



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL APPEAL NO. 115 OF 2014.

MUMIAS SUGAR COMPANY LIMITED ::::::::::::::: APPELLANT.

VERSUS

JOYCE WERE NGALA)

JENNIFER ONYANGO OPIMBI) ::::::::::::::: RESPONDENT.

JUDGEMENT

INTRODUCTION

1. The appellant herein Mumias Sugar Company Limited was sued by the 1st respondent JOYCE WERE NGALA in a road traffic case at Butere being Civil Suit No. 213 of 2013. The trial court at Butere found that the appellant was 70% liable for the accident whereas the 2nd respondent 30% liable. It went ahead and awarded Ksh. 350,000/= General Damages and Ksh. 4,000/= Special damages.

The appeal.

2. Being dissatisfied with the judgment of the Senior Principal Magistrate in Butere Civil Suit No. 213 of 2013 delivered on the 18th September, 2014, the appellant appealed on the following grounds:-

- (1) The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same;*
- (2) The learned trial magistrate misdirected himself in ignoring the written submissions presented and filed by the appellant in their entirety;*
- (3) The learned trial magistrate erred in not taking into account the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant;*
- (4) The learned trial magistrate erred in failing to hold that the respondent failed to prove negligence on the part of the appellant while the onus of proof lay with the respondent;*
- (5) The analysis of the evidence as per the judgment is extremely wanting in material respects;*
- (6) The learned trial magistrate misapprehended the evidence on record to a material degree resulting in his arriving at a wrong conclusion;*

(7) *The learned trial magistrate failed to apply judicially and adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.*

The appellant prays that the appeal be allowed with costs.

Submissions.

3. The appeal herein was canvassed by way of written submissions exchanged between the parties. In their submissions the appellant through L.G. MENEZES & CO. ADVOCATES submitted that the respondent did not prove its claim against them on a balance of probability but the trial magistrate found them 100% liable for the injuries of the 1st respondent without stating any degree to be shared thereof with the 2nd respondent and further awarded costs.

4. On liability the appellants have challenged the evidence given by the 1st respondent during trial on how the accident actually occurred. They have also raised issue with the fact that the 2nd respondent did not testify and interlocutory judgment was entered against him. They have also maintained that their witness who was the driver of the impugned motor vehicle (DW1) gave a true picture of what occurred on the day of the accident. Since he was behind the motor cycle and clearly saw the respondents and how they rode the motor cycle. They claim that it was an error on the magistrate's part who did not explain how he arrived at his apportionment.

5. On quantum they submit that this court should vary the award that was issued erroneously by the magistrate's court. The 1st respondent through the firm of Kweyu & Co. Advocates have opined that this appeal lacks merit, is baseless and an abuse of the due process of the court and should therefore be dismissed.

6. On liability they maintain that the 1st respondent established that the appellant was vicariously liable for the occurrence of the accident and that a liability of 100% was in order. They explain that the 1st respondent explained how the accident occurred and produced a Police Abstract & P3 form to prove her position. They add that the appellant through DW1 also confirmed that the accident did occur.

7. It is also submitted that ownership of the impugned motor vehicle was proved by the police abstract (PEX. 3) and copy of records from the registrar of motor vehicles (P. Exh. 4). The 1st respondents opines that the trial courts judgment properly expressed and explained the relation between all parties.

8. The 1st respondent has relied on the Court of Appeal case at **Kisumu CACA No. 333 of 2003 IBRAHIM WANDERA VS. P.N. MASHIRU LTD** on proof of ownership of a motor vehicle where the court stated:-

“..... that a police abstract report showing ownership of a motor vehicle if not challenged is sufficient evidence.”

They want this court to uphold the trial courts finding on ownership.

9. The 1st respondent also submits that though they sued the appellant and the 2nd respondent jointly and severally, the evidence adduced during trial established that the driver of the impugned motor vehicle KAZ 095G Peugeot Saloon belonging to the appellant was solely and wholly (100%) to blame for the accident. It is also submitted that the injuries the 1st respondent suffered were as a result of the said accident. They have overruled the evidence by DW1 by the appellants that the motor cycle made a u-turn abruptly thus was to blame for the accident.

10. On quantum the 1st respondent submits that the injuries she sustained were severe as shown in the medical evidence adduced which include PEXh. 1, PEXh. 2 and PEXh. 5 (a) and maintain that the award of Kshs. 700,000/= on general damages and Ksh. 4,000/= on special damages were sufficient.

11. The duty of the first appellate court was well explained in the case of **ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES VS. JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR** as follows:-

“On a first appeal from the High Court, the Court of Appeal should re-consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

The issues for determination.

12. From the submissions on record which this court has taken its time to study together with the authorities relied on the following are the three issues this court will determine as it evaluates the evidence:-

(1) *Whether there was an accident on 17th October, 2011 at Shikunga Area;*

(2) *Whether the appellant was wholly liable for the said accident;*

(3) *Whether this court can interfere with the award given by the trial court.*

13. In answer to the first issue, it is evident that there was an accident on the 17th October, 2011 at Shikunga Area. The accident involved motor vehicle registration No. KAZ 095G Peugeot 406 Saloon and a motor cycle registration No. KMCR 592 R TVS Star. The respondent was a pillion rider on motor cycle KMCR 592 R TVS Star. The documents produced to prove that the accident occurred included the Police Abstract [PEXh. 3], a P3 form [PEXh. 2]. The accident was also confirmed by both the testimonies of the appellant and the respondent. It came out from the evidence that the motor cycle was hit from behind by motor vehicle Reg. No. KAZ 095 G and the 1st respondent was injured as a result.

14. The learned trial magistrate in his judgment relied on the evidence given to him by the witness to come to the conclusion that it was as a result of the accident that the 1st respondent was injured. It is therefore clear that grounds 1 and 2 of the memorandum of appeal cannot stand. The trial court wholly relied on the evidence presented to it and the submissions by the parties to come up with its judgment. There is no other way he would have treated the evidence given to him as the appellant would have wanted him to. It is because of the strength of the evidence that the learned trial magistrate made his findings.

15. On the second issue on liability; the evidence presented to the trial magistrate was by PW1 and DW1. Both these witnesses were on the ground when the accident occurred. They gave their testimonies according to what they witnessed. Ownership of the motor vehicle was proved by way of a copy of records from the registrar of motor vehicles. The record properly showed that the owner of motor vehicle registration No. KAZ 095G was the appellant. This was confirmed by DW1 JOSEPH CHRISTOPHER BARASA who was at the time the driver of that motor vehicle.

16. There was also the police abstract which was produced and which showed that the said motor vehicle belonged to the appellant. It is therefore not in doubt that the said motor vehicle KZA 095G belonged to the appellant.

17. From the testimony by PW1, she blamed the driver of motor vehicle KAZ 095 G for the accident. According to PW1 the said motor vehicle which was behind them was moving at a high speed and thus the driver was unable to control it. It hit their motor cycle from behind and she was injured from the impact.

18. DW1 who was the driver of the saloon car also testified that the saloon car knocked the motor cycle

from behind. The argument raised by the appellant that the motor cycle made an abrupt u-turn ahead of the saloon car cannot stand. This is because the driver of the motor cycle and the 1st respondent could have sustained injuries or fractures on the left side of their bodies. The injuries sustained in this case were on the right side of the 1st respondent's body, it remains therefore that the appellant's motor vehicle hit the motor cycle from behind. In apportioning liability the trial court opines that it found it difficult to believe the appellant's version of the accident about the abrupt u-turn. In his judgment the trial court stated that:-

“..... if the appellant had kept the prescribed distance he would not have hit the motor cyclist and the plaintiff.”

19. To the mind of the trial court the appellant failed to keep its distance which failure occasioned the accident. I find that the trial court took into account the evidence presented before it in totality and weighed both the accounts of how the accident occurred and who was to blame. The trial court found that it was the appellant who was to blame for the accident. The trial court also found that the 2nd respondent was partly to blame for the accident. Liability was apportioned between the appellant and the 2nd respondent in the ratio of 70% to 30%. From the above discussion grounds 4 and 5 of the appeal fails.

20. Lastly, on the issue of quantum the trial court did not rely on the cases cited by the 1st respondent. He found the proposal by the 1st respondent to be on the higher side and the cases relied on were of more serious injuries with resultant incapacitation. He also compared the proposal by the appellant and was of the opinion that the same was inordinately low and the authorities cited had no relevance. For this court to interfere with the trial courts finding on quantum it has to be satisfied that the principles guiding it are followed.

21. In **DENSHIRE MUTETI WAMBUA VS. KENYA POWER & LIGHTING CO. CA. 60 OF 2004** citing the case of **KENFRO AFRICA LTD. VS. A.B. LOBIA & ANOTHER [1982-1988] KRA 777 Kneller J.A.** observed:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former Court of Appeal Eastern African to be that it must be satisfied that:-

(a) The judge in assessing the damages took into account an irrelevant factor or;

(b) Left out of account a relevant one or (3) that short of this the amount is inordinately low or so inordinately high that it must be an erroneous estimate of the damages.”

22. In this particular case I find that the trial court in assessing the quantum of damages did so judiciously as required by law. The court did not consider irrelevant factors or left out a relevant one. The amount awarded was within the scope and/or range of awards given where such soft tissue injuries have been proved.

23. There is therefore no reason to interfere with the award as issued by the trial court. The upshot is that the appeal fails and the same is dismissed with costs to the 1st respondent.

SIGNED, DATED and DELIVERED at KAKAMEGA this 1ST day of DECEMBER, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

.....**Oduol** **for the Appellant.**

.....**Kweyu****or the Respondent.**

.....**Lilian****Court Assistant.**