



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 334 OF 2016

PETER OMONDI OKELLO.....APPELLANT

VERSUS

NELSON WANJAMA1ST RESPONDENT

CHARLES OSUNDWA ASHIRA.....2ND RESPONDENT

STEPHEN KAGUTE M'MARETE.....3RD RESPONDENT

SAMUEL NDUNG'U KABIRU.....4TH RESPONDENT

(Being an appeal from the judgment delivered on 10th June, 2016 by Hon. I. Gichobi (Resident Magistrate) at Chief Magistrate's Court at Milimani Commercial Court Civil Case No. 845 of 2012)

JUDGMENT

1. By a plaint (amended) dated 16TH February, 2012, the Appellant, Peter Omondi Okello jointly and severally sued the 1st Respondent, Nelson Wanjama, the 2nd Respondent, Charles Osundwa Ashira, the 3rd Respondent, Stephen Kagute M'marete and the 4th Respondent, Samuel Ndung'u Kabiru. The Appellant claimed damages arising out of road traffic accident he was involved in while being a passenger in motor vehicle registration No. KBF 027U which collided with motor vehicle registration No. KBJ 592T. The Appellant attributed the accident to the alleged negligent manner in which the two motor vehicles were being driven at the material time.
2. The 1st Respondent did not enter appearance and interlocutory judgment was entered against him.
3. The 2nd Respondent in his statement of defence denied the Appellant's claim and blamed the accident as solely or substantially contributed to by motor vehicle registration N. KBF 027U or by the Appellant.
4. The 3rd Respondent denied the claim and blamed the accident as solely or substantially contributed to by the Appellant. The 3rd Respondent in the alternative blamed the collision as solely or substantially contributed to by the driver of Motor vehicle registration No. KBJ 592 T which hit motor vehicle KAV 546R which then hit motor vehicle KBF 027U.
5. The 4th Respondent denied the claim and blamed the accident on the Appellant and motor vehicle registration KBJ 592T which he claims hit motor vehicle KAVF 546R. It was further pleaded that the Appellant's claim was based on fraud and misrepresentation and is therefore unlawful and an abuse of the court process.
6. The Appellant filed replies to the statements of defence. The contents of the plaint were reiterated and the claims in the statements of defence denied.
7. During the trial, PW1 Peter Omondi Okello (Appellant) testified. The Appellant described himself as a fare paying passenger at the material time in motor vehicle No. KBF 027U. His evidence was that motor vehicle registration No. KBJ 592T was being driven on the wrong side of the road and motor vehicle No. KBF 027U failed to stop or swerve in time, hence the collision. That although he had fastened his seat belt the impact caused his head to bhng against the motor vehicle and thereby injured him on the lower lip. That he was treated at Guru Nanak Hospital and discharged. That after investigations the police blamed motor vehicle registration KBJ 052T for the accident. The

Appellant also blamed motor vehicle registration No. KBF 027U as having contributed to the accident by failing to swerve or stop in time.

8. The 2nd, 3rd and 4th Respondents closed their cases without calling any witnesses.

9. In the judgment the trial magistrate dismissed the Appellant's case as not proved. That is what triggered this appeal.

10. The Appellant summarized his grounds of appeal as follows:

1. Whether the learned magistrate erred in law and in fact in finding that ownership of motor vehicle KBJ 592 T and KBF 027U was not proved to the required standard.

2. Whether the learned magistrate erred in law and in fact in failing to appreciate and/or take into account the fact that interlocutory judgement had been entered against the 1st Respondent and that none of the Respondents called any witnesses thus the Appellant's evidence remained uncontroverted.

3. Whether the learned magistrate erred in failing to give an assessment of damages.

4. Whether the learned magistrate erred in law in failing to appreciate and correctly apply the doctrine or vicarious liability.

11. The appeal was canvassed by way of written submissions. The 1st Respondent did not participate in the appeal and the 2nd Respondent did not file any submissions.

12. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

13. The 1st Respondent, Nelson Wanjama was sued as the owner of motor vehicle registration No. KBJ 592T. Interlocutory judgment was entered on 8th August, 2013 against the 1st Respondent for failure to enter appearance or file a defence. The only outstanding issue against the 1st Respondent was therefore the assessment of damages.

