

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 131 OF 2008

KATHERI DAIRY CO-OP. SOCIETY 1ST APPELLANT

JOSEPHAT KUBAI IKIARA 2ND APPELLANT

-VERSUS-

M'MARETE M'GUATU RESPONDENT

J U D G M E N T

The appellants herein were the defendants in the lower court. The Respondent had through a plaint dated 14th December, 2005 sued the Appellants claiming special damages of Kshs.19,257/= and General damages arising out a road traffic accident. The trial court entered judgment in favour of the Respondent on liability at hundred per cent (100 percent) and special damages of Kshs.19,227/- with general damages of Kshs.500,000/-

The Appellants being aggrieved by the trial courts judgment preferred the appeal setting 7 grounds of appeal being as follows:-

1. The Learned Magistrate erred in law and fact by basing his award of General Damages on injuries that were not specific and which were different to those disclosed by the medical report, the P3 form and the plaint filed in court.
2. The Learned Magistrate erred in law and fact by awarding the Respondent General Damages that the excessive and incompatible with the injuries pleaded by the plaintiff and therefore the said award and General Damages is erroneous and oppressive.
3. The Learned Magistrate erred in laws and fact by failing and/or ignoring to analyse the evidence of PW3, the policeman, in the determination of the issue of liability.
4. The Learned Magistrate erred in law and fact by awarding the Respondent special damages of Kshs.16,057/- pleaded as hospital bills whereas no receipts were produced by the Respondent in evidence to support that figure.
5. The Learned Magistrate erred in law and in fact by failing to analyze and take into consideration the particulars of negligence attributed to the Respondent and if analyzed, the Respondent ought to have been found contributorily liable for the occurrence for the accident.
6. The Learned Magistrate erred in law by failing to find that the evidence of the Respondent and PW4 contradicted the pleading at paragraphs 4 and 5 of the plaint and therefore the Respondent's claim ought to have been dismissed on that ground.
7. The judgment of the Honourable subordinate court is against the evidence adduced before the court and the same cannot stand.

When the appeal came up for the hearing directions were given to the effect that the appeal be determined

by way for written submissions. The appellants counsel put in his written submissions on 22nd May, 2013 whereas the Respondent's counsel filed his submissions on 3rd December, 2012. The counsel highlighted on their submissions before me on 21st November, 2013.

I have carefully considered the pleadings, the proceedings, both written and oral submission by counsel and authorities relied upon as well as the grounds of appeal and shall deal with grounds of appeal submitted on and responded on as well as the other ground for which no submissions were made.

The appellant combined grounds of Appeal No. 1 and 2 and argued them together. The Appellants urged that the Respondent's exhibit PExh. 1, being Medical Report by Dr. Warui S. W. had disclosed different injuries that is basal skull fracture, fracture of cervical vertebra 4 and 5, cut wound on the scalp and blunt object injury on the left shoulder than the ones pleaded in the Respondent's plaint. The Appellants submitted the medical report by Dr. Warui was inconsistent with pleadings and exaggerated and as such the injuries did not warrant an award of Kshs.500,000/- which according to the Appellants is high and excessive in the circumstance.

The Respondent in his plaint under paragraph 5 gave particulars of injuries as chest injury, loss of hearing on the left ear, head injury concussion, cut wound on the face, hip injury, neck injury and tender swollen shoulder.

On perusal of P3 Form Exhibit PExh 6, out patient clinic card exhibit PExh. 3, and inpatient discharge card Exhibit PExh. 2 summary injuries sustained by the Respondent are well captured and are similar to the injuries in the plaint and that the medical report by Dr. Warui PW1. This should be noted in P3 form the injuries indicated in most of the time are not detailed as P3 Form is made before final examination of the patient and that detailed medical report that is made in the medical report. The medical report is usually detailed as it is made after all examination is done and after full treatment. Its purpose is to enable assessment of damages that can be awarded as opposed to P3 Form which is purely for assessment of the degree of injury to determine the nature of criminal charge to be preferred.

PW2, the Respondent in his evidence testified that he was hit from behind by the Appellants' lorry and lost consciousness. He testified that he was injured on the head, left hand, left shoulder, left side of the neck, chest and back. He produced medical notes. PW4 who was present confirmed that the Respondent sustained head injury and was bleeding from the nose, mouth and ears, that his hands and legs were bruised. I find that the only person who could give the clear nature of injuries and what extent is a professional persons.

In this case PW1 upon examination of the Respondent issued medical report exhibit P.Exh 1 detailing the injuries sustained by the Respondent. I have carefully examined the exhibits and considered the pleadings and do not find any inconsistency in the doctor's medical report with the pleadings nor are there any exaggeration as submitted by the appellants.

On the amount of Kshs.500,000/- the trial court considered each and every authority relied upon by the respective counsel before settling on a figure of Kshs.500,000/-. The awards in the authorities relied upon by the counsel ranged from Kshs.200,000/- to Kshs.Kshs.600,000/-. The authorities were over 10 years old. In this appeal the appellants referred me to the case of **JOHN MUTISYA NGILE V NTHAMBI PAUL MUTISYA (a minor suing through her father and next friend, PAUL MBITHI (206) eKLR** a decision by my brother Hon. Mr. Justice D. A. Onyancha in which he reduced the award since it was excessive. It is now settled that an appellate court can only interfere with an amount when:-

“It is so inordinately high or low to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low” See SHABANI V CITY COUNCIL OF NAIROBI AND ANOTHER C.A. 52 OF 1984 and;

I have considered the nature of injuries sustained in this case by the Respondent, the comparable awards

for similar injuries, the high rate of inflation, the cases submitted by counsel, the lapse of time since awards were awarded in cases relied upon by both counsel, and I am not persuaded that the Appellants have demonstrated that the award made in favour of the Respondent is inordinately high or represents an erroneous estimate or that the trial court acted on wrong principles or misapprehended the evidence in some material respect to warrant interference by this court with the award. I therefore find no merits in ground Nos. 1 and 2 and the same are dismissed.

