



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 28 OF 2013

ALEX KIMEU.....1ST APPELLANT

CENTAUR INSURANCE BROKERS LTD.....2ND APPELLANT

V E R S U S

KAMWOLYO MUUKI MBUVI aka MBUUI.....1ST RESPONDENT

CAR & GENERAL KENYA LTD.....2ND RESPONDENT

(Being an appeal from the judgement of the Hon. Obulutsa (Mr) Senior Principal Magistrate delivered on 22nd January, 2013 in Milimani CMCC 2262 of 2011)

JUDGEMENT

1. The 1st respondent herein, filed an action against the appellants herein, in which she sought for compensation for the injuries she had sustained in a road traffic accident along Mombasa road. It is alleged that on 10.10.2010, the 1st respondent was lawfully crossing the road when the 1st appellant as the servant and or agent of the 2nd respondent recklessly rode and or controlled motor cycle registration no. KMCK 559H that it collided with the 1st respondent and as a result, she sustained serious injuries. The 1st respondent testified and summoned the evidence of two witnesses. The respondents did not present any evidence in support of their defences. In the end, Hon. C. O. Obulutsa, the learned Senior Principal Magistrate found the 1st appellant wholly to blame for the accident and eventually gave judgment in favour of the 1st respondent. Being aggrieved, the appellants preferred this appeal to impugn the aforesaid decision.

2. The appellants put forward the following grounds in their memorandum of appeal:

1. That the learned magistrate erred in law and fact by finding that the appellants were 100% liable for the accident while negligence against the appellants had not been properly established.

2. That the learned magistrate erred in law and fact by failing to find that the plaintiff has not established his case of a balance of probability.

3. THAT the learned magistrate erred in law and fact by failing to apportion liability between the parties herein despite enough evidence warranting the same.

4. THAT the learned magistrate erred in law and fact in failing to apply proper legal principles regarding negligence and thus arriving at a bad decision.

5. THAT the learned magistrate erred in law and fact by making an award on general damages which was manifestly excessive and inordinately high.

6. THAT the learned magistrate erred in law and fact by failing to take into account the appellants evidence and the submissions on liability and quantum given on behalf of the appellants while considering his judgment.

7. THAT the learned magistrate erred in law and fact in failing to apply proper legal principles regarding quantum and thus arriving at a bad decision.

8. THAT the learned magistrate erred in law and fact by awarding special damages in the absence of proof thereof.

9. THAT the learned magistrate erred in law and fact by disregarding the evidence of the appellant and considering extrinsic matters thereby basing his judgment on the same thus failing to judiciously exercise his discretion.

10. THAT the learned magistrate erred in law and fact in awarding costs to the plaintiff when demand and notice had been denied and not proved in evidence.

3. When the appeal came up for hearing, learned counsels appearing in this matter 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 taken into account the rival written submissions. Though the appellants put forward a total of 10 grounds, the issues raised revolve around the challenge on liability and quantum.

4. It is the submission of the appellants that the evidence presented by the 1st respondent's witnesses were contradictory. It is submitted that the evidence of the 1st respondent shows that she was not standing at the Kerb but was standing in the middle of the road of which the motor cycle clearly had a right of way. The appellant pointed out that these set of facts contradicted the 1st respondent's assertion that she was hit while standing on the kerb. It is the further submission of the appellants that the 1st respondent was clearly crossing at an undesignated crossing point therefore the element of contributory negligence should have been considered. The 1st respondent urged this court to dismiss the appeal since the appellant did not adduce evidence to persuade the court to apportion liability. Having considered the divergent arguments and having re-evaluated the evidence presented before the trial court, I have come to the conclusion that the trial court's decision on liability cannot be faulted. The 1st respondent presented credible evidence which proved on a balance of probabilities that the appellants were wholly to blame for the accident. The contradictions pointed out in the evidence are normal in cases where many witnesses come forward to testify like in this appeal. The appellants chose not to summon witnesses to controvert the evidence tendered by the 1st respondent. Therefore the appeal as against liability is without merit.

5. On quantum, the learned Senior Principal Magistrate awarded ksh.1,028,020 as general damages. The appellants are of the view that the aforesaid figure is high and excessive in the circumstances of this case. The appellants are of the opinion that a sum of ksh.250,000/= was sufficient.

6. There is no dispute that the 1st respondent sustained the following injuries:

- i. Open compound fractures of the right tibia and fibula
- ii. Head injury leading to unconsciousness and
- iii. Loss of two upper teeth

7. I have considered past decisions over cases of similar injuries and it is apparent that this court made awards ranging between ksh.700,000 and ksh.1,500,000/=. I find the award of ksh.1,028,020 awarded as general damages not high nor excessive. I think the award is reasonable. On special damage, I have

considered the documents presented by the 1st respondent and her witnesses and I am satisfied that the documents produced proved the amount pleaded on a balance of probabilities.

8. I have considered the submissions filed by the 2nd respondent and I agree with the 2nd respondent's argument that no submissions have been directed at the finding of the trial court's judgment as regards the judgment in respect of the 2nd respondent herein.

9. In the end and on the basis of the above reasons, this appeal is found to be without merit. It is dismissed in its entirety with costs to the respondents.

Dated, Signed and Delivered in open court this 31st day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent