



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 505 OF 2011

DENNIS MUJOMBA 1ST APPELLANT

CHARLES ALLAN W. MWAWUGANGA 2ND APPELLANT

VERSUS

STEPHEN MWONGELA MUSAU RESPONDENT

JUDGMENT

1. The appellants were the defendants in a suit instituted in the lower court by the respondent. In the plaint dated 11th June 2007, the respondent sued the appellants for general and special damages for injuries sustained in a road traffic accident which occurred on 4th January 2017 when he was knocked down by motor vehicle registration number KAT 207L which was owned by the 2nd appellant but was being driven by the 1st appellant. The respondent blamed the occurrence of the accident on the sole negligence of the 1st appellant. The particulars of the alleged negligence are pleaded in paragraph 4 of the plaint.

2. In their joint statement of defence dated 21st September 2007, the appellants denied any liability for the accident and averred that if the accident occurred, it was caused or substantially contributed to by the respondent's negligence.

3. After a full trial, the learned trial magistrate *Hon. Ms. Mokaya* (PM) in her judgment made a final finding on liability for the respondent against the appellants jointly and severally at 100%. She also awarded the respondent general damages in the sum of KShs.400,000; special damages of KShs.2,700 and costs of the suit and interest.

4. The appellants were dissatisfied with the trial court's decision. In an amended memorandum of appeal filed on 23rd July 2014, the appellants faulted the trial court's decision on both liability and quantum of damages. They asserted that the learned trial magistrate erred in law and fact in finding that the appellants were 100% liable contrary to her analysis of the evidence which showed that the respondent was equally to blame for the accident; that the trial court erred in making an award of general damages which were inordinately high given the injuries sustained by the respondent and failing to consider the appellant's submissions and authorities on quantum.

5. On 14th May 2018, parties agreed to have the appeal prosecuted by way of written submissions. The appellants written submissions were filed on 21st June 2018 while those of the respondent were filed on 31st May 2018.

6. This being the first appeal to the High Court, it is an appeal on both facts and the law. The duty of a first appellate court is now well settled. The first appellate court is duty bound to revisit and to re-evaluate all the evidence tendered before the trial court and draw its own independent conclusions while giving allowance to the fact that it did not hear or see the witnesses - See: ***Selle & Another V Associated Motor Boat Company Limited & Others*, [1968] EA 123; *Williamson Diamonds Company Limited V Brown*, [1970] EA 1.**

7. It is also important to mention at this juncture that an appellate court should as a general rule be slow to interfere with the findings of fact made by the trial court. The court should only reverse findings of fact made by the lower court if it is satisfied that the findings were not based on any evidence or were based on a misrepresentation of the evidence or that in reaching such findings, the trial court applied the wrong legal principles – see: ***Sumaria & Another V Allied Industrial Limited* [2007] 2 KLR 1; *Peters V Sunday Post Limited* [1958] EA 424.**

But an appellate court is free to interfere with findings of a trial court if it appears that the court failed to take into account particular circumstances that impacted on the evidence or where the court's impression based on the demeanour of a material witness is inconsistent with evidence in the case generally – See: ***Simon Muchemi Atako & Another V Gordon Osore*, [2013] eKLR.**

8. I have considered the grounds of appeal, the parties' rival written submissions, the record of the lower court and the authorities cited.

Having done so, I find that it is not disputed that an accident involving the respondent and motor vehicle registration number KAT 062H occurred on the date and place stated in the plaint. It is also not disputed that the motor vehicle was owned by the 2nd appellant and was being driven by the 1st appellant. What is disputed in this appeal is the trial court's finding on liability and quantum of damages.

9. On the issue of liability, the only evidence that was tendered before the trial court was the testimony of the respondent. He testified as PW2. He claimed that on 4th January 2007 at around 11am, he was going to board a *matatu* at a stage near the railway station when he was hit from behind by the aforesaid motor vehicle and thrown to the ground. He testified that he was neither blocking the road nor blocking the path of the motor vehicle. He also denied that he was crossing the road when the accident occurred.

The respondent did not however state where he was exactly in relation to the road when the accident occurred or what happened to cause the collision between him and the vehicle. He claimed that he had not seen the vehicle prior to the accident.

The appellants did not adduce any evidence to counter the respondent's case or to support the allegations in their joint statement of defence.

10. In her judgment, the learned trial magistrate while analysing the evidence on liability stated as follows on page 75:

“In my view both the plaintiff and the defendant's driver owed each other the duty of care as road users. It would not be proper for the plaintiff to be standing at the point which is on the path of motor vehicles and expect the vehicle not to knock him. The defendant's driver equally ought to have been more careful given that the place where he was driving was busy with vehicles and people moving around. Under the circumstances both the plaintiff and defendant would be equally liable for the accident, liability is therefore apportioned in the ratio of 50:50 between the plaintiff and defendant...”

11. Interestingly, in her conclusion, the learned trial magistrate entered judgment on liability in favour of the respondent against the appellants jointly and severally at 100%. No reason or explanation was given for this latter finding. Given the earlier apportionment of liability in the ratio of 50:50, I am persuaded to agree with the appellants' submission that the final finding on liability appears to have been an accidental slip of the pen.

12. I say so because the trial magistrate had explicitly made a decision on liability soon after evaluating the evidence placed before her and apart from the latter contradictory finding, there is nothing on record to suggest that she had departed from her earlier decision. In any event, this is the only decision that was supported by the evidence on record. This is because the respondent did not state where he was when he was hit or what he was doing. He was very vague and evasive on this point both in his evidence in chief and under cross-examination. He did not for example claim that he was standing off the road or walking on a foot path when the motor vehicle veered off the road and hit him or that he was crossing the road on a designated pedestrian crossing in order to justify a finding that the 1st appellant was fully to blame for the accident.

13. The appellant did not offer any evidence on how the accident occurred. The police abstract produced as exhibit by the respondent to assist the court determine the question of liability was not useful at all as it did not indicate who was to blame for the accident or to what extent.

14. Although I am in agreement with the respondent's submission that the finding by the learned trial magistrate that the respondent had been standing on the path of the motor vehicle when the accident occurred is not based on any evidence, I entirely agree with her reasoning considering that the evidence on record did not disclose who between the respondent and the 1st appellant was to blame for the accident. In the circumstances, it was reasonable to conclude that each of the parties should bear equal responsibility for the occurrence of the accident. Consequently, it is my finding that the trial magistrate's earlier finding on apportionment of liability in the ratio of 50:50 was correct and it is hereby upheld.

The latter finding of liability at 100% in favour of the respondent against the appellants jointly and severally is not supported by the evidence on record. It was clearly made in error and it is hereby set aside.

15. Regarding quantum, the learned trial magistrate awarded the respondent KShs.400,000 in general damages for pain, suffering and loss of amenities. The appellants contend that this award was manifestly excessive given the injuries suffered by the respondent.

16. In paragraph 4 of the plaint, the respondent averred that he had sustained the following injuries:

- i. Fracture of the upper end of the right humerus;*
- ii. Dislocation of the right shoulder joint;*
- iii. Severe post traumatic stiffness of the right shoulder joint; and*
- iv. Wasting of the right shoulder muscles.*

17. The above injuries were confirmed by *Dr. Wokabi* who testified as PW1. He in addition stated that at the time of examination of the respondent on 6th February 2007 about a month after the accident, the respondent still had pain and stiffness on the shoulder and the shoulder joint was frozen making any movement impossible. He assessed the degree of disability at 35%.

18. The award of damages is always at the discretion of the trial court. The law is that an appellate court should not interfere with the trial

court's award on damages unless it is satisfied that in arriving at the award, the lower court misapprehended the facts or applied the wrong legal principles or that the award was either too high or too low as to give rise to a reasonable inference that it was a totally erroneous estimate of the damage suffered - See: *Mariga V Musila [1984] KLR 251*; *Kemfro Africa Limited T/A Meru Express Services & Another [1976]* and *Another V Lubia & Another [1987] KLR 30*.

19. It is clear from the trial court's judgment that in assessing the damages awarded to the respondent, the learned trial magistrate considered the injuries suffered by the respondent, *Dr. Wokabi's* evidence and the proposals on quantum made by the parties in their respective submissions. I find nothing in the judgment to suggest that the award was based on a misrepresentation of the evidence or on a wrong legal principle.

20. Given the nature of the injuries sustained by the respondent which according to *Dr. Wokabi* would result in about 35% disability of the right shoulder or 15% thereof after rigorous sessions of physiotherapy, I cannot say that the amount awarded was excessive or inordinately high. I cannot also say that the award was arbitrary or unreasonable. The award was reasonable and is therefore upheld.

21. The award of KShs. 2,700 special damages was not contested on appeal and the same will therefore remain undisturbed.

22. In the result, the appeal partially succeeds to the extent that the learned trial magistrate's final finding on liability against the appellants jointly and severally at 100% is hereby set aside. It is substituted with this court's judgment apportioning liability in the ratio of 50:50 between the respondent and the appellants jointly and severally. The award of general damages in the sum of KShs.400,000 is hereby maintained subject to the above apportionment of liability. The amount shall attract interest at court rates from today's date until payment in full.

23. As the appeal has partially succeeded, the appellants shall pay the respondent's costs in the lower court but each party shall bear his own costs of the appeal.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 11th day of October, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr Wambua for the appellants

Ms Awuor holding brief for Mr Kaburu for the respondent

Mr. Fidel: Court Clerk