



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HIGH COURT CIVIL APPEAL NO. 38 OF 2016

KAZUNGU KATANA SULUBU.....APPELLANT

-VERSUS-

ISSA RASMIYAH.....1ST RESPONDENT

R.K ISSA.....2ND RESPONDENT

KARISA SARO NGOWA.....3RD RESPONDENT

(Being an Appeal against the entire Judgment of the Chief Magistrate's Court at Malindi by Hon. CG Mbogo delivered on 16th February 2016 in Civil Suit No. 76 of 2014)

Mr. Wambua Kilonzo for the Appellant

Mr. Kairu & McCourt for the Respondent

JUDGMENT

KAZUNGU KATANA SULUBU the Appellant herein filed **Malindi CMC Civil Suit No. 76 of 2014** against the Respondents by a Plaint dated 19th March 2014 seeking general damages for pain, suffering and loss of amenities, special damages and costs of the suit.

Briefly, the facts at trial were that on or about 24th October 2013 along the Lamu-Malindi road at Mambrui area while the Plaintiff was lawfully traveling as a passenger in motor vehicle registration number **KBN 626F**, the 3rd Defendant so negligently drove, managed and or controlled motor vehicle registration number **KAX 998C** that the same lost control, veered off its lane to that of motor vehicle **KBN 626F** and collided with it as a result whereof the Plaintiff was seriously injured. The particulars of the 3rd Defendant's negligence were identified as:

- i. Driving at a speed that was excessive and dangerous under the circumstances*
- ii. Driving carelessly and recklessly*
- iii. Driving in a zigzag manner*
- iv. Driving without proper lookout and attention.*
- v. Failing to slowdown, swerve, stop or otherwise so as to avoid the said accident*
- vi. Failing to have regard to the safety of other road users in particular the of the m/v reg. no. KBN 626F*
- vii. Failing to heed to the Highway Code and the traffic rules.*
- viii. Failing to notice m/v reg. no. KBN 626F in sufficient time so as to avoid the said accident*
- ix. Veering off his lane.*

By their joint statement of Defence dated 7th October 2014 and filed in court on 10th October 2014, the Defendants denied the Plaintiffs

claim and averred that if any such accident occurred, which they denied, the same was caused solely and substantially contributed to by the plaintiff's own negligence.

Upon evaluation of the evidence on record as well as the submissions made, it was the learned trial magistrate's finding that the Plaintiff's suit had to fail as he had failed to demonstrate the liability of the Defendants for the accident.

The Learned Trial Magistrate went on to hold that had he been convinced of the Defendants' liability at 100%, the sum of Ksh. 200,000/- would have been due to the Plaintiff as quantum of damages for general damages and Ksh. 2,000/- as special damages.

The Appellant/ Plaintiff filed the current Appeal vide a Memorandum of Appeal dated and filed on the 14th December 2016 being dissatisfied with the whole of the judgement of the Learned Trial Magistrate.

As per the memorandum of appeal, the Appellant faulted the judgement of the lower court on the following grounds:

- 1. The learned trial magistrate erred in law and fact by failing to analyze the evidence hence arriving at a wrong decision.**
- 2. The learned trial magistrate erred in law and fact by failing to appreciate that PC Oyoo was not an eye witness and his evidence only amounted to opinion.**
- 3. The learned trial magistrate erred in law and fact by ignoring the evidence of the Plaintiff and that of PC Oyoo.**
- 4. The learned trial magistrate erred in law and fact by failing to appreciate the impact of full lights to other road users especially the driver of the tuk tuk and that the bus was over speeding.**

The Appellant sought the following orders:

- 1. This appeal be allowed with costs.**
- 2. The judgement of Civil Suit No. 76 of 2014 by Hon. C.G Mbogo dated 29/11/2016 be discharged and set aside with costs to the Appellant and judgement be entered for the Appellant against the Respondents on liability.**
- 3. In the alternative the court be pleased to apportion liability.**
- 4. The Honorable Court be pleased to award the plaintiff quantum of general damages commensurate with his injuries.**
- 5. The cost of this appeal and the suit in the subordinate court be borne by the respondents.**
- 6. Such other orders and relief that this honorable court may deem fit to grant.**

The Court directed that the Appeal be disposed-off by way of written submissions and Mr. Wambua for the Appellant subsequently filed submissions on behalf of his client. Despite having adequate opportunity to do so, the Defendants' advocate did not file submissions.

Appellant's Submissions

Mr. Wambua for the Plaintiff submitted that the trial court erred in finding that the Plaintiff case had not been proven on a balance of probabilities. Reiterating the facts of the case, Counsel urged that the plaintiff witnessed the accident and gave the best account. However, PW2 Oyoo Kwedho testified that the accident occurred on the lane of the bus. According to Mr. Wambua, PC Oyoo was not an eye witness hence his evidence amounted to opinion or better still hearsay.

Counsel submitted that in a civil case the standard of proof was on a balance of probabilities and the court in this case had imposed too much standard of proof like in criminal cases as since the respondent did not testify at the trial court, the appellant's evidence went unchallenged. Therefore, the trial court ought to have held the respondents 100% liable or at the very least 90% liable.

It was further urged that while the Respondents' applied for leave to join a 3rd party being the driver and owner of tuk tuk registration number KBN 626F which leave was granted, they did not bother to have the 3rd party participate in the proceedings since no 3rd party directions were taken. Alternatively, per Counsel, the trial court should have apportioned liability between the Respondent and the 3rd party. Additionally, it was submitted that the appellant was a mere passenger and could not be blamed for the occurrence of the accident.

The Law, Analysis and Determinations

This being a first appeal, this court is duty bound to analyze the evidence tendered before the trial court while warning itself that it did not see nor hear the witnesses. This duty was established in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:

"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not

enough that the appellate court might have come to a different conclusion...”

The Plaintiff at trial testified that on 24th October 2013 at around 7.00pm while he was passenger in a tuk tuk registration number KBN 626F traveling from Gongoni to Malindi, it was involved in a head on collision with a bus of registration number KAX 998C travelling in the direction of Lamu from Malindi. It was the Plaintiff’s testimony that the bus veered from its lane to the lane being used by the tuk tuk and hit the latter. He said one person died on the spot while he was injured on the head and also pierced on the cheek by a bar. The particulars of his injuries were described at trial as being:

(a) Deep cuts on the forehead (frontal).

(b) Deep cut on the left leg.

(c) Abrasions on the left ankle.

(d) Abrasion on the left cheek.

(e) Abrasion on the left knee.

The Plaintiff further testified that the road at the scene was straight, the bus was speeding, darkness had set in and both the bus and the tuk tuk had headlights on.

On cross examination, the Plaintiff reaffirmed that it was the bus travelling from Malindi to Lamu that had veered from its lane to crash into the tuk tuk. That there was no junction at the scene of the accident and that it was not true that the tuk tuk driver was trying to cross the road when the accident occurred. He further testified that the driver of the tuk tuk fled from the scene and that he remained at the scene for close to two hours before being escorted to hospital. It was his testimony that the driver of the tuk tuk had attempted to brake and avoid the accident by moving off the road but it was too late.

The Plaintiff further confirmed having being injured on the head, cheek and right leg. He stated that while Dr. Adede’s report identified an injury on his left leg, this ought to have been the left knee. He testified to experiencing leg pains time to time and blamed the bus driver for the accident.

PW2 Police Constable Oyoo Kwedho was the investigating officer in the matter. He testified to receiving an accident report at around 8.00pm on 24th October 2013. He identified the particulars of the bus, the driver and he owner and the details of the accident. It was his testimony that the tuk tuk veered towards the opposite lane and that is how the accident occurred. That the driver of the bus was said not to have dimmed his lights which made the tuk tuk driver get blinded. That he was unable to tell the speed at which the bus had been driven but the tuk tuk was extensively damaged. That the tuk tuk cannot therefore be blamed for the accident.

It was PW2’s testimony that the bus stopped 15 meters from the point of impact. There were skid marks of about 9 meters before the point of impact, the road was tarmacked, the potholes at the scene had been patched, the point of impact was a straight stretch, the bus had been inspected and there had been no pre-accident defects noted.

Upon cross examination, PC Oyoo confirmed that he had visited the scene of the accident on the night it occurred. That he did not find the driver of the tuk tuk. That the bus driver and conductor reported to the police station. That the tuk tuk driver came to the police station after 2 days. That no one was ever charged for the accident. That the driver of the tuk tuk was to blame for the accident as the point of impact was on the lane used by the bus. That the road at the scene was straight and there were no rains on the material night. He testified that there had been an element of speeding. That the bus stopped 15 meters from the point of impact, there were skid marks at the scene 9 meters before the accident and 15 meters after the accident. That he blamed the driver of the tuk tuk.

On reexamination by Mr. Wambua Kilonzo, he stated that he concluded that the driver of the tuk tuk was to blame for the accident as the point of impact was on the side of the bus.

The Defendant’s closed their case at trial without availing any witnesses.

The preceding reassessment of the evidence at trial coupled with the grounds enumerated by the Appellant on appeal reveal that the instant appeal turns on whether the honorable trial magistrate erred in failing to find the Defendants liable. If answered in the affirmative, the next question that this court will tackle is what quantum of damages is sufficient given the circumstances of the case.

The principles that ought to guide an appellate court of first instance where an appellant seeks to upend the findings of a lower court on fact are well settled. It is trite that the appellate court will always be reluctant to interfere with the trial magistrate’s findings unless it can be clearly demonstrated that in reaching their decision, the magistrate relied on the wrong principles, took into account irrelevant details or failed to consider important matters that ought to have been paid regard to. Where a trial Judge finds that one of the parties to an accident has not been guilty of any negligence which contributed to the accident an appeal court should not even if it is doubtful that it would have arrived at the same decision had it been sitting at the first instance, interfere with that finding, which as it has been said is largely a question of fact and degree, unless it is satisfied that the trial judge was wrong. I stand guided by the words of **Sir Clement De Lestang, VP in Mbogo v Shah 1968 EA 93**, where he held as follows;

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not

have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”

Upon evaluation of the evidence on record as well as the submissions made, it was the learned trial magistrate’s finding that whereas the Plaintiff in his evidence told the court that motor vehicle registration number KAX 998C veered onto the lane that was being used by the tuk tuk registration number KBN 626F, PC Oyoo Kwedho (PW2) who is a traffic officer and who was the plaintiff’s witness indicated that it was actually the latter vehicle that veered onto the lane that was being used by the former. The learned magistrate further held that on that basis therefore, the defendants were not blame because there was nothing on evidence to suggest that they either caused or substantially contributed to the accident. On that basis, the Learned Trial Magistrate condemned the Plaintiff’s suit to fail.

The burden was always on the appellant to prove on a balance of probabilities that the accident was caused by the respondent’s driver. **Section 107,108 and 109** of the Evidence Act, cap 80 placed this burden on the appellant. Having given his version of events, the onus then fell upon the Defendants to controvert this evidence. This they did not do, leaving the Plaintiff’s evidence unchallenged.

My assessment of the judgement of the subordinate court exposes that the learned trial magistrate relied on the testimony of the police officer over that of the Plaintiff in finding that the driver of the bus KAX 998C neither caused nor contributed to the accident. With all due respect, I find this conclusion to be wrong. Per the Plaintiff’s direct testimony, it was the bus that was over speeding and veered into the path of the tuk tuk. PC Oyoo Kwedho in his evidence in chief attributed the accident to the bus stating that the tuk tuk could not be blamed for the accident. However, on cross examination he changed his story averring that the driver of the tuk tuk was to blame for the accident as the point of impact was on the lane used by the bus. In the face of this contradictory evidence, it is not clear to me on what basis the trial magistrate made his finding.

