



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 59 OF 2007

MICHAEL MUIMIKIMANZI.....APPELLANT

VERSUS

1. JAMSONS INDUSTRIES LIMITED

2. PRATIN KAPURCHANOSHAH.....RESPONDENT

(An Appeal arising from the judgment of D. Toigat (Mrs.) R.M. delivered on 19th December 2006 in Milimani CMCC no. 3714 of 2004)

JUDGMENT

The claim by the Appellant against the Respondent for Damages in respect to injuries he suffered in a road traffic accident that occurred on 21st August 2003 was dismissed by the Trial Court. The Appellant being aggrieved by that decision appealed.

In a plaint dated 8th April 2004, the Plaintiff averred that on 21st August 2003, while lawfully and carefully pushing a handcart along Masari Road-Nairobi he was knocked down by motor vehicle registration KAA 444M belonging to the 1st Respondent and driven by the 2nd Respondent. The Plaintiff suffered injuries which included commuted multiple fractures of the right mandible and a sprain injury to his right shoulder. He blamed the accident on the negligence of the 2nd Respondent, the 1st Respondent being vicariously liable.

In response, the Respondents filed a Statement of Defence on 24th June 2004. The Respondents denied almost everything; The ownership of motor vehicle KAP 444M, that the accident occurred and that if it did, that the 2nd Respondent was to blame, or that the Appellant was injured. In addition, the Respondents blamed the Appellant wholly or partly for the accident. Particulars of the Appellant's negligence were listed.

The Appellant told the Trial Court that on the day of the accident, he was pulling a hand cart which he used to supply milk from 1st Parklands Avenue towards Masari Road on his way to Highridge when he was knocked down from behind. That he could tell that the Respondents' motor-vehicle was speeding from the impact of the accident. That he became unconscious and found himself in Avenue hospital. He was discharged and taken to Kenyatta National Hospital on 23rd August 2003 which he attended for three months as his jaw had been wired. That as a result of the accident he suffered a broken right lower jaw and the right shoulder had a sprain. That he was on the left side of the road when he was hit and thus

blamed the 1st Respondent wholly for his injuries.

The Respondent did not lead or call any evidence at the trial.

In the judgment, that is the subject matter of this Appeal, the Trial Court found that the Appellant had failed to prove his case on a balance of probability. On quantum the Learned Magistrate did not give her opinion on what she would have awarded had the claim been sufficiently proved.

The Appeal assails the said judgment on the following grounds -

- i. **The learned Trial Magistrate erred in law and fact by not appreciating that the standard of proof in civil cases is on the balance of probability**
- ii. **The Learned Trial Magistrate erred in law and fact in considering extraneous matters and/or evidence in total disregard of the reliable and humble evidence on record in support of the Appellant's case**
- iii. **The Learned Trial Magistrate erred in law and fact in not assessing quantum of damages even after dismissing the appellant's case.**

This Court has given regard to all the evidence tendered in support of the claim. The evidence by the Appellant was that he was knocked by a vehicle as he pushed his handcart on the left side of the road. He did not see the vehicle as he was hit from behind. There is no other evidence on how the accident occurred.

The only evidence on liability is that of the Appellant himself. The Respondents chose not to lead any evidence. The learned Magistrate in her Judgment insisted that the Appellant's exhibits 4, 5 and 6 contradicted his pleadings as on the date of the accident the Appellant was supposedly taken to Avenue Hospital and then transferred to Kenyatta Hospital after spending a day and night in Avenue hospital. However, the X-Rays and medical report produced indicated that they were taken and prepared on 21st August 2003 the same day of the accident. The evidence does not prejudice the appellant's pleadings reason being that it is clear from the medical report (P. exhibit 1) and the PW1's testimony (Dr. Wokabi) that he relied on a number of documents in order to come up with his report. These documents included the discharge summary from Avenue hospital, X-Ray Films and the Radiologist report on the X-Rays.

The report produced by PW1 confirmed all the injuries. Even if it were to be taken that the accident occurred on 21st August, 2003 at around 10.30 p.m. to 12.00 midnight as was stated in the pleadings and in his testimony, there is no way he could have been examined before then. It is noteworthy that the Abstract and p3 form produced indicate that the accident occurred on 21st August, 2003. The date on P. Exhibit 4 was possibly a mistake that occurred during its preparation. Furthermore the Respondents did not rebut his allegations by evidence as they did not lead or call any evidence.

In **Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) HCCC No. 68 of 2007(unreported)**, it was held -

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

In the same vein, the failure to adduce any evidence means that the evidence adduced by the Appellant against them is uncontroverted.

On whether failure to assess damages was fatal, Aganyanya J. (as he then was) in **Suleiman Hamed Adow v. Kamulat Supplies Ltd (2002) eKLR** stated as follows -

“...I do not think it is an error of law for a Magistrate or any court to fail to assess damages even if it dismisses a running down case. I would call this a guideline by the court of appeal to minimize assessment work in the event of the success of the appeal and could be a ground for an order for review. It does not come within the ambit of the grounds stipulated in Order XLIV of the Civil Procedure Code.”

On quantum the Appellant had prayed for 600,000/= as General Damages. This would have been an appropriate award given that the Appellant’s Counsel had drawn the attention of the Trial Court to the Decision in **Franke Ray vs Paul M. Kahara & others, Mombasa HCCC No. 579 of 1989** where the High Court awarded General Damages of ksh.540,000/= for fracture of the mandible and severe facial disfigurement. The injuries in this case were slightly more grave but considering the incidence of inflation over the years Kshs. 600,000/- is adequate compensation for pain and suffering of the Appellant. Special damages of Kshs. 2,000/- was pleaded and strictly proved.

In the end this appeal succeeds. The judgment of the lower court is hereby set aside in its entirety. In place thereof, there shall be judgment for the appellant as set out hereinabove. The appellant shall also have the costs of the suit both in the lower court and this appeal.

Dated, signed and delivered at Nairobi this 9th day of July, 2015

A.MBOGHOLI MSAGHA

JUDGE