



IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 128 OF 2018

BETWEEN

FREDRICK OBAIGWA SIMONAPPELLANT

AND

TRADE RESOURCE INTERNATIONAL LIMITED1ST RESPONDENT

CHRISTOPHER MANG'AA OMARI2ND RESPONDENT

HENRY KEVIN ONYANGO3RD RESPONDENT

ODUOR WILLIAM.....4TH RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. Wamucii, RM dated 15th November 2018 at Kisii Magistrates Court in Civil Case No. 302 of 2011)

JUDGMENT

1. The appellant was the plaintiff before the subordinate court. He filed suit following injuries sustained in an accident that took place on 23rd March 2011 along the Kisii – Keroka road. He alleged that on that day he was travelling in motor vehicle KBJ 688X when the driver of motor vehicle registration KBK 586C which was owed by the 1st respondent and driven by 2nd respondent collided motor vehicle registration number KBJ 688X. The 2nd respondent joined the owner and driver of the motor vehicle registration KBJ 688C, that is the 3rd and 4th respondents respectively, as third parties to the suit. The appellant claimed that the 1st and 2nd respondents were wholly responsible for the accident.

2. After hearing the case, the trial magistrate dismissed the claim thus precipitating this appeal. From the amended memorandum of appeal dated 14th May 2019, the appellant asks the court to re-evaluate the evidence and find the respondent's liable. The appellant contends that he proved his case on the balance of probabilities and that the trial magistrate erred in reaching a different conclusion. The respondent takes a contrary view and contends that the trial magistrate reached a correct conclusion based on the evidence.

3. The determination of the issue of liability is a question of fact and since this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123, 126). At the hearing only the plaintiff called witnesses.

4. The appellant (PW 1) adopted his statement as his evidence in which he stated that on 23rd March 2011 at about 6.30pm, he was travelling in motor vehicle registration number KBJ 688X as a fare paying passenger. As the vehicle neared Bobaracho market, an oncoming motor vehicle registration number KBK 586C veered off its lane and hit the vehicle they were travelling in. In cross-examination, he stated that the accident took place at a sharp corner and that motor vehicle KBK 586C was coming from Keroka and that the collision occurred on the left side of the road heading towards Keroka direction.

5. PC Lihanda Adore (PW 2), a police officer at Kisii Police Station, produced the police abstract confirming that the appellant, who was a passenger in motor vehicle KBJ 688X, was involved in an accident at Babaracho area. He explained that motor vehicle KBJ 688X was headed to Keroka from Kisii while motor vehicle KBK 586C was coming from Keroka. He pointed out when the vehicles collided, the other vehicle hit KBK 586C on the right side. When cross-examined, he told the court that according to the Occurrence Book, motor vehicle registration number KBK 586C left its lane and hit KBJ 688X. He told the court that the driver of motor vehicle KBK 586C was convicted

on his own plea of guilty in *Kisii Traffic Case No. 418 of 2011*.

6. The 1st and 2nd respondents did not call any witnesses as the trial magistrate declined to grant them an adjournment. I note that the order rejecting the adjournment was the subject of an appeal that was subsequently withdrawn.

7. After considering the evidence, the trial magistrate concluded that the testimony of PW 1 and PW 2 was inconsistent as such she was unable to assign blame for the accident as it appeared that both vehicles were travelling in the same direction.

8. I have re-evaluated the evidence and I am satisfied that there was a collision involving both vehicles. Indeed, the testimony of PW 1 and PW 2 was unassailable and uncontroverted that there was a collision between two vehicles on the material day. That evidence was augmented by the fact that the 3rd respondent, as the driver of KBJ 688X was convicted on his own plea of guilty on a charge of careless driving contrary to **section 49(1)** of the *Traffic Act (Chapter 403 of the Laws of Kenya)*. So taking the totality of the evidence, the inescapable conclusion that two vehicles collided on the material day and the appellant was a passenger in one of the vehicles was injured. Since he was a passenger, he could not shoulder any liability.

9. I find that there was prima facie evidence of negligence by the drivers of both motor vehicles and since the court was unable to decide which driver was to blame or apportion of liability between the drivers, it ought to have been apportioned equally. In such circumstances, the Court of Appeal in *Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR* observed as follows:

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

10. Since the defendant had joined the third party to the proceedings, the trial court was entitled to apportion liability and ought to have apportioned liability equally between the defendants and third parties. I therefore set aside the judgment dismissing the suit for want of proof and substitute it with a judgment apportioning liability equally between the 1st and 2nd respondents on one hand and the third parties, that is the 3rd and 4th respondents, on the other.

11. I now turn to the issue of damages. The trial magistrate assessed general damages for pain and suffering at Kshs. 100,000/- on the basis that the appellant sustained soft tissue injuries. According to the medical report of Dr Ezekiel O. Zoga dated 31st March 2011, the appellant sustained the following injuries; blunt trauma to the head, tender on the lower back and blunt trauma, multiple bruises and lacerations on the left thigh, blunt injuries on the left thigh and lower back. When the doctor examined him he concluded that though the appellant had sustained severe injuries, which had healed well and no permanent disability was anticipated.

12. Before the trial court, the appellant submitted that an award of Kshs. 500,000/- was reasonable in the circumstances. He relied on the case of *Francis Ochieng and Another v Alice Kajimba MGR HCCA 23 of 2015 [2015]eKLR* where the plaintiff sustained multiple soft tissue injuries without any fractures together with head injuries, the court awarded Kshs. 350,000/- as general damages and the case of *Fanny Esilako v Dorothy Muchene NBI HCCC No. 642 of 1991 (UR)* where the plaintiff sustained multiple soft tissue injuries involving cuts over the left upper arm, multiple cuts over the left wrist, cuts over the left knee and right arm, a sprained knee and blunt injury to the head with swelling. He was left with permanent scars and the was awarded Kshs. 150,000/- in 1993.

13. In considering the issue of quantum of damages, I am guided by the principle laid down in *Butt v Khan [1981] KLR 349* where it was held that for an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied.

14. I accept the conclusion that the injuries were soft tissue in nature and had healed without any permanent disability. However, the trial magistrate did not consider the decisions cited in coming to a conclusion as to the appropriate award. Taking into account the cases cited, I would award Kshs. 150,000/- as general damages. The appellant did not plead or prove special damages.

15. For the reasons I have set out, I allow the appeal, set aside the judgment of the subordinate court and substitute with the following judgment:

a. Judgment be and is hereby entered for the appellant against the respondents on liability apportioned on equally between the 1st and 2nd respondents and the 3rd and 4th respondents.

b. The appellant is awarded Kshs. 150,000/- as general damages.

c. The appellant is awarded costs of the suit in the subordinate court and costs of the appeal to be paid by the respondents which are assessed at Kshs. 30,000/-.

DATED and DELIVERED at KISII this 14th day of JUNE 2019.

D.S. MAJANJA

JUDGE

Mr Mogire instructed by Ombuhi K. Mogire and Company Advocates for the appellant.

Mr Peter M. Karanja, Advocate instructed by the 2nd respondent.