



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 36 OF 2017

WILLY NGUGI.....APPELLANT

VERSUS

BRENDA KHALAYI.....RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate Honourable C. Obulutsa

in Eldoret Civil Case No. 882 of 2015, dated 1st March, 2017)

JUDGMENT

This is an appeal arising from the judgment delivered by Hon. C. Obulutsa on 1st March 2017 in which he entered judgment against the appellant as follows:-

- (a) Liability: - 100% against the defendant
- (b) General damages: Kshs.300,000/-
- (c) Special damages:- Kshs. 6,000/-
- Total:- Kshs. 306,000/-
- (d) Plus cost and interest

The respondent herein, Brenda Khalayi instituted this suit in the lower court vide her pleadings dated 12th November 2015 in which she prayed that judgment be entered against the defendant for:-

- (a) Special damages
- (b) Costs incidental to the suit
- (c) Interest on all of the foregoing at court rates.
- (d) Any other or further relief that the court would deem fit to grant.

She claimed that on or about 12th September 2015, she was abode Motor Cycle Registration number KMDP 106B when she was hit by the oncoming motor vehicle registration number KBP 107H along Eldoret – Kimumu road of which vehicle was owned and driven at the time by the appellant,/defendant,Willy Ngugi.

She claimed that as a result of the accident, she sustained the following bodily injuries:-

- (a) Blunt injury to the head.
- (b) Bruises on the face.

(c) Blunt injury to the chest

(d) Blunt injury to the abdomen

(e) Blunt injury to the left knee

At the trial court, the plaintiff, who was PW4, claimed that she was hit by an oncoming motor vehicle which was overtaking. She further claimed that she fell unconscious and later found herself in the hospital.

Dr. Paul Rono, PW1, examined the plaintiff and produced a discharge summary and control sheet as evidence.

PW2, Dr. Sokobe produced a medical examination report for the plaintiff, marked as PEXH 3. She also produced a P3 form marked as PEXH 3B. PW2 charged the plaintiff Kshs.6,000/- for the medical examination.

PW3, Mr. Chosek from Eldoret Police station was the police officer who investigated the accident involving Motor Vehicle Registration Number KBD 107H and Motor cycle registration Number KMMP 106B. He stated that the rider of the motor cycle died on the spot while the other two passengers, one of whom was the plaintiff, sustained injuries. He further claimed that the members of the public set ablaze the car. He produced a police abstract before the court, marked as PEXH 5.

The defendant/appellant, vide his statement of defence dated 27th May 2016 denied responsibility in the said accident. He denied that he was the owner of motor vehicle registration number KBP 107H, Toyota ISL.

In his alternative defence, the defendant averred that if at all the accident ever occurred, then it was entirely as a result of negligence on the part of the plaintiff.

He further claimed that the trial court lacked jurisdiction to hear and determine the matter.

Being dissatisfied with the findings of the trial court, the defendant/appellant appealed against the whole judgment on both liability and quantum of damages awarded.

This court is tasked with determining the following contentious issues:-

- (1) Whether the trial court lacked jurisdiction to try the suit.
- (2) Whether the trial court erred in apportioning liability wholly on the appellant.
- (3) Whether the quantum of damages awarded was reasonable.

1. Whether the trial court lacked jurisdiction to try the suit.

The cause of action arose along Eldoret-Kimumu Road which is within the jurisdiction of the court.

I therefore find that the trial court did not err in hearing the matter as it had jurisdiction.

2. Whether the trial court erred in apportioning liability wholly on the appellant.

The appellant submitted vide his written submissions dated 20th November 2018 that the plaintiff/respondent failed to satisfy to the court that the appellant was wholly liable for the accident under Section 107 and 108 of the Evidence Act that puts the responsibility on the person who alleges a fact, to prove it.

He further contends that the rider was carrying excess passengers.

This court in determining the liability, ask itself; Were it not for the appellant's actions, would the accident still have occurred? Further, I will consider whether the accident was partially or wholly caused by the negligence of the motor cycle rider. Did the motor cycle rider do all that was reasonably within his means to avert or reduce the impact of the collision?

It is my finding that, though the motor cycle rider was carrying excess passengers, no evidence was adduced to show that the fact contributed to the occurrence of the said accident. Carrying excess passengers though a traffic offence, is not by itself evidence of contribution towards occurrence of an accident in absence of clear evidence attributing occurrence of the accident to it.

I therefore my finding that the trial court did not err in apportioning liability wholly on the appellant.

3. Whether the quantum of damages awarded was reasonable.

As to the quantum of damages awarded, I elect to be guided by the principles that governs the discretionary privilege that is bestowed upon an appellate judge in interfering with an award by the lower court. This court would be guided by the wordings in the case of Butt V Khan

(1981) KLR 349 that (per Law JA):-

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

I find that the Kshs. 306,000/- awarded in damages is neither unreasonably high nor is it unjustifiably low as to warrant a variance of the same. The amount is just fair given the circumstances of this case.

In view of the forgoing, I dismiss this appeal with costs to the respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 3rd day of July, 2019

In the presence of:

Mr. Mukabane holding brief for Mr. Omwenga for the appellant

Mr. Kandie holding brief for Mr. Alwanga for the respondent

Ms Sarah – Court assistant

Mr. Mukabane: We pray for 30 days stay.

COURT:

30 days stay is granted.

SIGNED

S.M GITHINJI

JUDGE

3/7/2019