



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 571 OF 2016

NJORA SAMUEL.....APPELLANT

VERSUS

RICHARD NYANG'AU ORECHI.....RESPONDENT

(Being an appeal from the judgment of the Hon. E.A Nyaloti (Ms), Chief Magistrate Milimani CMCC No. 6320 of 2014 dated 3rd August, 2016)

J U D G M E N T

1. **Richard Nyang'au Orechi**, the Respondent herein, filed a compensatory suit before the Chief Magistrate's court, Nairobi against **Njora Samuel**, the Appellant herein, for the injuries he allegedly sustained in a road traffic accident on 5th September, 2014 involving the Appellant's motor vehicle registration No. KAW 374T along Outering Road.
2. The Appellant filed a defence to deny the Respondent's claim.
3. Hon. Edna Nyaloti, the learned Chief Magistrate heard the case and in the end gave judgment in favour of the Respondent.
4. The Appellant was found 90% liable and the Respondent was awarded Ksh.500,000/- and Kshs.16,490/- being general and special damages respectively. The aforesaid amount would be reduced by 10% contribution.
5. The Appellant was aggrieved by the decision and was, therefore, prompted to file this appeal and put forward the following grounds: -
 - i) *That the learned magistrate erred in fact and in law in finding the Defendant liable for the accident.*
 - ii) *That the learned magistrate erred in fact and in law in the manner of analyzing the evidence.*
 - iii) *That the learned magistrate erred in fact and in law in awarding the Plaintiff general damages of Ksh.500,000/-.*
6. When the appeal came up for hearing learned counsels' appearing in the matter recorded a consent order to have the appeal disposed of by written submission.
7. I have considered the rival written submissions and I have further re-evaluated the case that was before the trial court.
8. The first ground of appeal is against the order on liability. It is the submission of the Appellant that the learned Chief Magistrate erred when finding the Appellant liable in the absence of any proof of a collision between the Respondent and his motor vehicle registration No. KAW 374T.
9. The Respondent is of the submission that the trial court by looking at the totality of the evidence could not have arrived at the conclusion that the Respondent should have been pronounced 100% liable for the accident.
10. The Respondent further argued that there is no basis upon which a finding can be made blaming the Respondent for the accident since in his evidence he sufficiently demonstrated that the Appellant was solely blamed.
11. It is apparent from the judgment of the trial magistrate that the Appellant was found 90% liable while the Respondent was made to shoulder 10% liability.

12. The record shows that the Respondent's case was supported by the evidence of two witnesses namely: - PC Rachael Lotukomo (PW 1) and Richard Nyang'au Orechi (PW 2).

13. It is the evidence of PW 2 that he was hit by motor vehicle registration No. KAW 374T which did not stop and as a result he got injured. PW 1 said he was hit at Outering Road near Fedha Junction. He said he was crossing at the junction when the vehicle hit him.

14. PW 1 blamed the driver of the aforesaid motor vehicle for knocking him on the side of the road after he swerved to avoid being hit by an Embassava Matatu.

15. Samuel Waweru Njora (DW 1), the appellant stated that on the fateful day he drove along Outering Road for Fedha Estate. DW 1 confirmed driving on the left side of the road and turned right to Fedha Estate. He stated that he was stopped by somebody who told him he had knocked someone.

16. DW 1 claimed he stopped, came of the vehicle, looked around but did not see anyone. He then entered his vehicle and sped off thinking it was a trap.

17. A week later DW 1 said, he was confronted by a mob who brought to him a person who was limping alleging that he was the person he had knocked on 5th September, 2014. He denied hitting the Respondent and thought the suit was the work of an extortionist.

18. The learned Chief Magistrate noted that the Defendant conceded in his evidence that he was stopped by someone who informed him that he had hit a pedestrian and, therefore, formed the opinion that evidence of the Respondent show that he was at the scene of the accident.

19. After a careful re-evaluation of the evidence tendered before the trial, I am convinced that the learned Chief Magistrate cannot be faulted in the manner she handled

the evidence of PW 2 and DW 1 which is to the effect that the Appellant was placed at the scene of the accident, save for the order on apportionment of liability which I will determine when dealing with the Respondent's cross-appeal.

20. On quantum, the learned Chief Magistrate awarded the Respondent a sum of Ksh.500,000/- as general damages for a closed fracture right 5th Metatarsal.

21. It is the Appellant's submission that the aforesaid award was manifestly excessive and should, therefore be adjusted downwards to Ksh.200,000/-.

22. The Appellant cited the case of **Samuel Mungai Njau Vs Wananchi Sanitary & Hardware Ltd [2004] eKLR**, in which this court awarded the Plaintiff Kshs.150,000/- for fractures to the right 1st – 4th metatarsals in the year 2004.

23. The Respondent was of the submission that the court did not err in making the aforesaid award on the basis of the anticipated pain of the right legs whenever the Respondent stepped on a hard terrain.

24. Having considered the rival submissions on quantum, it is not in dispute that the Respondents suffered a closed fracture right 5th metatarsal bone.

25. The record shows that the Respondent had beseeched the trial court to award him Ksh.800,000/-. The Respondent cited two cases.