14. The 2nd Respondent (Charles Osundwa Ashira) was sued as per paragraph No. 4 of the amended plaint as the driver of Motor vehicle KBJ 592 T. The uncontroverted evidence as per the police abstract proved on a balance of probability that the 2nd Respondent was the driver of Motor vehicle KBJ 592T. As held by the Court of Appeal in the case of **Joel Muna Opija v East African Sea Food Limited [2013] eKLR:**

“We agree that the best way to prove ownership would be to produce document from the Registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

15. The 3rd Respondent, Stephen Kagute M'Marete was named in the amended plaint as the registered owner of motor vehicle KBF 027U. The 3rd Respondent has not been mentioned in the Appellant's evidence nor reflected in the police abstract produced as evidence. There was therefore no proof of ownership of motor vehicle KBT 027U nor any proof that the motor vehicle was being driven for his benefit or with his authority.

16. The police abstract named the 4th Respondent Samuel Ndungu Kabiru as the driver of motor vehicle KBF 027U. This evidence remained uncontroverted and proved on a balance of probability that the 4th Respondent was the driver of motor vehicle KBF 027U. However, there being no evidence of ownership of motor vehicle KBF 027U, the 3rd Respondent cannot be held to be vicariously liable for the actions of the driver of motor vehicle KBF 027U.

17. The evidence of the Appellant on the occurrence of the accident remains uncontroverted. The Appellant's evidence blamed motor vehicle registration No. KBJ 592T for being driven on the wrong side of the road. Motor vehicle KBJ 592T owned by 1st Respondent and driven by 2nd Respondent bears the biggest responsibility for the collusion. I assess liability against the 1st & 2nd Respondent jointly and severally at 70%.

18. Motor vehicle KBF 027U which the Appellant was in is blamed for the failure to avoid the accident or stop in time. The Appellant had fastened a seat belt. The Appellant cannot therefore be blamed for the accident. I hold the 4th Respondent as the driver of motor vehicle KBF 027U 30% liable for the accident.

19. The medical reports produced reflect that the Appellant sustained a soft tissue injury to wit a deep cut on the lower lip. The injury has since resolved. Whether the Appellant was able to prove his case or not the trial magistrate was obligated to assess the damages. In the case of **Andrew Mwori Kasaya v Kenya Bus Service [2016] eKLR** the Court of Appeal held while quoting **Lei Masaku Masaku v Kalpama Builders Ltd [2014] eKLR** it was observed thus:

“There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established.”

20. The Appellant had submitted in the lower court for an award of Ksh.400,000/= as general damages. The case of **Frida Agwanda & another v Titus Kagichu Mbugua [2015] eKLR** was relied on where an award of Ksh.400,000/= was made for **facial injuries with a cut wound on the lower lip**.

21. The 1st Respondent submitted for an award of Ksh.150,000/= as general damages. The case of **Muchema Ayako & another v Gordon Osore Nbi Court Appeal 180/2005** was relied on where an award of Ksh. 120,000/= where the **Plaintiff suffered multiple injuries**.

22. The 2nd, 3rd, & 4th Respondents also submitted for an award of Ksh.170,000/=. The case of **Machakos CA No. 130 of 2011 Kamenju Charles v Gideon Muia Mutisya** where the **plaintiff suffered blunt injury to the right shoulder, cut wound to the right thumb, bruises of the right hand, 4 fingers and blunt injury the left ankle with discloset**.

23. Taking into the injuries sustained and the range of awards in similar cases, I award the sum of Ksh.150,000/= as general damages.

24. Special damages claimed and proved was Ksh.2,500/= as per the receipt for Ksh.2,500/= from Dr. Theophilus Wangata.

This brings the total of damages to Ksh.152,500/=.

25. In the upshot, the appeal has merits and is allowed against the 1st, 2nd and 4th Respondent. Subject to apportionment of liability at 70% against the 1st & 2nd Respondent jointly and severally and 30% against the 4th Respondent, the judgment of the lower court is hereby set aside and substituted with judgment for the sum of Ksh.152,500/=. Costs both in the lower court and this court to the Appellant. The appeal against the 3rd Respondent is dismissed with costs.

Dated, signed and delivered at Nairobi this 9th day of April, 2019

B. THURANIRA JADEN

JUDGE