Per **Koome J in Sospeter Ndungu Kamau vs Charles Mageto Nakuru HCC No. 404 of 1998 [1998] LLR 7449 (HCK)**, when considering the issue on liability there are two elements to take into consideration namely; causation and blameworthiness. In the current case, it was the investigating officer’s testimony that the bus stopped 15 meters from the point of impact, there were skid marks at the scene 9 meters before the accident and 15 meters after the accident. From this it can be inferred that the bus was over speeding. That the skid marks were to be found on the lane of the bus indicates that the *tuk tuk* driver may have been on the lane of the bus.

To me, in the face of lack of concrete evidence to distinguish the blameworthiness or otherwise of the two drivers, the learned trial magistrate ought to have adopted the presumption, which I now do, that both drivers were equally liable. This position is buttressed by the positions taken by the court in **Njuguna Macharia vs Josephat Mathia Mwihi and Others Civil Appeal No. 185 of 1999 [2000]**, **Jimnah Munene Macharia vs John Kamau Erera Civil Appeal No. 218 of 1998** and **Barclay vs Steward Limited and Another [1982-1988] 1 KAR 1118**.

Having dealt with the issue of liability, I now turn to quantum. The principles to be followed by an appellate court in deciding quantum were succinctly outlined in **Butler vs Butler, Civil Appeal No. 49 of 1983 (1984) KLR**, wherein the Court of Appeal held:

“8. In awarding damages, a court should consider the general picture of all the prevailing circumstances and effect of the injuries on the claimant but some degree of uniformity is to be sought in the awards, so regard should be paid to recent awards in comparable cases in local courts.

9. The fall in the value of money generally, and the leveling up and down of the rate of exchange between the currencies of Kenya and of the country from which comparable cases derived, must be taken into account.

10. The assessment of damages is more likely an exercise of discretion by the trial Judge and an appellate court should be slow to reverse the Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision”.

The Appellant in this instance had suffered soft tissue injuries to wit:

(a). Deep cuts on the forehead (frontal).

(b) Deep cut on the left leg.

(c) Abrasions on the left ankle.

(d) Abrasion on the left cheek.

(e) Abrasion on the left knee.

Per the Court’s record, the Plaintiff at trial had proposed a sum of Ksh. 350,000/- in lieu of general damages calling to his aid the case of **Catherine Wanjiru Kingori vs Gibson Theuri Gichubi Nyeri HCC No. 320 of 1998**. It had been submitted that Ksh. 2,000/- serve as special damages in line with the receipts produced at court. The Defendants on the other hand had proposed a figure of Ksh. 120,000/- relying on **Pamela Ombiyo Okinda vs Kenya Bus Services Ltd Nairobi Civil Case No. 1309 of 2002** where the Plaintiff had been awarded Ksh. 100,000/- for soft tissue injuries. Taking into account the respective parties submissions, the learned trial magistrate was of the opinion that had damages been due, the sum of Ksh. 200,000/- would have sufficed.

My analysis of the evidence leads to the conclusion that the learned trial magistrate’s estimate on quantum was commensurate with the injuries suffered by the Appellant. Accordingly, I award the Appellant the sum of Ksh. 200,000/- as general damages.

In the upshot, and having established liability in the ratio of 50%-50% between the Defendants and the Third Parties, judgement is entered in favour of the Appellant in the following terms:

(a) This appeal is allowed

(b) The judgement in Civil Suit No. 76 of 2014 by Hon. C.G Mbogo dated 29/11/2016 is hereby set aside.

(c) Liability is hereby entered in the ratio of 50%-50% between the Defendants' and the Third Parties'.

(d) General and Special damages are awarded as follows:

1. General damages Ksh. - 200,000/-

2. Special damages Ksh. - 2,000/-

Total Ksh. 202,000.00

Less 50% Ksh. 101,000.00

Net Award Ksh. 101,000.00

(e) The Appellant shall have the costs of the Appeal and of the suit at the subordinate court.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MALINDI THIS 3RD DAY OF JULY 2019.

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R. NYAKUNDI

JUDGE