



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 156 OF 2009

ISSA FAUZ IDHIAPPELLANT

VERSUS

HAMISI HASSAN SIWA alias

HAMISI HASSANIRESPONDENT

JUDGMENT

This appeal arises from the Judgment of Hon. Ogembo in Senior Resident Magistrate Court No. 47 of 2008 Kwale wherein he made several determinations.

1. That the Defendant was solely liable for the accident
2. That a sum of Ksh. 300,000/= was sufficient to compensate the plaintiff in general damages.
3. That a sum of Ksh. 3, 100/= as special damages was proved.
4. Awarded Ksh. 8,000/= as Witness expenses.

The appellant was dissatisfied with the Judgment and filed this appeal on two main issues

- (a) Liability
- (b) Quantum

On the issue of liability. The magistrate in his Judgment dismissed the evidence of the driver and his turn boy who had testified that there was an oncoming matatu that prevented them from avoiding the accident.

He also did not find favour with the evidence of the two defence Witnesses whose evidence he found contradictory. It is the Appellants contention that the learned magistrate failed to evaluate the evidence relating to the accident by not appreciating the fact that it was not possible to capture the registration number of the oncoming vehicle in a situation where the driver was trying to avoid an imminent accident.

The Plaintiff/Respondent version of how the accident occurred is that he was standing on the left side of the road when the Appellant lost control of the vehicle and hit him while he was off the road. He also had stopped back to evade being hit by the vehicle.

The appellants version was that the Respondent was crossing the road. He saw him while he was at the middle of the road. There was an oncoming matatu from the other opposite direction. The Respondent

stopped back on the right side. The Respondent crossed to the Appellants lane to avoid hitting him he swerved to his right where there was an oncoming matatu this forced him to swerve back to his lane and that's when he hit the Respondent with the left side mirror.

It is common ground that at the place where the accident took place there was no zebra crossing marks.

There was also no bus stage. There was no evidence as to whether there was speed limit or not.

It is not indicated whether this was in a town centre or not .

A perusal of the police file shows that the Appellant was to be blamed on account of the speed at which he was driving the motor vehicle in question at the time.

There is no sketch plan in the police file. The point of impact was not ascertained.

The police did not prefer charges of careless driving against the Appellant. They did take statements of the Appellant, the Respondent and two witnesses and that was all.

Upon a careful analysis of the evidence on record. I am of the considered view that failure by the police to charge the appellant with careless or reckless driving speaks volumes.

It's inconceivable that the appellant swerved and hit the Respondent simply because he was at high speed.

The appellants version of what caused the accident seems plausible. The appellants allegation that there was an oncoming matatu that prevented him from avoiding the accident is plausible. The effect that the appellant did not take the registration number of the matatu does not necessarily mean that it did not exist. I do find that the Respondent did substantially contribute to the accident by not ensuring that it was safe to cross more so when there was no zebra crossing marks and there was no bus stage at the spot. It is also noted that had the appellant applied brakes at the time, no accident could have occurred. He did not apply brakes because he was at high speed.

I assess Respondents contributory negligence at 30% and that of the Appellant at 70%.

On the issue of quantum. I do not think the award of Ksh. 300,000/= for the injuries sustained by the Respondent to be inordinately excessive and I find no reason to interfere.

The appeal is allowed only to the extent of contributory negligence.

Judgment delivered dated and signed this **12th** day of **February, 2014**.

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M. MUYA

JUDGE

12TH FEBRUARY, 2014

In the presence of:-

Miss Muya for the appellants

Said for the Defendants (absent)

M. MUYA

JUDGE

Miss Muyaa: I apply for stay of execution for forty five (45) days.

Court: Stay granted for thirty (30) days.

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M. MUYA

JUDGE

12TH FEBRUARY, 2014