26. The first case is **Razi Amin Kulaten Vs Claus Kringer & Rosemary Nyakinyua [2004] eKLR**, where the court awarded Ksh.800,000/-. The second case is that of **Hussein Abdi Hashi Vs Hassan Noor [2004] eKLR** where the Plaintiffs was awarded Ksh.800,000/-.

27. After a careful consideration of the decisions relied upon by the Respondent, it is apparent that the aforesaid decisions were in respect of more serious injuries.

28. In the case of **Razi Amin Kulaten (supra)**, the Plaintiff was awarded Ksh.800,000/- for the following injuries: -

i) Fracture of right tibia/fibula.

ii) Potts fracture on left ankle.

iii) Severe strain with rupture of cruciate ligaments (left knee).

iv) Fracture of metatarsal bone.

29. In the case of **Hussein Abdi Hashi (supra)**, the Plaintiff was awarded Kshs.800,000/- for the following injuries: -

i) Fracture of the lateral malleolus.

ii) Fractures of metatarsals (2nd and 5th).

iii) Large laceration anterior to the ankle.

30. The most relevant case whose injuries appear to be nearer to those obtaining in this case is the case of **Samuel Mungai Njau Vs Wananchi Sanitary & Hardware Ltd (Supra)** in which the plaintiff was awarded Kshs.150,000/- for fractures of metatarsals 1st, 2nd, 3rd and 4th.

31. However, the inflationary trends must be taken into account for the last 14 years.

32. I am satisfied that the award of **Ksh.500,000/-** is reasonable and takes into account the inflationary trends in this country.

33. The Respondent on his part also filed a cross-appeal and put forward the following grounds: -

i) The learned magistrate erred in both law and fact by substantially failing to consider the Respondent's evidence and submissions.

ii) The learned magistrate erred in law and fact by finindg that the Respondent contributed to the occurrence of the accident despite the evidence before the Honourable court.

iii) The learned magistrate erred in law and fact in awarding the Respondent a sum of Ksh.500,000/- despite the weighty evidence before the honourable court, the extent of injuries to the Respondent and well-established legal principles and practice in award of damages and the authorities.

iv) The learned magistrate erred in fact by failing to award costs of the suit and interests to the Respondent despite the well-established legal principles and rules of practice in that costs follow the event.

34. In the cross-appeal, the Respondent has appealed against the order directing him to shoulder 10% contribution. In his written submissions, the Appellant did not address the issue on contributory negligence.

35. I have on my part examined the judgment of the learned Chief Magistrate and it is apparent that the trial Magistrate, merely made an order directing the Respondent to shoulder 10% contribution without assigning any reasons to her finding on this aspect.

36. The Appellant had completely denied knowledge of the accident. In fact, in his evidence he stated that he did not see the Respondent at the scene of the accident.

37. The Appellant was of the view that the accident did not occur. The Appellant did not therefore, urge for the apportionment of liability.

38. With respect, I agree with the submissions of the Respondent that there was no justification for the order apportioning 10% liability as against the Respondent, therefore the order must be set aside.

39. The other issue which was raised in the cross-appeal is on quantum. The Respondent in his memorandum of cross-appeal avers that the learned Chief Magistrate erred when she awarded the Respondent a sum of Ksh.500,000/- despite the weight of evidence before the court. The Respondent did not allege that the award was excessive nor low.

40. I dealt with the issue touching on quantum when determining the substantive appeal and found no fault in the award of Ksh.500,000/- I equally do not find any fault on the award given to the Respondent. Therefore, nothing turns out on the ground challenging the award of damages.

41. The final issue which this court has been asked to determine is the award of costs.

42. It is the submission of the Respondent that the learned Chief Magistrate erred when she failed to award the Respondent costs of the suit plus interest.

43. It was pointed out that the trial court did not give reasons for its refusal to grant costs as pleaded. Again, the appellant failed to address this court over the issue on costs.

44. There is no doubt that the Respondent was a successful litigant before the trial court. It is not in dispute that the learned Chief magistrate was silent on the prayer for costs and interest sought in the plaint dated 6th October, 2014.

45. Under Section 27 of the Civil Procedure Act, an unsuccessful party will be ordered to pay costs to the successful party since costs follows the event. With respect, this ground is found to be with merit.

46. In the end, the Appellants appeal is found to be without merit. The same is dismissed with costs to the Respondent.

47. However, the Respondent's cross-appeal is found to be meritorious. It is allowed thus giving rise to the issuance of the following orders:

i) *The order apportioning 10% liability on the part of the Plaintiff/Respondent) herein, is set aside and is substituted with an order making the Defendant (appellant herein) wholly liable. Therefore, the award should not be subjected to 10% contribution.*

ii) *Costs of the suit is awarded to the Plaintiff (Respondent).*

iii) *The award given by the trial court to attract interest at court rates from the date of judgment of the trial court until full payment.*

iv) *Costs of the cross-appeal is awarded to the Respondent.*

Dated, signed and delivered at Nairobi this 3rd day of October, 2018.

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J K SERGON

JUDGE

In the presence of

..... *for the Appellant*

..... *for the Respondent*