



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 293 OF 2013

FELIX GITHAEAPPELLANT

V E R S U S

PETER MUHUHU MUNGAI.....RESPONDENT

(An appeal from the judgment and decree of the chief magistrate's court at Kiambu by the Hon. J. W. Onchuru (Mr) Ag. PM dated 7th March 2013 in CMCC case no. 190 of 2011)

JUDGEMENT

1. Peter Muhuhu Mungai, the respondent herein, filed a suit before the Chief Magistrate's Court, Kiambu, against Felix Githae, the appellant herein, claiming for *inter alia*, both general and special damages for the injuries he claimed to have sustained when he was involved in a road traffic accident on 29th January 2011. The respondent stated that he was hit by motor vehicle registration no. KAN 830P as he walked along Kiambu-Banana road. The respondent blamed the appellant for the accident claiming he negligently drove, managed or controlled the aforesaid motor vehicle thus knocking him down. The appellant denied the respondent's claim. In his defence, he admitted that on the material day he drove motor vehicle registration no. KAN 830P Subaru Legacy on 29.1.2011 along Kiambu-Banana road. He claimed he saw ahead of him a man who was staggering or attempting to cross the road when he was hit by his motor vehicle's bumper and fell in front of the car. The appellant wholly blamed the respondent for the accident. The suit was heard and determined in favour of the respondent by hon. Onchuru, learned Ag. Principal magistrate. Being aggrieved, the appellant preferred this appeal.

2. On appeal, the appellant put forward the following grounds in his memorandum:

1. The learned magistrate misdirected himself in treating the evidence and submissions on liability superficially and consequently arriving on the same by;

a. The learned magistrate erred in law and in fact in finding the appellant wholly liable against the weight of the evidence.

b. The learned magistrate erred in law and in fact by failing to apportion liability between the respondent and the appellant.

c. The learned magistrate erred in law and in fact by failing to take into consideration the contribution of the respondent towards the causing of the accident.

2. The learned trial magistrate grossly misdirected himself in treating the evidence on submissions on quantum before him superficially and consequently coming to a wrong

conclusion on the same by;

a. The trial magistrate misdirected himself by ignoring the principles applicable and to authorities which he relied on.

b. The learned trial magistrate proceeded on wrong principles, when assessing the damages to be awarded to ten respondent

c. The learned trial magistrate award was so manifestly excessive in the circumstances as amount to an erroneous estimate of the loss suffered by the respondent.

d. The learned magistrate erred in law and fact in holding that the special damages had been proved.

3. 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 submissions. I have re-evaluated the case that was before the trial court. I have further taken into account the rival written submissions. From the material placed before this court, two twin issues have commended themselves for the determination of this court. First, is the question as to who is liable for the accident. Secondly, what is the appropriate quantum of damages.

4. On the first issue touching on liability, learned counsels from both sides have each put forward strong arguments in support of their positions. It is the submission of the appellant that based on the evidence presented before the trial court, the respondent's suit ought to have been dismissed and the respondent should have instead been held wholly liable for the accident. The respondent on the other hand is of the view that the decision of the trial court on liability should not be disturbed. The respondent pointed out that the appellant had claimed in his evidence that he could not see the respondent was a clear admission that he was indeed careless and was not keeping a proper look out. It is appropriate at this juncture to examine how the trial magistrate analysed the evidence presented to him. The learned Ag Principle magistrate came to the conclusion that the respondent was not drunk contrary to the assertion made by the appellant that the respondent was staggering and was smelling of alcohol. He formed the opinion that had the respondent been drunk, the appellant would have recorded that allegation with the police when he reported the accident. The learned magistrate believed the evidence of the respondent and found the appellant wholly liable. I have critically examined the evidence tendered by both sides. It is the evidence of the respondent that on the fateful day he was walking along Kiambu-Banana road heading towards Kiambu direction. He said he was hit by a motor vehicle on the left side and was thrown into the ditch. He said he was walking on the edge of the road when he was hit. He denied the allegation that he was walking in the middle of the road. He also denied that he was crossing the road. He further denied being drunk since he does not take alcohol. The traffic police officer who was summoned to testify merely produced the police abstract form and also stated that the accident was pending investigation. In the police abstract form, it is indicted that the pedestrian was hit as he tried to cross the road. The appellant stated that the pedestrian was staggering or trying to cross the road. He also stated that the respondent did not fall into the ditch but instead fell in front of his car. The appellant further claimed that the pedestrian came into his view very suddenly and was trying to cross his path. The appellant stated that he told the police that the pedestrian was drunk but that was not recorded in abstract. The appellant claimed that he had two passengers in his motor vehicle but none of them recorded a statement with the police. In cross-examination and in re-examination the appellant admits he had not seen the respondent in advance.

5. It is clear from the evidence tendered by both sides that this case can only be decided by the evidence of the plaintiff (respondent) as against that of the defendant (appellant). Each of them gave evidence which appear on the face of it to be credible. What is not in dispute is that the respondent was hit while walking along Kiambu-Banana road. I agree with the opinion of the trial magistrate that there was no credible evidence to show that the respondent was drunk.

6. There is no clear evidence as to whether or not the respondent was crossing the road when he was hit. There was no investigation undertaken by the police hence the contents in the police abstract which stated

that the pedestrian was hit when he attempted to cross the road is without any basis. I have already stated that there we are dealing with competing evidence of the protagonists. We do not have the benefit of the evidence of any independent evidence to assess the veracity of such evidence. It is possible the pedestrian was crossing the road when he was hit. If that was true, then it behoves upon the motorist to be very vigilant. In fact the evidence of the appellant shows that he was abit of a rush to the extent that he did not notice the respondent's present along the road. In my view, faced with such evidence liability should be apportioned equally. The learned principal magistrate therefore fell into error when he found the appellant wholly liable. I hereby allow the appeal as against liability. Consequently the order finding the appellant solely liable is set aside and is substituted with an order apportioning liability in the ratio of 50%: 50%.

7. On quantum, it is not disputed that the respondent suffered fractures on the tibia and fibula. He was awarded ksh.900,000 as general damages and ksh.9,610 as special damages. The appellant has complained that this award is excessive and erroneous. I have considered the authorities cited by both sides. In those cases this court awarded between ksh.250,000 and 500,000 as general damages for such like injuries. With respect, I agree with the appellant's submissions that the award on general damages in this case is exorbitant. Consequently, I allow the appeal on quantum by setting aside the award of ksh.900,000/= and substitute it with an award of Ksh.500,000/=.

8. In the end, the appeal is allowed as hereinabove proposed. For the avoidance of doubt the appeal is allowed as follows:

i. The order finding the appellant wholly liable is set aside and is substituted with an order apportioning liability in the ratio of 50:50.

ii. The award of ksh.900,000/= being general damages, is set aside and is substituted with an award of ksh.500,000/=

iii. The award in (ii) above is subjected to 50% contribution.

i.e. 500,000+9,610=509,610

less 50% contribution=254,805

Net = 245,805/=

iv. Costs of the suit and the appeal is awarded to the respondent based on the figures given on appeal.

Dated, Signed and Delivered in open court this 2nd day of December, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent