



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.101 OF 2014

DUN ONYANGO ODERAAPPELLANT

VERSUS

AINEAH AMAKUMBE MBUYIARESPONDENT

[Being An Appeal From Judgment Nd Decree From Kisumu Cm's Court: E. N. Obina- Srm

In Civil Case No. 544 Of 2012.]

J U D G M E N T

1. The respondent filed suit against this appellant claiming damages for a road traffic accident that occurred on 19.5.12 at 2.30 a.m. along Lwanda Siaya road at Siandumba Primary School.
2. In the accident the respondent was riding motorcycle reg. No.KMCA 327X while the appellant was driving motor vehicle reg. No.KBM 896M. The matter proceeded to a full trial where the trial court apportioned liability against the parties on 50:50 basis and awarded the respondent the sum of Kshs.1,255,108.50 as general damages and Kshs.10,217 as special damages. This then prompted the appeal herein.
3. The respondent apart from himself testifying called 2 other witnesses., The respondent told the court that on the material morning, he was from a funeral and was riding his motorcycle on the left side of the road. The vehicle came from the opposite side of the road and entered into his lane and hit him. He sustained the following injuries according to the report by one **DR. D.O. OLIMA:**
 - a. **Head injuries with loss of consciousness.**
 - b. **Lacerations left frontal region**
 - c. **Fracture middle1/3 rib of the left fermur;**
 - d. **fracture dislocation of the left elbow joint dislocated radial had with fracture proximal ulna;**
 - e. **Symphysis pubic separation cring separation with crenial dislocation of the left sacroiliac joint;**
 - f. **Cut wound of the left thigh and groins.**
4. According to the respondent the accident was caused by the appellant who drove carelessly at a high speed.
5. His witness **PW2 P.C. MAURICE KIBUI** from Lwanda Police station produced the police abstract in respect to the accident. On being cross-examined he said that he was not seized of the matter as he was not from the traffic department and therefore he could not tell the circumstances of the accident.

6. **PW3 CAREN ONYANGO** produced the Maseno Court's traffic register which showed that there was no traffic charges preferred against the respondent nor the appellant.

7. When put on his defence the appellant did not deny that the accident occurred. He however said that the same was caused by the respondent who drove at high speed and joined the road from a junction. He approached the road from the left side and all the efforts to warn him failed. The respondent according to the appellant hit the left side of his vehicle near the left bumper. He blamed him also for being drunk at that time as he smelled alcohol.

8. Those are the facts and the circumstance of the accident. The appellant being dissatisfied has filed the amended Memorandum of Appeal comprising 13 grounds which can be summarised as hereunder:

(1) Whether the trial court was right in apportioning liability at 50:50 basis against the parties.

(2) Whether the award of both special and general damages was reasonable viz a viz the injuries sustained by the respondent

(3) The issue of costs.

9. The parties have submitted at length in support and opposing the appeal. I have had the privilege of perusing the same together with the attached authorities. It is trite law that:

“The appellate court is not necessarily bound to accept or follow the trial court's findings on facts if it appears either the court failed to take into account particulars pertinent circumstances or if the impression based upon the demeanor of witnesses is consistent with the evidence adduced. “(SELLA & ANOTHER VRS ASSOCIATED MOTOR BOAT COMPANY LIMITED & OTHERS [1968] E.A. 123.”

10. The first issue therefore to determine is the question of liability. As to whether the accident occurred on the said early morning is not in dispute. The plaint clearly attributes negligence on the part of the defendant (appellant. Equally the respondent filed his defence denying the issue and attributing the accident on the appellant.

11. Against the two competing allegations who was to blame for the accident? I shall proceed to analyse the two competing evidence with full knowledge that there was no eye witness to the accident. This court is also alive to the provisions of Section 107 of the Evidence Act which states as follows:

107(1) “ Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

12. The respondent told the court that:

“I was on the left side of the road the vehicle came from the opposite direction.”

13. On cross-examination he said:

“I was on the left side facing Lwanda. The vehicle came from the opposite direction and into my lane.

I blame the driver.”

13. He did not produce his driving licence as he alleged that the same was lost.

15. The appellant on the other hand told the court that he was driving from Kisumu to Siaya at a speed of between 50km to 60km. He went on to say that:

“After passing Lwanda heading towards Siaya at the junction to a road heading to Ramula, on the left hand side a motor-cycle rider came from the junction and joined the road. It was abrupt. I was just about to pass the junction, I tried to warn him. I hooted flashed some lights. He did not heed the warning. He knocked me. He joined at very high speed. He proceeded to the left side moving in the opposite direction. He hit the left side of the motor vehicle partly on the left hand and left bumper and left side mirror.”

He further concluded that the respondent was drunk and rode carelessly. He did not have a reflective jacket.

16. PW 3 the police officer did not help things either. He only produced a police abstract but nothing else to show if there was a follow-up on the part of the traffic police although the matter was reported to them.

17. In light of the above observations, did the respondent prove negligence on the part of the appellant? I don't think so. In the absence of any 3rd eye or any corroboration its not easy to conclude that the appellant caused the accident

18. The trial court equally was unable to clearly pin point who caused the accident. The court went on to state:

“It is not clear whether it was right on the Lwanda-Siaya road or at Lwanda-Siaya-Ramula junction perhaps a few meters off the junction right at the junction. An accident occurred involving motor vehicle reg. No.KBM 896M and the plaintiff.

On liability, I hold the defendant 50% liable. I hold the plaintiff 50% liable.”

19. What then was the basis of apportioning liability. The moment the court doubted, the burden as clearly provided under Section 107 of the Evidence Act earlier quoted shifted to the evidence adduced by the respondent. It was incumbent upon the respondent to establish the allegation of negligence enumerated in the plaint. The appellant's job was to simply rebutt.

20. Nothing was easier for the respondent than to call the evidence in possession of the police traffic department including for instance the inspection if any done on both its motor-vehicle and the motorcycle. Was there any scene report by the said traffic police? Did they carry out any inspection of both the vehicle and the motorcycle?

21. In **SALLY KIBI & ANOTHER VRS FRANCIS OGARO [2012] e KLR** Justice **Ibrahim** (as he was then) stated as follows:

“This is a case of two cars colliding. What facts have been proved by the plaintiffs to presume negligence on the part of the defendant as against the other vehicle? Can I presume that the mere fact that the two cars being KAK 746J and KAG 231K collided, negligence was on the part of the defendant's case and not the other. The plaintiff must prove facts which give rise to what may be called. *Res Ipsa* liquotor situation. There cannot simply be an assumption in the case. If the accident was self involving then perhaps, such a presumption can be made as against the owner of the car.”

22. I wouldn't agree more . The fact that the motor-cycle and the motor-vehicle collided was not enough to form a basis that it was the appellant's vehicle that caused the accident. The respondent as earlier found, ought to have gone beyond simply assuming that it was the appellant who caused the accident. How would the court for example conclude that there was or was no junction at the scene? And even if there was a junction what was the particulars of the junction. This issue infact confused the trial court.

23. In the premises I do find that the respondent was unable to establish negligence on the part of the appellant. That doubt ought to have been in favour of the appellant.
24. On the question of damages awarded the court is indeed satisfied having perused the medical report that the respondent sustained the injuries. The only injury that was not proved was the loss of conjugal rights as the same was purely narrated and no other supporting medical evidence or otherwise was provided.
25. The question of damage is purely a discretion of the court and this court will only interfere with the same if it is manifestly high or low. The same ought to be commensurate to the injuries sustained.
26. I find that the trial magistrate in the circumstances such as this ought to have perhaps broken down the damages awarded into various sub-headings instead of simply plucking a figure from somewhere. Nonetheless I find that there was no proof by the appellant on loss of consortium future medical expenses and loss of earning capacity as submitted by the respondent. There was no medical proof of future medical expenses and neither did the respondent prove that as a consequence of the accident he lost his means of livelihood. In any event he did not establish what he was doing at the time of the accident.
27. On the injuries sustained and based on the authorities cited by the parties although some are apparently old, and taking into consideration the pain that the respondent must have undergone I find that a sum of Kshs.800,000 would have been sufficient in the circumstances. I would not disturb the findings on special damages as the receipt produced was not disputed by the appellant. I would have then set aside the award of Kshs.1,255,108.50 and substitute it with Kshs.800,000 together with special damages of kshs.10215.
28. On the last issue of costs, I do agree with the appellant that costs follow the event. However it is the court again exercising its unfettered discretion to determine how it awards. In this case having found that both parties shoulder liability equally, the court ought to have apportioned costs on equal basis. That is the respondent should have been awarded 50% costs.
29. In conclusion I do hold that the respondent was unable to prove negligence on the part of the appellant. In such tort cases, the issue of negligence is paramount. It is at the heart and centre of the case. The burden will always remain on the plaintiff (respondent) to establish after alleging. The defendant would in fact simply sit put and rebutt. As found above an accident must always be caused by either of the parties. This was not a self involving accident. The doctrine of *Res ipsa liquitor* ought to be established.
30. I think I have said much to show that the appeal ought to succeed. The lower court's judgment is hereby set aside together with all its attendant consequences. Each party shall bear their respective costs both in this appeal and at the lower court.

It is ordered.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF DECEMBER 2015

H. K. CHEMITEI

J U D G E

In the presence of

.....**for the appellant**

..... **for the respondent**