound on the forehead.

f) Cut wounds on the dorsum of the right hand.

g) Cut wounds on the left shin.

22. It was submitted for the appellant that the trial court refused to consider the appellant's submissions in arriving at the assessment of general damages.

23. I have perused the authorities cited by the appellant, each of them speaks of fractures, none of them speaks to an amputation of the plaintiff's leg, and the associated needs of the plaintiff consequent there.

24. I have perused the authorities that were cited before the trial court by both the plaintiff and the defendant, and the one cited before me, on appeal, and I am of the view that clearly the trial court considered the authorities cited, and set out clear reasons for the awards he made.

25. I am guided by the decision in **Kemfro Africa Limited v Am Lubia**.

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Trial Judge were held by the former court of Appeal in Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage.”

In Loice Wanjiku Kagunga v Julius Gachau Mwangi CA 142/2003 the Court of Appeal held that: -

“... We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or had misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles...”

26. I find no reason to interfere with the awards on General Damages. The appeal succeeds only in part, on liability, 90%:10% in favour of the plaintiff.

$4,800,000/= \times 90/100 = 4,320,000/=$

$+ 4,100 = \underline{4,324,100/=}$

The respondent will have costs and interest here and below from the date of the judgment of the lower court.

Dated, delivered and signed at Nakuru this 29th day of June, 2020.

Mumbua T. Matheka

Judge

In the presence of VIA ZOOM

CA Edna/Martin

Ms. Obura for E. M. Juma & Co. Advocates for the appellant

Mathew Nyabena & Co. Advocates N/A

Ms. Obura: I pray say for stay for 30 days;

Court: Stay granted as prayed.

Judgment be sent to parties through email.

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Judge