



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 623 OF 2016

ANDREW MINJIRE RUORO.....APPELLANT

V E R S U S

JOSEPH CHEGE MAINA1ST RESPONDENT

KALEKYE CELESTINE LANGATT..... 2ND RESPONDENT

JOSEPH GATHERU MBOGO.....3RD RESPONDENT

(Being an appeal from the judgement of Hon. L. W. Kabaria, RM delivered on 23rd September 2016 in CMCC No. 5960 of 2014, Nairobi)

JUDGEMENT

1) Andrew Minjire Ruoro, the appellant herein, filed an action seeking for damages for the injuries he suffered on 10.8.2013 as a result of a road traffic accident against Joseph Chege Maina, Kalekye Celestine Langatt and Joseph Gatheru Mbogo, the 1st, 2nd and 3rd respondents respectively before the Chief Magistrate's Court, Milimani Commercial Court vide the plaint dated 14th April 2014.

2) The respondent filed a defence to deny the appellant's claim. on. L. W. Kabaria learned Resident Magistrate heard the case and in the end she proceeded to dismiss it for want of proof.

3) The appellant was dissatisfied with the dismissal order hence this appeal. The appellant put forward the following in his memorandum:

i. The learned magistrate erred by finding/holding that the appellant had not proved his injuries.

ii. The learned magistrate erred by failing to appreciate that the facts pleaded in the plaint had been admitted or were not in issue after entry of judgment on liability was recorded by consent and her duty was to assess damages only.

iii. The learned magistrate erred by failing to notice that the injuries were pleaded to have been sustained "on or about" 10.8.2013.

iv. The learned magistrate erred by failing to do substantive justice as enjoined to do by the Constitution of Kenya, 2010, and the Overriding Objectives.

v. The learned magistrate erred by making an award of Kshs.300,000/= which was too low or was not a fair estimate of the damages.

vi. The learned magistrate failed to apply the correct legal principles and or reached erroneous conclusions of law or of fact(s).

vii. The learned magistrate erred by failing to make an award for special damages.

4) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions plus the authorities cited by both sides. The record shows that the parties to the suit appeared before the trial magistrate on 30.3.2016 and recorded a consent order on liability so that the appellant would shoulder 10% while the respondent would shoulder 90% liability.

5) The appellant (PW1) testified before the trial court and adopted his written witness statement. In his brief witness statement the appellant

averred that on 10.8.2013 he was on board motor vehicle registration no. KBJ 068E. He said that the aforesaid motor vehicle was negligently driven thus collided with motor vehicle registration no. KBD 602G whereof he sustained serious injuries.

6) PW1 averred that he went to Kenyatta National Hospital and produced documents to prove he was at the aforesaid hospital. In cross-examination, PW1 said that the accident occurred on 10.8.2013 and that he visited hospital the same day.

7) In cross-examination the appellant confirmed that the treatment notes from Kenyatta National Hospital PW1 was treated on 11.8.2013 while the accident occurred on 10.8.2014.

8) The learned Resident Magistrate formed the opinion that the injuries the appellant suffered were not sustained on the material because the delivery sheet and treatment notes were dated 11th and 12th August 2013.

9) It was pointed out that the appellant failed to explain himself over the conflicting dates at the hearing of the suit. It was further pointed out that there is no evidence that the appellant sustained injury on the date material. For this reason, the suit was dismissed.

10) The defendants in paragraph 4 of the defence denied the plaintiff's assertion that the accident occurred on 10.8.2018 and the assertion any occurrence was the sole mistake of the defendant.

11) I have on my part perused the police abstract dated 15.10.2013 and produced as exhibit in evidence. In the police abstract it is shown that the date of the accident is recorded to be 11.8.2013. In the medical report it is noted that the accident occurred on 11.8.2013. However, the demand letter indicates the date of the accident on 10.8.2013.

12) On appeal, the appellant argued that the learned trial magistrate erred when she failed to appreciate that the facts pleaded had been admitted and therefore were not in issue after entry of judgment on liability.

