



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NUMBER 18 OF 2017

SIKUKU NYAMAI.....APPELLANT/APPLICANT

VERSUS

RAINER LIMITED.....RESPONDENT

J U D G E M E N T

1. The **Appellant** herein had sued the **Respondent** *vide* **Kitui CMCC No.255 of 2014** for tort of negligence arising from a road traffic accident which occurred on **28th July 2012** along **Kwa Vonza – Kanyagi road** involving the **Respondent's** motor vehicle **Registration No.KAN 104N** and **Appellant's** motor cycle **Registration No.KMCP 738K**. The **Appellant** sought general and special damage from the **Respondent** pleading that its driver caused the accident from which he suffered injuries.

2. Upon trial, the trial court found that both the **Appellant** and the **Respondent** had equally contributed to the accident and held that each was **50%** liable. On quantum the subordinate court made an award of **kshs.200,000/=** noting that the **Appellant** had suffered soft tissue injuries to wit;

(i) Soft tissue injury to the left ankle region

(ii) Dislocation of the left tibia/fibula joint.

3. The **Appellant** felt aggrieved by the judgment of the trial court and preferred this appeal raising the following grounds namely:-

(i) That the learned Magistrate erred in law and fact by failing to consider the Appellant's evidence.

(ii) That the learned Magistrate erred in law and fact by apportioning liability on the appellant in the absence of any evidence from the Respondent or at all.

(iii) That the learned Magistrate erred in law and in fact by failing to appreciate the full nature of the Appellant's injuries and authorities cited and thus making an award that was manifestly low.

(iv) That the learned Magistrate took into account irrelevant factors in arriving at the award given.

4. In his written submissions through learned counsel **M/s Mulu & Company Advocates**, the **Appellant** submits that he tendered evidence indicating that he suffered the following injuries namely:-

a. Injuries on both hands.

b. Injuries on the left leg.

c. Broken left leg.

5. He contends that he adduced evidence from Kitui General Hospital and called a doctor to assert his claims.

6. He further submits that the police officer he called to testify at the trial clearly gave evidence on the circumstances surrounding the accident and tendered the police abstract. According to the **Appellant**, the police officer testified that the accident occurred on his lane and that the **Respondent** never adduced any evidence in rebuttal.

7. The **Appellant** faults the trial Magistrate for apportioning liability on him on the uncontroverted evidence indicating that the accident was caused by the **Respondent**. He has cited the authority in the case of **Peter Ngigi Kuria & Another** (suing on the legal representatives of the estate of **Joan Wambui Ngigi**) -vs- **Thomas Ondili Oduor & Another [2019] eklr**. He has also cited the decision in the case of **Shaneebal Ltd –vs- County Government of Machakos [2019] eklr** to support his contention. He adds that the **Respondent** did not call any evidence despite having filed a statement of defence. He contends that the **Respondent** did not controvert or challenge the evidence of the **Appellant** and/or that of the police officer.

8. The **Appellant** further adds that the trial court ought to have been guided by the pleadings, documentary and oral evidence instead of considering what he terms “**irrelevant factors**” and erroneously apportioning liability. He has relied on the decision in the case of **David Musafiri Kulova –vs- Chhabhadiya Enterprises Ltd. [2020] eklr** to support his contention that the trial court should only have apportion blame if there were two competing arguments and evidence on who was to blame for the accident. The **Appellant** posits that it is only the **Appellant** who gave evidence on what transpired and that because **Respondent** adduced no evidence to challenge him, it was erroneous for the trial court to apportion blame and cites **Shaneebal’s** decision (*supra*) to buttress that position.

9. On quantum, the **Appellant** submits that he suffered severe injuries and that the trial court did not take into consideration the nature of injuries suffered. He claims that he cited legal authorities which justified an award of **kshs.600,000/=** he pleaded but according to him the trial Magistrate was not well guided by the case law and that **kshs.200,000/=** awarded was inordinately too low. He is asking this court to invoke its appellate jurisdiction and interfere with the award citing the decision in **Butt –vs- Khan (1977) KAR** to support his assertion.

10. On the other hand the **Respondent** has opposed this appeal through written submissions by learned counsel **M/s O.N. Makau & Mulei Advocate**.

11. The **Respondent** submits that the police officer called to testify told the trial court that the motor cycle rider was initially not in his right lane and that upon noticing an oncoming lorry, he changed lanes by swerving back to his lane where the lorry driver had also swerved to avoid the accident.

12. According to the **Respondent**, the evidence of the police officer was in contrast to what the **Appellant** had stated and that he was to blame for the accident.

13. The **Respondent** has further submitted that even if the trial court was to go with the version of the **Appellant**, it was incredible that he had time to stop and the pillion passenger managed to escape before the collision occurred.

14. On quantum, the **Respondent** contends that the **Appellant** suffered mild injuries and that what was pleaded in the plaint were the following injuries:-

a. Crush injury to the left ankle region.

b. Dislocation of the left distal tibia/fibula joints.

c. Deep cut wound on left ankle region.

15. The Respondent claims that the Appellant never tendered evidence to support the claims adding that whoever alleges must prove. He cites the decision in **Treadsetters Tyres Ltd. –vs- Wekesa Wep hukulu [2010] eklr** to support his assertions.

16. This court has considered this appeal and the submissions made by both counsels. I have also looked at the cited authorities. This is an appeal against the finding of the subordinate court on both quantum and liability.

17. On liability, it is true that one of the cardinal rules of evidence is that whoever alleges has the burden of proof. The Provisions of **Sections 107 and 108** of the **Evidence Act** (Cap 80 Laws of Kenya) are clear on this. In this instance, the **Appellant** having sued the **Respondent** on tort of negligence had the legal burden of proof. According to the **Appellant** his evidence against the **Respondent** was uncontroverted.

18. This court however finds that before a **Plaintiff** or a **Claimant** asks a **Defendant** to controvert he/she must first establish and proof that the accident occurred due to negligent acts of the **Defendant** whose particulars must be clearly pleaded as provided by **Order 2 Rule 4 of the Civil Procedure Rules**.

19. The court has perused through the pleadings filed in the lower court and finds that the **Appellant** did specifically pleaded the particulars of negligence he attributed to the **Respondent**. In his evidence before the trial court the **Appellant** testified that he was on his left side riding a motor cycle with a pillion passenger when he noticed an oncoming lorry at a corner and that he “**braked and stopped**” and his pillion passenger fled away before the lorry rammed onto him. According to him he was outside the road when he was hit by the lorry.

20. However this narrative was contradicted by his own witness, **Corporal Charles Kiprotich (Pw3)** The Police Officer testified that as per report on the Occurrence Book, the rider “*was on the lane of the driver first before he changed his lane*” adding that the driver swerved to avoid the accident just as the rider also swerved. He was categorical that the motor cycle “*was at first not on its proper lane and that the point of impact was on the middle of the road.*”

21. On the face of such evidence, the question posed is whether the **Appellant** discharged his burden of proof notwithstanding the fact that the **Respondent** elected not to call any evidence. This court takes the considered view that the fact that defendant has not called any evidence in defence does not mean that there is an assumption that the evidential burden placed by law on the **Plaintiff** is lifted. A **Plaintiff** is required

by law at all times to prove to the required standard (which is a balance of probabilities in this instance) that the defendant was to blame. Looking at the evidence tendered by the Appellant in its entirety, I am unable to find fault in the assessment and the conclusion made by the trial court. I have as an **Appellate** court re-assessed the evidence placed before the trial court and I am unable to reach any other conclusion other than the correct conclusions reached by the trial court.

22. The **Appellant** in the first place clearly stated that he was not at the time not licensed to ride the motorcycle. He testified that he did not “*hold a current license*” which puts to questions his ability and competency to ride and observe all the traffic regulations.

23. Secondly and more importantly the evidence tendered by **Appellant’s** own witness (**Pw3**) put asunder his narrative on the circumstances leading to the accident. It is reported that he had swayed to the wrong side perhaps oblivious of the danger he was exposing himself to but on realizing that there was an oncoming lorry he swerved to his side as the lorry driver also swerved leading to the accident. In my view given the evidence placed before the trial court is obvious that the **Appellant** to a substantial degree was to blame for the accident. In my considered view given the circumstances surrounding the accident, the **Appellant** have no basis to fault on the finding of the trial Magistrate.

24. On quantum, it is true that a party is bound by his/ her pleadings and the Appellant in his pleading pleaded the following injuries:-

a. Dislocation of the left distal tibia/fibula laterally above the ankle joint.

25. In his oral evidence before the trial court the Appellant stated that he sustained injuries in both hands and left leg. This court finds that the submissions by the **Appellant** that he suffered a broken leg and injuries to both hands amount to a departure of what he had pleaded. The assertions that the trial court erred by not factoring the said injuries are misleading and unfounded because the trial court directed its mind to what had been pleaded and proved at the trial. There was no mention of a broken leg and no evidence was tendered to that effect.

26. The injuries pleaded and proved by the **Appellant** were soft tissue injuries to be fair to the **Appellant**. The amount awarded by the trial court of kshs.200,000/= cannot be described by any stretch of imagination to be so inordinately low as to call for intervention by this court as per the decision in **Butt –vs- Khan (supra)**: Going by the **Appellant’s** cited decision in **Ndungu Dennis –vs- Ann Wangui and Another [2018] eKLR**, an **Appellate** court such as in this instance will not disturb an award of damages unless the award is so inordinately high or low to represent an entirely erroneous estimate. I am not persuaded that the lower court considered any irrelevant factor in arriving at the award of **kshs.200,000/=** in general damages.

27. In the end for the aforesaid reasons, this court finds no merit in this appeal. The same is disallowed with costs to the **Respondent**.

Dated, Signed and Delivered at Kitui this 05th day of October, 2020.

R. K. LIMO

JUDGE