The appellants combined number 3 and 5 and argued that the Respondent was contributory negligent for he admitted on cross-examination that he was crossing the road at the time of the accident and that PW3, a policeman testified that the investigation revealed that the plaintiff was hit while crossing the road abruptly. The appellants blamed the trial court submitting that the court erred in finding the Appellants wholly liable for the accident. They further submitted the evidence o PW3 was not analyzed.

PW2, M'Marete M'Guatu in his evidence testified that when he was hit by the Appellants' lorry he had already finished crossing the road. That he was 3 steps off the road. PW4 Josephat Murithi Marete, who was at the scene of the accident testified that the Respondent at the time of the accident had finished crossing the road and that he was hit 2 or 3 paces off the road. PW3 a police officer, who gave evidence was not the investing officer. He did not investigate the matter nor did he say he recorded any witness' statement. He did not in his evidence disclose the point of impact neither did he say whether it was on the road or off the road. The 2nd Appellant in his evidence testified that the Respondent was crossing the road and the Respondent went and hit his lorry's door on the right as he was running to cross the road. The trial court which heard the case and saw the witnesses did not believe the 2nd Respondent's evidence but the Respondent's and his witness's. I have very carefully re-evaluated and analyzed the evidence and I am inclined to find that the Respondent was hit after he had crossed the road as testified by PW4. PW3's evidence is hearsay and unacceptable. The trial court found that the injuries sustained by the Respondent could not have occurred in the manner the 2nd Appellant was claiming and found that the injuries sustained by the Respondent could only have been caused by being hit by a speeding vehicle but not by Respondent running and hitting vehicle's door.

In view of the aforesaid I find no merits in Appellants grounds of appeal No. 3 and 5 and the same are dismissed.

The Appellants in their ground of appeal No. 4 submitted that the Respondent pleaded Kshs.16,057 as special damages. That the receipts produced were not affixed with stamp duty stamps and that the trial magistrate erred by awarding the Respondent Kshs.16,057/-. That they prayed the specials awarded be set aside by virtue of the provisions of Section 19 of the Stamp Duty Act.

Section 19 of the Stamp Duty Act provides-

(1) Subject to the provisions of subsection (3) of this section and to the provisions of Sections “19 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except.....“

Section 5 of the Stamp Duty Act sets out instrument which are specified for the Stamp duty on the schedule. The said Section 5 provides:-

“5. Subject to the provisions of, and to the exemptions contained in, this Act and any other written law, even instrument specified in the schedule, wheresoever executed, which relates to property situated, or to any matter or thing done or to be done, in Kenya, shall be chargeable with the stamp duty specified in that Schedule.

Provided that the Government shall not charge stamp duty twice where a person moves a mortgage from one bank to another”

Further Section 6(3) of the Stamp duty Acts provides:-

“6(3) where in the Schedule or in any other written law it is specified that an instrument is to be stamped before execution, it shall be stamped before execution by any party thereto.”

I have very carefully gone through the schedule listing every instrument specified in the schedule for stamp duty purposes and have not found any evidence including the documents produced by the Respondent before the trial court.

The appellants did not satisfy the court that the documents produced required to have stamp duty affixed to them.

The above section notwithstanding the law requires in claims for special damages that it must be pleaded and specially proved. In the instant case the Respondent in his plaint pleaded specials of Kshs.19,227/- and the same was specially proved. The Appellants are not objecting to any of the receipts. They are not saying any of the receipts is not genuine but are merely relying on a technicality that the receipt lack stamp duty. The receipts in question were not prepared by the Respondent but by various authorities who received money from the Respondent. Exhibit P.Exh 7 B is a receipt for issuance of police Abstract for Kshs.200/- which was issued by OCPD – Meru Central, receipts exhibit P.Exhibit 5(a) issued by P.C.E.A. Chogoria hospital for Kshs.16,057/- and Exhibit P.Exh 1 b by doctor for Kshs.3,000/-. It was the duty of the issuer of the receipts if Stamp Duty was required to be affixed to do so but not the payee. The appellant did not nevertheless demonstrate the above receipts attracted stamp duty Under

Article 159 (2(d) of the Constitution it is provided:-

“Justice shall be administered without undue regard to procedural technicalities; and..... “

In view of the above I find it would be denying justice to a claimant who has acted innocently and incurred expenses to be denied part of special damages simply because the receiver of the money for services rendered has failed or neglected to comply with the provision of the Stamp Duty Act. Further I take this as a technicality which cannot be relied upon to do injustice to a party who has acted innocently and who is not to blame for the failure to act as required. There is no denial that the sum claimed were not incurred by the respondent but the appellants are merely averring that though the expenses were incurred the Respondent should not recover the amount for want of stamp duty. The exhibits were admitted before trial court without any objection and I find it too late in the day for the Appellants to raise the point on appeal having failed to do so at the trial. I find no merits in ground No. 4 of the appeal and the same is dismissed.

I have in dealing with other ground dealt with issues raised under ground Nos. 6 and 7 and I need not repeat the same. The grounds have been covered under ground Nos. 3 and 4 and the same have no merits and are accordingly dismissed.

In view of the foregoing and having considered all grounds of appeal I find that the same has no merits. The Appeal is dismissed with costs to the Respondent.

DATED AT MERU THIS 6TH DAY OF FEBRUARY, 2014

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:-

Mr. Muthomi for the appellants

Mr. Kaimenyi for the Respondent

J. A. Makau

JUDGE