13) The respondent on the other hand is of the submission that the appellant had failed to discharge the burden of proof and that he did not sustain the injuries complained of as a result of the accident which occurred on 10.8.2013, therefore the trial court did not commit any error.

14) Having carefully considered the rival submission and having re- evaluated the evidence presented before the trial court, it is not in dispute that the parties to this appeal recorded a consent order on liability. They even went ahead to apportion liability as stated hereinabove. The pleadings had clearly indicated that the occurrence of the accident would be an issue to be determined at the trial.

15) In paragraph 4 of the plaint the appellant stated that the accident occurred on or about 10.8.2013. In paragraph 4 of the defence, the respondents denied the occurrence of the accident as pleaded in paragraph 4 of the plaint.

16) However, the parties appeared before the trial magistrate on 30.3.2016 and settled by consent the issue touching on liability.

17) It is apparent from the written submissions of the appellant filed in the trial court that it is clearly stated at outset that the issue touching on liability had been settled by consent.

18) With respect, I agree with the submissions of the appellant that it was not open to the learned Resident Magistrate to reopen the issue. If she felt that it was necessary for the issue to be interrogated then she should have invited all the parties to make submissions on it.

19) It is apparent from the judgement that the learned Resident Magistrate arrived at her decision by solely considering the written submissions of the respondents. Her determination prejudiced the appellant.

20) For the above reasons, I am convinced that the appeal as against the order on liability must succeed. Consequently, the order dismissing the suit is set aside and is substituted with an order entering judgment in terms of the consent order recorded on 30.3.2016.

21) The second main ground of appeal is that the award of ksh.300,000 is inordinately low. The appellant further complained that the trial court erred when it failed to make an award on special damages.

22) The appellant tendered evidence showing that he sustained a fracture of the left radius and a fracture of the left ulna. The trial magistrate awarded ksh.300,000/= as general damages. The trial magistrate further stated that the appellant had tendered receipts to prove special damages therefore she said she would award. However no specific figure was stated for special damages. She also ordered each party to meet its own costs.

23) The appellant urged this court to adjust upwards the figure of ksh.300,000 to ksh.450,000/=. This court was also urged to grant the appellant ksh.6,550/= as special damages.

24) The respondents are of the submission that the trial magistrate gave the correct assessment on general damages hence the award should not be disturbed.

25) I have considered the authorities supplied on similar injuries. In the case of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros =vs= Augustine Munyao Kioko (2006) eKLR** the plaintiff was awarded ksh.300,000/= for a fracture of both radius and ulna.

In the case of **Peris Mwikali Mutua =vs= Peter Munyao Kamata (2008) eKLR**, the plaintiff was awarded ksh.450,000/= for a fracture of

both radius and ulna.

26) The first decision was made in 2006 while the second decision was made in 2008. Both decisions were made more than 10 years ago. Doing the best I could, I think the proposal by the appellant is plausible. Consequently I find the award of ksh.300,000/= inordinately low. The same is set aside and is substituted with an award of ksh.450,000/=.

27) The record shows that the appellant tendered evidence proving ksh.6,550/= for special damages. The same is awarded.

28) The other issue which came up for arguments is the order on costs. The trial magistrate directed each party to bear its own costs. With respect, that is an erroneous decision. The appellant should have been awarded costs pursuant to the provisions of Section 27 of the Civil Procedure Act since costs follow the event. The appellant was a successful party therefore he is entitled to costs.

29) In the end, the appeal is allowed giving rise to the following

orders:

i. The order dismissing the suit is set aside and is substituted with an order entering judgment in favour of the appellant (plaintiff) as against the respondents (defendants).

ii. The appellant awarded as follows:

a) General damages ksh.450,000/=

b) Special damages ksh. 6,550/=

Gross total ksh.456,550/=

Less 10% contribution ksh. 45,655/=

Net total ksh.410,895/=

iii. Costs of the suit.

iv. Costs of the appeal.

v. Interest at court rates on (ii) (a) and (b) above from the date of judgement of the trial court until full payment.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents