



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO 98 OF 2008

SHREEJI ENTERPRISES (K) LIMITED.....APPELLANT

VERSUS

JOHN KYEENE WAMBUA.....1ST RESPONDENT

ELIZABETH KALUKI MUSEMBI.....2ND RESPONDENT

(An Appeal arising out of the judgment of S.A. Okato SRM delivered on 15th May 2008

in Machakos Chief Magistrate's Court Civil Case No. 239 of 2007)

JUDGMENT

The Appellant was the 1st Defendant in Civil Case No. 239 of 2007 at Machakos Chief Magistrate's Court, while the 1st Respondent was the original Plaintiff and the 2nd Respondent the 2nd Defendant in the said suit. The Appellant has appealed against the judgment of the learned trial Magistrate in the said suit, which was delivered on 15th May 2008. The learned magistrate found the Appellant to be 100% liable for an accident that occurred on 29th January 2006. The trial magistrate awarded the 1st Respondent total damages of Kshs 613,604/=, being Kshs. 600,000/= as general damages for pain and suffering and Kshs. 13,604/= for special damages.

The Appellant subsequently moved this Court through a Memorandum of Appeal dated 29th May 2008, wherein its grounds of appeal are as follows:

1. That the learned magistrate erred in law and in fact by holding the 1st defendant was 100% liable for the accident which occurred on 29th January 2006 and being the subject matter of the suit.
2. That the learned magistrate erred in law and in fact in failing to take into consideration the interlocutory judgment entered against the 2nd defendant thereby arriving at a wrong conclusion.
3. That the learned magistrate erred in law and in fact by failing to consider the evidence adduced by the witnesses and submissions filed by the 1st defendant on liability thereby arriving at a wrong conclusion.
4. That the learned magistrate erred in law and in fact by proceeding to dismiss the suit against the 2nd defendant while the interlocutory judgment entered on 14th May 2007 as against the 2nd

defendant was in force and the 2nd defendant did not lead any evidence to rebut the evidence by the 1st defendant thereby arriving at a wrong conclusion.

5. That the learned magistrate erred in law and in fact by holding that the 1st defendant was 100% vicariously liable as owner of motor vehicle registration number KAT 980W contrary to the evidence adduced and thereby reaching a wrong conclusion.

6. That the learned magistrate erred in law and in fact in failing to apportion liability as between the 1st and 2nd defendants contrary to the evidence before court.

7. That the learned magistrate erred in law and in fact in assessing general damages at Kshs. 600,000/= which amount is excessive and inordinately higher than awards granted in similar cases previously by this court and are contrary to the pleadings filed.

8. That the learned magistrate in law and in fact acted on a wrong principal of law.

9. That the learned magistrate mis-appreciated the evidence before him and reached a wrong conclusion of law.

10. That the learned magistrate erred in law and in fact by awarding costs of the suit to the plaintiff as against the 1st defendant only.

The Appellant is praying for orders that the appeal be allowed with costs, and that the learned magistrate's judgment, decision and decree be set aside and quashed and be substituted by this Court's orders. Further, that this Court adjudicates and determines the issue of liability and quantum and arrives at a just judgment in light of the evidence on record, and that the costs of this appeal and proceedings be provided for.

The Facts and Evidence

I will proceed with a summary of the facts and evidence that was given in the trial Court. The brief facts of the case are that the 1st Respondent instituted a suit in the lower court by filling a plaint dated 20th March 2007. He stated therein that the Appellant was the registered owner of motor vehicle registration number KAT 980W while the 2nd Respondent was the registered owner of motor vehicle registration number KAL 016M, and that on 29th January 2006, he was lawfully travelling in motor vehicle registration number KAL 016M in the course of his employment along the Mombasa – Nairobi road when at Kambu area the two motor vehicles collided.

The 1st Respondent contended that the said collision was occasioned by the negligence of the drivers of the two motor vehicles, and as a result he sustained severe injuries. He provided the particulars of negligence by the drivers of the two motor vehicles in his plaint, and relied on the doctrine of *res ipsa loquitur*.

The particulars of the injuries the 1st Respondent stated he suffered were as follows:

- a. Head injury with loss of consciousness for several hours.
- b. A deep cut on the forehead with a large skin flap measuring 10 cm.
- c. A deep cut on the right temporal side along the hair line approximately 5 cm long.
- d. Fracture of right side clavicle.
- e. Fracture of right humerus with displacement.

f. A cut on the left wrist joint; and

g. A deep cut on the right thigh.

The 1st Respondent initially sought special damages of Ksh 2,700/= for medical related expenses and the police abstract. He also sought general damages for pain, suffering and loss of amenities, and costs of the suit.

The Appellant filed a Defence in the trial Court dated 17th April 2007, wherein it denied ownership of motor vehicle registration number KAT 980W and that an accident occurred on 29th January 2006, or that its driver, servant and/or agent was negligent as alleged. Further, to the foregoing the Appellant denied that the 1st Respondent was a passenger in motor vehicle registration number KAL 016M on the material date as alleged.

In the alternative, the Appellant averred that if at all an accident occurred on the material date as alleged, the same was wholly caused by and /or substantially contributed to by the negligence on the part of the 2nd Respondent, her driver, employee, servant and/or agent. The Appellant further denied the injuries and damages particularized in the 1st Respondent's Complaint, and sought indemnity and/or contribution from the 2nd Respondent.

It appears from the record of the trial court that judgment was entered for Kshs 2,700/= against the 2nd Respondent on 14th May 2007 upon default of appearance. Three witnesses testified on behalf of the 1st Respondent during the hearing in the trial Court. The 1st Respondent was PW1 and his testimony was on the occurrence of the accident and the injuries he suffered. He testified that at about 5.00- 6.00pm on 29th January 2006 he was travelling in motor vehicle registration number KAL 016M, and had reached Kambu township on the Mombasa- Nairobi highway.

Further, that the driver stopped at a junction so that they could cross when he heard a loud bang from the rear and lost consciousness. He stated that he was admitted at Makindu Hospital and transferred to Machakos General Hospital where he was admitted for 7 days, and attended Kathiani sub-district hospital as an outpatient. He produced his treatment notes as exhibit P1, the P3 form as exhibit P2, the doctors' reports as exhibits P3 and P4. He also produced searches of the ownership of the motor vehicles KAL 016M and KAT 980W and the receipts of expenses he incurred as exhibits.

PW2 was Joel Nzomo Maingi, and he testified that on 29th January 2006 as about 5.00-6.00pm he was at the Kambu junction selling charcoal. He stated that he saw a lorry overtaking another lorry that was going to Mombasa, and that the lorry being overtaken left the road and hit a pickup that had stopped at the junction and was off the tarmac. He stated that the lorry that veered off the road was registered as KAT 980W and the pick-up was registered as KAL 016M.

PW3 was P.C Joseph Kitonga who was based at Mtito Andei traffic base, and he informed the trial court that the investigating officer of the accident that occurred on 29th January 2006 involving motor vehicle KAT 980W and KAL 016M had been transferred to Nairobi. He produced the abstract of the police file as an exhibit. He testified that no one was charged with causing the accident, and that the charge of causing death by dangerous driving was to have been preferred against the driver of the pick-up, but who died as a result of the accident.

The 1st Respondent at the hearing amended his pleadings to claim Kshs 13,804/= as special damages, and in his submissions sought an award of Kshs 780,000/= as a fair and reasonable compensation. He relied on the decisions in **Kibet Chelangat & Another vs Plan International, Nakuru H.C.C. No. 261 of 1984** where the court awarded Kshs 840,000/= for injuries sustained by the Plaintiff of multiple cuts to the hands, legs, face and head; a severe head injury resulting in epilepsy; fracture of the right femur and shock. He also relied on the decision in **Stephen Kihara Gikonyo vs Peter Kirimi Kingori & Another, Nakuru H.C.C.C NO 109 of 2002** where the Plaintiff sustained head injuries, injuries to the right foot

and dislocation of the right hip and was awarded Kshs 800,000/= as general damages.

The Appellant on its part called Benedict Ndolo Makau, a turnboy in its employment as the only Defence witness (DW1). DW1 testified that on 29th January 2006 he was in a lorry registration number KAT 980W travelling to Mombasa, and that as they reached the Kambu junction there was a lorry parked off the tarmac and the driver of their lorry veered to the right to avoid hitting it. Further, that a pick-up then emerged in front of the parked lorry and was hit by their lorry on the right lane on the tarmac. He also testified that the pick-up was trying to cross the road when it was hit by their lorry.

The Appellant in its submissions in the trial court proposed that Kshs 270,000/- as general damages was reasonable and fair, and that the special damages sought should fail as the receipts produced by the 1st Respondent did not conform to the Stamp Duty Act as they did not have the requisite revenue stamps.

The Appellant relied on the decisions in **James Musau Vimweli vs Bernard Ndegwa & Another, Machakos HCCC No. 133 of 1999** where the Plaintiff sustained injuries of a fracture of the right humerus, fracture of the collar bone and soft injuries to the hip, and was awarded Kshs 250,000/= as general damages. Reliance was also placed on the decision in **Loise Wangari vs Joseph Githinji Kaiu, Nairobi HCCC No. 765 of 1989** where the Plaintiff suffered fracture of the right humerus, loosening of 4 lower teeth and bruises to head, chest, knees and both legs, and general damages were assessed at Kshs 150,000/=.

The Issues and Determination

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are contesting the issues of liability and quantum of damages.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661**, **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**. The duty of this court as the first appellate court is therefore to examine and re-evaluate the evidence in, and findings of the trial Court, and to reach its own independent conclusion as to whether or not the findings of the trial Court as to liability and quantum of damages should stand.

The Appellants and Respondent canvassed the present appeal by way of written submissions. The Appellant in submissions dated 3rd April 2013 argued that from the plaint filed by the 1st Respondent, he attributed negligence to both the Appellant and 2nd Respondent, and the burden of proof was bestowed upon him to discharge in order for any liability to attach to either of the defendants in the trial court.

The Appellant submitted that on the testimony adduced in the trial court, the 1st Respondent never indicated that he held the Appellant responsible for the accident or confirmed the several particulars of negligence he had attributed to the Appellant in his plaint. Further, that he confirmed that the 2nd Respondent was the owner of motor vehicle registration number KAL 016M in which the 1st Respondent was travelling as a passenger. He also confirmed that the driver of motor vehicle KAT 980W was never charged, and that it is the pick-up driver who sustained fatal injuries hence the reason why nobody could be charged.

It was further submitted by the Appellant that it proved its case and discharged its burden as against the 2nd Respondent, and was able to demonstrate the particulars of negligence attributed to the 2nd Respondent in its defence by the evidence of DW1 and in its final submissions after the lower court hearing.

It was contended that the trial magistrate failed to take note of the conflicting evidence on liability adduced by the 1st Respondent's witnesses being PW1, PW2 and PW3. Further, that the learned magistrate never explained why he dismissed DW1's account and testimony and why he opted to believe

the 1st Respondent's account over the Appellant's. It was also submitted that the trial magistrate also erred in law by failing to consider the evidence adduced before it during the trial, and in particular the testimony of PW3 on cross examination and the contents of the police abstract, which clearly placed culpability on the 2nd Respondent. Further, that the proximate cause of the accident was the negligence and carelessness of the 2nd Respondent's driver as clearly testified by PW3 and DW1.

It was the Appellant's submission that the learned magistrate dismissed the suit against the 2nd Respondent without reviewing, setting aside or varying the interlocutory judgment already entered against the 2nd Respondent. Further, that the learned magistrate also failed to take into account the provisions of Order IXA Rule 6 of the Civil Procedure Rules Cap 21 (now repealed) with regard to interlocutory judgment where several defendants are sued. The Act as it then was, placed the burden upon the court to assess at the same time as the hearing of the suit against the other defendants the extent of each party's liability.

On the issue of quantum of damages, the Appellant submitted that the 1st Respondent in the primary suit produced two (2) medical reports, one by Dr. M.N. Kuria dated 13th December 2006 (exhibit P3) and the other by Dr. Modi M. Y dated 22nd July 2007 (exhibit P4). Further, that both doctors confirmed the several injuries sustained by the 1st Respondent, and that the said Respondent had made full recovery by the time of trial. Lastly, that no permanent disability was envisaged by the doctors.

The Appellant further submitted that given the nature of the injuries an award of Kshs. 270,000/= as general damages was reasonable, fair and sufficient compensation, taking into account the age of the judgments relied upon; the difference in severity of injuries; inflation trends; and the envisaged permanent disability. The Appellant also relied on the decision in **Kalenjin Auto Hardware Limited & Another –VS- Philip Wakaba, Eldoret C.A. No. 75 of 2003** where the plaintiff sustained head injuries, swollen and tender bruises, swollen face and chest, dislocation of the right shoulder and blunt trauma to the abdomen. The Court of Appeal upheld the lower court's award of Kshs. 220,000/= as general damages in the said decision.

The 1st Respondent on his part filed submissions dated 17th April 2013 in which he argued, on the issue of liability, that the trial magistrate carefully considered the evidence in its totality and found that the 2nd Respondent was not liable. Further, that PW1 was categorical that the driver of motor vehicle registration No. KAT 960W-ZB 9609 was to blame for the said accident and not the driver of motor vehicle registration No. KAL 016M. It was also submitted that no efforts were shown to court why the driver of No. KAT 960W could not be brought to the court, and that the Appellant's evidence was, therefore, un-corroborated and their witness untrustworthy.

The 1st Respondent submitted that although he blamed both motor vehicles, the evidence adduced before the court clearly showed that motor vehicle registration No. KAL 016M was parked off the road and motor vehicle registration No. KAT 960W-ZB 9606 veered off the road without proper look out and hit motor vehicle registration No. KAL 016M. It was his submission that the driver of motor vehicle registration No. KAT 960W-ZB 9609 was to blame entirely for the said accident, and that the trial magistrate did not err in finding that the Appellant was 100% liable for the accident and dismissing suit against the 2nd Respondent.

On the issue of quantum the 1st Respondent submitted that from the exhibits he produced in the trial court, it is clear that he sustained the following injuries:-

- i. Head injuries with loss of consciousness for several hours.
- ii. A deep cut on the forehead with large skin flap measuring 10 cm.
- iii. A deep cut on the right temporal side along the hair line approximately 5 cm long.

- iv. Fracture of right clavicle.
- v. Fracture of right humerus with displacement.
- vi. A cut on the left wrist joint.
- vii. A deep cut on the right thigh and small cut on the left leg.
- viii. Large bruise on the right pelvis.

Further, that Dr. Kuria was of the opinion that the 1st Respondent sustained life threatening injuries which left him with permanent weakness of the right arm, and that Dr. Modi's medical report confirmed the afore mentioned injuries.

The 1st Respondent referred to the principles on which an appellate court will interfere with the findings of a trial court's quantum as laid down in **Kenya Bus Service & Another –vs- Fredrick Mayende, [1991] 2 KAR 232**, and submitted that the sum of Kshs. 600,000/= awarded by the trial magistrate for pain, suffering and loss of amenities was not manifestly high in the circumstances, as the doctors had indicated that he had suffered life threatening injuries that have left him with permanent incapacitation.

The 1st Respondent relied on the decision in **Bethwell Mutai –vs- China Road and Bridge Corporation, eKLR [2008]**, wherein the plaintiff was awarded Kshs. 800,000/= for injuries of a fracture of the left clavicle, right humerus and right femur. On the award of special damages of Kshs. 13,604/=, the 1st Respondent submitted that the Appellant never called any evidence on the said special damages, and that this limb should be left undisturbed.

I have considered the evidence given in the trial Court and the arguments made by the parties. On the issue of liability, there is no dispute from the evidence on record that an accident occurred along the Nairobi-Mombasa Road at Kambu on 29th January 2006 involving motor vehicle registration KAT 980W and KAL 016M, that were being driven by the drivers of the Appellant and 2nd Respondent respectively. The contestation revolves around the question of which party was responsible for the accident.

There was conflicting testimony given in this regard. DW1 stated that the deceased driver of KAL 016M was culpable, as he was crossing the road at the time of the accident, and that the said accident occurred on the road. PW3 also stated that the said deceased driver was to be charged with causing death by dangerous driving. However, PW3 did not give any account of the investigations that led to this decision.

PW1 and PW2 on the other hand testified the motor vehicle KAL 016M was parked by the side of the road when it was hit by KAT 980W, which had veered off the road. The common thread in the account of the witnesses which is not disputed is that motor vehicle registration KAT 980W had veered off its lane when the accident occurred, and therefore there must be some negligence that is attributable to the driver of the said motor vehicle in this regard.

I also do not find PW3's evidence to be conclusive as to who was to blame for the accident as he was not at the scene at the time of the occurrence of the accident, and he did not produce any report and/or sketch plan giving details as to the point of impact, and the location of the two vehicles at the time of the accident. I hold that PW3's evidence is mere opinion to the court, which the court can accept or reject for stated reasons.

That having been said, I am alive to the fact that the 2nd Respondent failed to file any defence and reply to the Appellant's defence. It can therefore be concluded that the 2nd Respondent admitted the negligence attributed to her deceased driver and the particulars thereof, in terms of order VI rule 9(1) of the Civil Procedure Rules.

PW1 evidence was also contradictory to the extent that he testified as follows:

“We were along Mombasa-Nairobi Road. We were going to Muthingiini ssecondary school at about 5-6.00pm and when we reached Kambu township we proceeded and stopped at a junction so that we could cross”

It is therefore evident that the driver of motor vehicle KAL 016M was intending to cross the road, and this corroborates to some extent the evidence of DW1 to this effect.

The totality of the foregoing is that the evidence on record fails to pin down the Appellant for the accident on 100% basis as there was an element of negligence on the part of the driver of KAL 016M particularly in failing to keep a proper look out and to get out of the road. I therefore in the circumstances, hold both the Appellant and 2nd Respondent as owner of the motor vehicles KAT 980W and KAL 016M liable for the accident. I would apportion liability between the Appellant and 2nd Respondent at the ratio of 70:30.

In the premises I find that the learned trial magistrate’s did err in his finding on liability, by not apportioning liability to the 2nd Respondent in light of the interlocutory judgment entered against the said Respondent, and the testimony of witnesses at the trial that alluded to an element of culpability on the part of the 2nd Respondent’s driver.

On the issue of quantum of damages, it is an established principle of law that that the appellate court will only interfere where the trial court either took into account an irrelevant factor or left out a relevant factor, or that the award was too high or too low as to amount to an erroneous estimate, or that the assessment is not based on any evidence (see Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5).

It is not contested in this regard by the parties that the 1st Respondent suffered head injuries, multiple cuts on the head, wrist joint and thigh, and fractures of right side clavicle and the right humerus with displacement. These injuries were also confirmed by the medical reports produced as exhibits in the trial court by the 1st Respondent.

I have also perused the authorities relied upon by the parties in the lower court and in this appeal. The two cases cited by the 1st Respondent in the trial court namely Kibet Chelangat & Another vs Plan International, Nakuru H.C.C. No. 261 of 1984 where the court awarded Kshs 840,000/= as general damages, and Stephen Kihara Gikonyo vs Peter Kirimi Kingori & Another, Nakuru H.C.C.C N0 109 of 2002 where the Plaintiff was awarded Kshs 800,000/= as general damages, had elements of complications and incapacity arising from the injuries suffered by the Plaintiffs therein, which are not there in the present case. These were epilepsy and osteoporosis in the first case and a 35% permanent disability in the second case.

In Bethwell Mutai vs China Road and Bridge Corporation, eKLR [2008] the plaintiff was awarded Kshs. 800,000/= for injuries of a fracture of the left clavicle, right humerus and right femur. These injuries were slightly more serious than the ones that were suffered by the 1st Respondent.

Coming to the authorities relied upon by the Appellant, I note that the injuries were significantly less severe, particularly in Kalenjin Auto Hardware Limited & Another –VS- Philip Wakaba, Eldoret C.A. No. 75 of 2003 where the Plaintiff did not suffer any fractures and an award of Kshs 220,000/= as general damages was made in 2007. In James Musau Vimweli vs Bernard Ndegwa & Another, Machakos HCCC No. 133 of 1999 the Plaintiff therein suffered a fracture of right humerus and of the left collar bone in addition to facial lacerations and an abrasion on the left side of the lumbar region. An award of Kshs 250,000/- was made for general damages. I note that the injuries in that case were slightly less severe but more comparable to the ones suffered by the 1st Respondent. In addition, this award was made in 2002, some 5 years before the accident in this suit, and inflation must be taken into account.

In Loise Wangari vs Joseph Githinji Kaiu, Nairobi HCCC No. 765 of 1989 the injuries were also significantly less severe with only one fracture of the right humerus having been suffered by the Plaintiff,

and the award of Ksh 150,000/= was made in 1993.

I therefore find that the award of Kshs 600,000/= as general damages for pain and suffering awarded by the trial magistrate was reasonable, and was not too high or too low given the awards granted in the cases cited in the foregoing, which were for injuries that were either less or more severe than those suffered in the present appeal. In addition, the learned trial magistrate also did take into account the rate of inflation in his judgment.

Lastly, as regards the issue of the admissibility of the documents used by the 1st Respondent to prove his special damages, the Appellant ought to have raised the objection at the time of their production during trial, and it is too late to do so now.

I accordingly allow the Appellant's appeal of only to the extent of apportioning liability as between the Appellant and 2nd Respondent at the ratio of 70:30. The awards of Kshs 600,000/= as general damages and Kshs 13,604/= as special damages granted by the trial court is upheld. The Appellant shall meet 70 % of the 1st Respondents' costs of this appeal.

It is so ordered.

DATED AT MACHAKOS THIS 13TH DAY OF OCTOBER 2015.

P. NYAMWEYA

JUDGE