



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 454 OF 2017

JOSEPH KURIA NJUGUNAAPPELLANT

VERSUS

DAVID KARANJA NJUGUNA.....1ST RESPONDENT

CHARLES NJIMU.....2ND RESPONDENT

ANTHONY KARIUKI3RD RESPONDENT

(Being an appeal from the ruling and order delivered at Nairobi by Hon. L. Kassan on 24th June, 2016 in CMCC No. 7567 of 2013)

JUDGMENT

This appeal arises from the judgment of the lower court delivered on 24th June, 2016 wherein the appellant was held to be 100% liable for an accident involving motor vehicle registration No. KAU 027 W and motor vehicle no. KAZ 416 R. The brief facts of the case as captured in the pleadings are that the 1st respondent who was the plaintiff in the lower court was a passenger in motor vehicle registration No. KAU 027W. This motor vehicle was registered in the name of the 3rd respondent herein. It was pleaded that the said motor vehicle was stationary when the motor vehicle registration No. KAZ 416R rammed into it as a result of which the 1st respondent sustained injuries. He sued the appellant herein as owner motor vehicle registration No. KAZ 416R at the time of the accident, alongside his driver and or agent for the injuries he sustained.

The 1st respondent blamed the accident on the driver of the appellant herein, alongside the driver and owner of the motor vehicle registration No. KAU 027W in which he was a passenger.

In deciding the issue of liability, the trial court observed that the 1st respondent who was a passenger in motor vehicle registration No. KAU 027W had first said he blamed the driver of the motor vehicle in which he was a passenger for blocking the road. He later said that the motor vehicle was on the stage which was off the road.

The court decided to take the evidence of the plaintiff on liability observing that the defence did not call any witness to deny the accident occurred. The court concluded,

“On liability, I find that the plaintiff’s testimony is unchallenged. I hold liability at 100% in favour of the plaintiff.”

There was already default judgment entered against the 2nd and 3rd respondents herein. The trial court then proceeded to award Kshs. 1,500,000/= general damages for pain and suffering, Kshs. 635,988/= special damages, Kshs. 250,000/= future medical costs, Kshs. 960,000/= future loss of earnings, Kshs. 150,000/= past loss of earnings, costs and interest.

This is what aggrieved the appellant who lodged the present appeal. In the Memorandum of Appeal dated 25th August, 2017 the lower court is faulted for awarding past and future loss of earnings which the 1st respondent did not prove, for holding that the appellant was totally liable for the accident and that he disregarded the authorities cited in arriving at the liability imposed. He was also faulted for disregarding authorities on quantum of damages which were exorbitant, and finally that he relied on heresay as opposed to proven facts.

As the first appellate court, it is my duty to consider the evidence adduced at the trial with a view to arriving at independent conclusions. In the pendency of this appeal, upon an application filed on behalf of the appellant, for stay of execution, an order was given in favour of the appellant provided that the appellant paid the 1st respondent half of the decretal sum, and the balance thereof be deposited in an interest earning account in the names of both advocates.

I have reviewed the evidence on record. It is true that only the plaintiff testified in relation to the occurrence of the accident. It is also true that the appellant did not testify in this matter. The fact that the defence offered no evidence should not be held against them. It is upon a plaintiff to prove his case to the satisfaction of the court.

After the 1st respondent gave evidence in the lower court he was subjected to cross-examination by the counsel for the appellant. The following is what he said,

“I did not look at the plaint. Paragraph 4 says 2nd defendant was also to blame. It says 2nd defendant stopped on the road/ blocking the road. That is not true. Paragraph 4 says 2nd defendant was negligent for blocking the road. 2nd defendant is also to blame. I have particulars of negligence by the 2nd defendant.

Our vehicle blocked the road. If it had not blocked the road, there would have been no accident. I blame the matatu for stopping on the road to allow passengers to alight. KAZ wouldn't cause the accident. The vehicle was hit while on the stage. Stage was beside the road. The stage is off the road not on the road.”

It is clear from the above extract of the proceedings that the 1st respondent blamed the driver of motor vehicle registration No. KAU 027W for blocking the road while in the same breath exonerating him by saying that he was at the stage of the road. Both versions of his evidence cannot be true. It is either one or the other.

That being the case, and the trial court having emphatically stated that it took the evidence of the 1st respondent, there is no way one can conclude that on liability, that evidence was unchallenged. If anything, the contradictions are self-challenging. A clear assessment of that evidence cannot lead to 100% liability on the part of the appellant. If indeed the motor vehicle in which the 1st respondent was in as a passenger was stationary, then the driver of the appellant's motor vehicle should have noticed the same. In that case, he would have applied brakes or swerved to avoid ramming into the stationary motor vehicle.

Having observed that the appellant did not testify or call any evidence in the lower court, I hold that liability on the part of his driver should be 80% while 20% should be attributed to the motor vehicle in which the 1st respondent was as a passenger.

On quantum the 1st respondent sustained a fracture of the left femur, compound fracture of left tibia and fibula. According to the report prepared by Dr. Wokabi and produced in evidence, he underwent surgical toilet procedures, and external fixators but developed infection. These injuries were confirmed by Dr. Wambugu.

It is true that the trial court did not cite any authorities but stated that he had looked at the submissions and nature of injuries. The submissions on record included authorities and it may not be fair to conclude that the trial court did not look at the authorities. However, normal practice is that if any authorities are relied upon, the same should be cited.

Authorities cited in the current submissions include **Hellen Atieno Odour vs. S.S. Mehta & Sons Limited vs. Muthitu Nanao (2015) e KLR, Simon Muchemi Atako & Another vs. Gordon Osore (2013) e KLR, James Thingo githiri vs. Nduati Njuguna Ngugi (2012) e KLR and Susan Wanjiru Njuguna vs. Keringet Flowers Limited Nakuru HCC NO.64 of 2001.**

According to the second report prepared by Dr. Wokabi and dated 3rd December, 2015 the 1st respondent had his leg become shorter and could not step on the left foot. The fracture of the tibia and fibula had failed to unite; the left knee was very stiff and could kneel or squat. However, the infection he had on the left leg had ceased after the plates had been removed. He was to undergo surgery to fix a metal plate and apply bone graft to compensate for the shortening of the leg. The soles of his left shoe will require to be raised at the cost of Kshs 5,000/= every year. His left knee will remain forever stiff and this will not allow him to kneel or squat. He would experience difficulties using pit latrines and travelling in motor vehicles. His permanent disability was assessed at 45%.

The appellate court may interfere with the awards of the trial court if they are inordinately high or too low to give an impression of application of wrong principles leading to wrong assessment. Having considered the medical reports and the authorities cited, I am not persuaded that I should disturb the award of Kshs. 1.5 Million awarded in terms of general damages.

Future medical costs was assessed by Dr. wokabi at kshs. 250,000/= I have no reason to disturb that award. In his plaint, the plaintiff specifically pleaded special damages of Kshs. 635,988/=. He has strictly proved the said figure and I have no reason to disturb the same.

Loss of earnings fall under general damages and proof thereof is on a balance of probability. The plaintiff testified that he was unable to work. He did not produce any document to prove that he was earning Kshs. 1000/= as a mason. He had an employer called Gachoru. He should have called him. He did not have any payslip in addressing that subject, but the trial court believed his evidence.

In calculating loss of earnings, the trial court used a multi plier of four years on a five day week at Kshs. 1000/= per day. This was moderate, and so was the same approach in granting an award for past loss. Again I am unable to fault the trial court in that regard.

The end result is that this appeal is dismissed with costs to the 1st respondent. However, I have found that the 2nd and 3rd respondents were to blame to the extent of 20%. The 1st respondent will get 80% of the total award from the appellant and is at liberty to pursue 2nd and 3rd respondents for the balance.

For the avoidance of any doubt, the appellant shall be liable to pay 80% of the costs both in the lower court and in this appeal.

Dated, signed and delivered at Nairobi this 4th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE