



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 32 OF 2014

ALI SAID KOLO MWAREMA.....APPELLANT

VERSUS

CENTRAL ELECTRICAL INTERNATIONAL LTD.....RESPONDENT

J U D G M E N T

1. The appellant Ali Said Kolo Mwarema moved to the seat of justice in the Trial Court of Kenya at Mombasa and lodged his claim against the Respondent Central Electrical International Limited vide a plaint dated 18th day of October, 1999 and filed in Mombasa HCCC No. 121 of 1999.
2. The claim arose from a road accident involving the appellant and motor vehicle Registration No. KAG 552U belonging to the Respondent. The appellant was knocked down as he walked along the road. The appellant attributed the accident to the negligence of the Respondent, its agents and or servants, the particulars of which were set out in the plaint. It was averred that the appellant suffered injuries particularized as head injury concussion and Right hemiparesis, per-trochanteric Fracture (Right Hip) contusion chest (no fracture) and lastly contusion right knee (no fracture). The appellant further averred that he suffered loss and damage as a result of the aforesaid injuries, in consequence of which the appellant sought from the respondent both special and general damages, costs of the suit, interest and any other relief that the Honourable Court deemed fit to grant.
3. The respondent opposed the appellant's claim through a defence dated the 21st day of December 1999, in which the respondent denied responsibility for the accident. Instead, the respondent attributed the accident to the negligence of the appellant, which was particularized in the defence. The respondent therefore denied responsibility for any damages and prayed for the dismissal of the appellant's suit with costs.
4. On 16th day of February, 2004 a consent was entered into by advocates of both sides, for the transfer of the suit from the Trial Court at Mombasa to the Chief Magistrate's Court at Mombasa for hearing and final disposal. The suit was duly transferred and registered in the Chief Magistrate's Court at Mombasa as Civil Suit No. 1205 of 2004. The suit was heard parties were heard. In his judgment B.N. Olao Chief Magistrate (as he then was) dismissed the appellants (plaintiffs) claim with costs to the respondent (defendant).
5. At trial the plaintiff called three witness besides himself. PW 2 was a colleague at work who said he did not witness the accident as there was a depression nearby from where the vehicle came from. On cross examination however the witness said he saw the accident happen because he stood waiting to

CROSS.

6. The 3rd witness, PW 3, was the base commander traffic department who produced an abstract issued to the plaintiff, conceded that there was yet another police abstract. He was however not the investigating officer but said on the road, Ronald Ngala road, there is a depression towards Nyali direction and that the accident occurred after the depression.

7. The 4th witness was Dr. Adede who produced the medical report on the plaintiff and said that the plaintiff had sustained head injuries with the fracture of the femur, soft tissue injuries to the chest and right knee. He was in hospital for 1 ½ months was discharged on crutches which he used for two years thereafter when it was detected that the plates had been misplaced hence a surgery was conducted and the left leg was left shorter. To the doctor the Appellant need a corrective surgery for total hip replacement at lists 500,000 and would need physiotherapy with use of crutches all his life.

8. For the defendant the driver of the motor vehicle one ZARFEEM MEHJI gave evidence and said that while driving on Ronald Ngala road on the right hand side (the inner lane may be) on a dual carriage road, she saw a lorry emerge from a minor road. As she approached the lorry a person emerged from the front of the lorry running across the road and there occurred a sudden collision. She applied the brakes but it was too late, the person was hit and fell on the right side of car. She stopped, went back to the scene and people helped her put the injured in her car and he was taken to hospital where she paid all the hospital bills. Her position was that the accident was solely and wholly caused by the act of the Appellant. Suddenly dashing unto the road and without observing kerb drill.

9. In his reserved judgment the trial court, Boaz Olao, CM, (as then was) found the Appellant wholly to blame and said:-

“Yet, this driver was not only not charged with any traffic offence but was also not even served with a notice of intended prosecution [N.I.P.]. The explanation for this can only be that the driver’s explanation that she was doing about 50km/h when “someone just ran across the road in front of the lorry” must be the most reasonable explanation of what transpired on that day. But that is not all. INSPECTOR NGONI did produce the traffic file in respect of this incident i.e 1AR/38/99 as defence EXHIBIT 1. I have perused the file. Curiously the plaintiff’s statement, assuming he recorded any, is not in the file. All that there is are the statement of the driver, the P3 FORM, copies of the driver’s driving licence and covering report. The covering report has an important aspect to it in that after narrating the incident, the officer in charge of investigating the case has made the following pertinent findings:

“Otherwise, am of the opinion of shifting the whole blame to the pedestrian for carelessly crossing the road without taking proper precautions. Therefore, if it were not due to the carelessness of the victim, this accident could not have occurred.”

There is then a recommendation in the file that it be closed with

“no further police action to be taken”. It is obvious therefore that the statement of the driver that the plaintiff was the negligent party finds full support in the statement of the police officers who investigated this incident and who were obviously well placed to make conclusions after visiting the scene and recording the necessary statements and sketch plans which are in the said police file.

It is clear from all the material available before me that the

Plaintiff has not established his case against the defendant on a balance of probability as required. If anything, the evidence shows that the plaintiff was the negligent party. I would therefore dismiss plaintiff’s suit with costs to the defendant”

10. It is that decision which has elicited this appeal in which the appellant faults the court on some six

grounds in the Memorandum of Appeal dated 17/3/2014. Those grounds can be grouped into two broad grounds; Grounds 1-4 are on liability while ground 5 is on quantum of damages. Ground 6 is omnibus and runs through all the other grounds.

11. In determining the appeal, I will seek to answer two questions:

i) Was the Appellant wholly to blame for the accident/Did the Respondent contribute to the accident?

ii) Was the assessment of damages commensurate with the injuries pleaded and proved?

Causation of the accident

12. That an accident occurred on the fateful day and place is not in dispute. The only dispute is who between the Appellant and the driver of the Respondents DW 1 caused it or caused it to what extent. That can only be resolved from the examination of the evidence led at trial.

13. Both sides agree that the accident occurred on the second lane (the inner lane) of the road. The plaintiff says he did not see the vehicle prior to the accident but the driver says the plaintiff suddenly and swiftly emerged from in front of a lorry which had itself emerged from a minor road onto the major road and was using the outer lane.

14. I am prepared to believe the account of the driver that as she drove, a lorry emerged from a minor road and entered the main road and took the nearside lane. She was able to see that lorry and while she was about one meter or so from behind the lorry the plaintiff emerged from in front of the lorry and onto the road and was hit falling on the offside and on pavement between the roads. This court takes judicial notice that a lorry would be 5-7 meters long. If it be taken as the witness said, that she saw the plaintiff while she was about one metre behind the lorry then the plaintiff must have been 6 – 8 metres away. That, to this court, was an ample distance for a vehicle doing the acceptable speed limit of 50kph, in a built up area, could be controlled to avoid a collision. The emergence of the plaintiff could not be said to have been all over sudden. It is in fact the prospects of such eventuality that the speed limit or built up area is kept at 50KPH.

15. The foregoing analysis is thus inconsistent with the Defendant's Witness' evidence that she was doing 50kph. It is either that she saw the plaintiff while she was a metre behind the lorry and hit him due to high speed or it is that she was not attentive and only saw the plaintiff when it was too close to take any manoeuvres. In either of the situations there was failure to do what a reasonable driver in the circumstance was expected to do. It was negligent.

16. It was however not the sole cause of the accident. The plaintiff on his side was also equally to blame. The existence of the depression notwithstanding, it was his duty to venture onto crossing the road only once he had observed the kerb drill and confirmed that it was safe to do so. His emergence across the road prior to ensuring it was safe to do so was not expected of a reasonable pedestrian. It was negligent.

17. In those circumstances, I hold the view that both the plaintiff and the driver were to blame in equal measure and this is a case demanding that each takes equal blame for the accident. I would disagree and interfere with the trial court's finding and hold that the Appellant was not 100% to blame but 50% while the driver of the motor vehicle was also to blame to the extent of 50%.

18. Still on the question of liability, the trial court in answer to the Respondents' submissions on a point of law that no liability could attach on the Respondent, vicariously, without the driver being sued, the court said:-

“There is however one legal issue on which the defendant's counsel addressed me and which I need to decide on although that will not change the position in this case. Plaintiff's counsel submitted that since the driver of the vehicle No. KAC 552 U was not sued and only the

defendant who is the owner of the vehicle was sued, then the defendant cannot be liable because the said driver is not a director of the defendant. In the course of her evidence in cross-examination, the driver (DW1) conceded that although she is not an employee of the defendant, her husband is a director of the defendant and she was “authorized to drive the vehicle”. Since the driver had the authority to drive the vehicle, an inference is drawn that she was driving it for the joint benefit of the owner (i.e. defendant and herself and in the absence of evidence to the contrary, the owner (defendant) would be responsible for the negligence of the driver and hence vicariously liable. That is the position in law – see **KARISA AND ANOR VS. SOLANKI AND ANOR [1969] E.A. 318** and also **KENYA BUS SERVICES LTD VS KAWIRA E.A.L. R. 2003 2 E.A. 519.**, Therefore should I have found the driver liable in negligence, on the material before me and on the basis of the decisions in the cases of **SOLANKI** and **KAWIRA (Supra)**, there would have been no reason not to find the defendant herein vicariously liable”.

19. In so saying the trial court fell into an error. It is a cardinal principle of law that a court of law should not deliver itself on the rights of a party not before it having been accorded the opportunity to defend himself. That is trite and a cardinal learning as a rule of natural justice. In this matter the suit against the Respondent was pleaded as follows:-

“The Plaintiff avers and maintains that the said accident occurred due to careless and negligent manner in which the Defendant, his authorized driver, employee and/or agent drove, managed and/or controlled the said motor vehicle registration number KAG 552U”.

20. On that pleading it was important that the driver says what he did or failed to do. I have found that she was called and gave evidence and therefore although not being party she was heard. It would be different had she not been called.

21. On quantum of damages, I find that the assessment of damages is a decision in exercise of discretion. An appellate court can only interfere where it is demonstrated that the trial court committed an error by considering irrelevant factor or failing to consider relevant facts and in coming up with an award that is totally incommensurate with the injuries suffered and leads to an injustice.

22. In this case, no such error has been disclosed and I find myself unable to interfere. Infact the appellant did not stress this ground. The upshot is that this appeal is allowed and the judgment of the trial court dismissing the suit on the basis that the Appellant was to blame 100% is substituted with a finding that the plaintiff was 50% to blame. The award remains as assessed by the trial court but subject to the apportionment of liability.

23. In effect there is entered judgment from the plaintiff in the sum of Kshs.1,000,000/= which when subjected for the contribution leaves a net of Kshs.500,000/=. I award to the Appellant ½ costs of the trial court as well as costs of this appeal.

24. It is so ordered.

Dated and delivered at **Mombasa** this **17th** day of **March 2017**.

P.J.O. OTIENO

JUDGE

In the presence of:-

Mr. Nyongesa for Mr. Gikandi for Appellant

Mr. Mwakisha for Mr. Gishora for the Respondent

Hon. Justice P.J.O. Otieno J

17/3/2017