



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 355 OF 2017

JASWANT SINGH & BROTHERS LIMITED.....1ST APPELLANT

KENNEDY ODHIAMBO.....2ND APPELLANT

VERSUS

SELINA ANIMA AMANGA.....RESPONDENT

(Being an appeal from the judgment of E. Wanjala, (SRM) in CMCC No. 6759 of 2012

delivered on 16th June 2017)

JUDGMENT

1. This appeal arises from the judgment of *Hon. E. Wanjala (SRM)* dated 16th June 2017 in which the respondent, then the plaintiff was awarded general damages in the sum of KShs.300,000 as compensation for pain and suffering for injuries sustained in a road accident on or about 24th December 2011 whose occurrence was blamed on the negligence of the 2nd appellant in the manner in which he drove or controlled motor vehicle registration number KAX 064S Nissan caravan which was owned by the 1st respondent. The aforesaid damages were awarded after the trial court entered judgment on liability in favour of the respondent against both the appellants at 100%.
2. The appellants were aggrieved by the trial court's decision on both liability and quantum. They proffered this appeal vide a memorandum of appeal filed on 13th July 2017 relying on seven grounds of appeal. In the main, the appellants complained that the learned trial magistrate erred in law and fact in finding that the 2nd appellant was to blame for the accident which was against the weight of the evidence on record; that the learned trial magistrate erred when she totally ignored the appellants' submissions and authorities on liability and quantum; that the learned trial magistrate erred by failing to apply the right legal principles on quantum and thereby awarded the respondent an amount that was manifestly excessive and was not commensurate to the injuries she had sustained.
3. In her evidence before the court, the respondent testified that on 24th December 2012, she was travelling as a passenger in motor vehicle registration number KAX 064S Nissan caravan; that the vehicle was involved in an accident after it rolled several times and landed in a ditch; that as a result of the accident, she sustained the injuries listed in paragraph 6 of the plaint. Though she claimed both in her plaint and under cross-examination that the vehicle she was travelling in belonged to the 1st respondent, she admitted that she did not have a copy of records from the registrar of motor vehicles to confirm that the vehicle was actually owned by the 1st respondent.
4. In their statement of defence dated 18th January 2013, the appellants denied all the allegations of negligence pleaded against them in the plaint and put the respondent to strict proof thereof. They did not offer any evidence during the trial.
5. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellants filed their submissions on 24th April 2019 while those of the respondent were filed on 9th May 2019.
6. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully aware of the duty of the first appellate court which was succinctly summarized by the Court of Appeal in *Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR* where the court stated that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

7. I have carefully considered the grounds of appeal, the pleadings, the evidence on record as well as the rival written submissions filed on behalf of the parties and the authorities cited. Having done so, I find that only two issues arise for my determination in this appeal. These are:

- i. Whether the learned trial magistrate erred in law or fact in her finding on liability.
- ii. If the answer to the first issue is in the negative, whether the trial court erred in arriving at its decision on quantum.

8. Turning to the first issue, I wish to start by observing that a reading of the plaint reveals lack of diligence and poor workmanship in the drafting of the plaint which made it difficult to understand the circumstances under which the accident happened.

In the plaint dated 9th November 2012, the respondent claimed that when the accident occurred, she was travelling in the aforesaid vehicle along the Kiriani-Muranga road as a lawful passenger. In the same pleading, she claimed that the accident occurred when the vehicle she was travelling in hit or ran over her occasioning her injuries. These two versions of events are hard to reconcile since they depict a practical impossibility. I say so because the respondent could not have been a passenger and a pedestrian at the same time. This confusion must have been caused by a drafting error on her counsel's part which error was rectified during the trial when the respondent testified that she was actually a passenger in the said vehicle not a pedestrian.

9. A reading of the learned trial magistrate's judgment confirms that in arriving at her decision on liability, she relied exclusively on a police abstract which was filed together with the respondent's list of documents. I have gone through the trial court's record and I have not come across any proceedings in which the said police abstract was produced in evidence. The police officer who authored it was not called as a witness to produce it nor was it produced as an exhibit by the respondent by consent of the parties. In the circumstances, the police abstract was not formally admitted in evidence and should not have formed the basis of any finding by the court. It is thus my finding that the learned trial magistrate erred in relying on a document that was not admitted as evidence and making it a basis for her finding on liability.

10. It is trite law that he who alleges must prove. This is the import of *Sections 107 to 109 of the Evidence Act*. The respondent having alleged that she sustained the injuries in question due to the negligence of the 2nd appellant for which the 1st appellant was vicariously liable had the burden of proving by tangible evidence on a balance of probabilities that the 2nd appellant was indeed the person who carelessly drove or managed the aforesaid vehicle as a result of which the accident in which she was injured occurred. It was also incumbent on the respondent to prove that the 1st appellant was as a matter of fact the owner of the motor vehicle and that the 2nd appellant was the 1st appellant's driver and/or agent.

11. In her evidence, the respondent only narrated how the accident occurred. She did not identify the 2nd appellant as the person who had been driving the vehicle. She claimed that the vehicle belonged to her employer but she did not indicate whether or not the 1st appellant was the employer she had in mind or produce a copy of records from the registrar of motor vehicles to prove that the vehicle belonged to the 1st appellant.

12. Given the foregoing, I have no doubt in my mind that the respondent failed to tender evidence sufficient to prove any of the allegations of negligence pleaded against the appellants. The learned trial magistrate failed to properly interrogate the testimony of PW1 which was the only evidence on record in support of the respondent's case and failed to appreciate that the evidence did not link the appellants to the occurrence of the accident. The law is that there is no liability without fault. Having not established that the 2nd appellant was guilty of any act of commission or omission which was negligent, there was no basis of making any finding on liability against them.

13. In the result, I find merit in the appeal on liability and it is hereby allowed. Having allowed the appeal on liability, it goes without saying that the appeal on quantum automatically succeeds since the award on quantum was based on the trial court's erroneous finding on liability. In the premises, the appeal is hereby allowed in its entirety. The judgment of the learned trial magistrate is consequently set aside and is substituted with an order dismissing the respondent's suit with costs to the appellants.

14. On costs of the appeal, the order that best commends itself to me is that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Salach: Court Assistant

No appearance for both the appellants and the respondent though duly served via the causelist