



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 87 OF 2014

MULO HOLDINGS.....1ST APPELLANT

VICTORIA COMMERCIAL BANK.....2ND APPELLANT

TOBIAS ODEYO OBURU.....3RD APPELLANT

NELSON OTIENO ATINDA.....4TH APPELLANT

VERSUS

RASHID SWENTA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Njoroge in Kisii CMCC No. 194 of 2012 delivered on 07/07/2014)

JUDGMENT

1. The appellant is dissatisfied with the award of Kshs. 300,000/- as general damages by the trial court filed this instant appeal on the following grounds:

- 1. The learned magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.*
- 2. The Learned Trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.*
- 3. The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (to apply precedents and tenets of law applicable.*
- 4. The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.*
- 5. The Learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.*

2. The facts of this case were as follows. The Plaintiff alleged that the 1st and 2nd defendants were the registered owners of Motor Vehicle Registration No. KAH 254 A, Isuzu Tanker which was being driven by the 3rd defendant. The 4th defendant being the owner in user, manager and or driver of motor vehicle KAH 254 A. The 3rd and 4th defendants entered appearance and filed their defence in which they denied the allegations outlined in the Plaintiff's plaint.

3. The Plaintiff withdrew the suit against the 2nd Defendant after the 2nd defendant filed their defence. Contents of their defence was that in 1/8/1996 it hired out the motor vehicle registration number KAH 254A which said vehicle was registered in the joint names of the 1st and 2nd Defendant. On 17/7/1997 the said vehicle was involved in a serious accident and the 2nd defendant repossessed the wreckage which the 2nd Defendant sold and transferred to M/s Deen's Agencies Limited.

4. Later liability was agreed in the ratio 70:30 against the 3rd and 4th appellants on the 12/3/2014. The trial magistrate awarded the respondent Kshs. 300,000/- as general damages. It is the award of general damages that has prompted this appeal.

5. In dealing with an appeal on quantum, I am guided by the decision of the Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** where it held that;

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”

6. The injuries sustained by the respondent were not in dispute. Dr Ezekiel Ogando Zoga prepared a medical report dated the 1/8/2013 in which he detailed the injuries sustained by the respondent as follows:

- Bruises on the head
- Deep cut wound on the head
- Bruises on both hands
- Deep cut wound on the right knee
- Dislocation of the right knee

7. In quantifying the level of award, the respondent proposed Kshs. 200,000/- as general damages and cited the following cases; *Arrow Car Ltd vs Elijah Shamilla Bimomo & Others* as quoted in *Kithoka Youth Polytechnic vs Lucy Kithira Riungu Civil Appeal No. 126 of 2006* in which the Court awarded Kshs 150,000/- for soft tissue injuries. The quoted case did not outline the nature of soft tissue injuries sustained by the Plaintiff. The Respondent also relied on the case of *John Okoth v Diversy Wyandotte East and Central Africa Limited Nbi Hccc No. 730 of 1991* in which an award of Kshs 160,000/- was awarded where the Plaintiff's injuries were fracture and dislocation of the right muscle joint, multiple soft tissue injuries and bruises of the upper and lower limbs. In this case the trial court awarded general damages of Kshs 300,000/- .The 3rd and 4th appellants did not submit on quantum in the lower court.

8. The Respondent/plaintiff sued four Defendants in the lower court, only the 2nd, 3rd and 4th defendants entered appearance. The Respondent withdrew its suit against the 2nd defendant, the 3rd and 4th defendants/Appellants defended the suit. The 1st defendant having failed to enter Appearance or file Defence the Respondent made an application to have interlocutory judgment was entered against him. Having perused the record before me, no interlocutory judgement was entered against the 1st Defendant. The appellant submitted that the trial court ought to have entered an interlocutory judgement against the 1st Defendant and is also seeking that this court to make a determination on liability against the 1st Defendant at 100% as an interlocutory judgement.

9. In this case the Plaintiff was required to formally prove its case against the Defendants and the trial court was to arrive at either of the following possible outcomes:

- That all the three Defendants could be held jointly and severally liable.
- Any two could be held jointly and severally liable.
- One could be liable
- None could be liable.

10. Though the Learned Trial Magistrate failed to explicitly state who of the three Defendants he found liable, it can be construed that he referred to all the 3rd and 4th Defendants who had entered a consent on liability in the ratio of 70:30. The plaintiff in his plaint had sought reliefs against the defendants jointly and severally. In **Dubai Electronics – Vs – Total (K) Ltd & 2 Others HCC NRB Civil 870/98**, the same court had stated,

“Clearly therefore, where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability, each tortfeasor is only liable to settle the sum due to the time of his liability. Where, however, the liability is joint and/or several, the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way, he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.”

11. Having looked at the proceedings before the trial Court I find that no interlocutory judgement entered against the 1st Defendant upon the Plaintiff's application. No appeal has been preferred by the Plaintiff in this regard. This court cannot enter judgment against the 1st defendant as sought as the appellant chose to enter a consent with the 3rd and 4th defendants. The appellant's did not raise the issue of interlocutory judgment before the trial court, they chose not to pursue it. The trial court decided the case on the consent. The appellants cannot ask this court to make a finding on the 1st defendant's liability at this appeal. Had they brought to the attention of the trial court attention and no finding was made, then then the issue of liability could have been one to determine in this appeal. In the circumstances the judgment therefore applies jointly and several against the 3rd and 4th defendants.

