REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 277 of 2004

MODERN SECURITY SYSTEMS & PRODUCTS ..... 1ST APPELLANT

JOSHUA ODERO MIGOYA ..... 2ND APPELLANT

AND

PAUL OTIENO ……..…… RESPONDENT

(Being an appeal from the judgment and decree of the SRM in

Migori SRMCC No.1219 of 1999 delivered on 28th September 2004)

JUDGMENT

1. The Respondent herein was the Plaintiff in Civil Suit No.1219 of 1999 in which he had sued the 1st and 2nd Appellants (the Defendants in the trial before the magistrate's court) by way of an amended plaint in which he prayed for judgment against the appellants jointly and severally for:-

(a) *General Damages for Injuries suffered.*

(b) *Special damages incurred.*

(c) *Costs of the suit.*

(d) *Interest on (a), (b) and (c) above at the present court rates.*

(e) *Any other relief deemed fit to be granted in the circumstances.*

2. The trial magistrate heard the suit in which the plaintiff averred that he was lawfully cycling together with two others when the 2nd appellant a servant of the 1st appellant so negligently and carelessly drove, managed and/or controlled motor vehicle Registration No.KAK 254 K causing it to knock them down thus causing him grievous harm. As a result of the said accident the respondent sustained injuries, namely contusion on the right parietal bone, haematoma on the left shoulder and cut wound on the right forearm. Hearing proceeded ex parte since the appellants, having been served failed to enter appearance but filed their defence within the prescribed period.

3. During the hearing, the respondent who was the only one to testify according to the proceedings produced documentary evidence being **P. Exhibits 1-4**. According to the trial magistrate, court noted that

the plaintiff had proved his case on a balance of probability as required and hence was entitled to the reliefs sought as hereunder:-

(a) *General damages for pain and suffering Kshs.70,000/=.*

(b) *Costs of the suit.*

4. Issue of liability was settled in the ratio of 80%:20% in favour of the respondent.

5. Being aggrieved with the above judgment the 1st appellant appealed against whole judgment on the 19th October 2004. Directions on the appeal were thereafter taken on the 15th day of March, 2011.

6. The main contention of the appeal appears in the grounds of appeal being:-

1. *The Learned Trial Magistrate erred in law and fact in finding the appellant 80% contributory negligent while the evidence on record clearly showed that the respondent was to blame wholly and/or substantially.*

2. *The Learned Trial Magistrate erred in law and fact in making an award of damages which were excessive and represents an erroneous estimate.*

3. *The Learned Trial Magistrate erred in law and fact in not finding that the respondent was the author of their own misfortune.*

4. *The Learned Trial Magistrate erred in law and fact in failing to evaluate and consider the evidence on record properly and thereby arrived at a wrong finding.*

5. *The Learned Magistrate's finding both on liability and quantum are against the weight of evidence on record.*

6. *The Learned Trial Magistrate erred in law in proceeding with the case contrary to the express provisions of Order **17 Rule 10** of the **Civil Procedure Rules**.*

7. The appellant thus prays that the appeal be allowed, the decree dated 28th September 2004 be set aside and an order dismissing the case with costs be made.

8. It will be noted that during the hearing of the suit the appellants never called any witness or evidence to challenge the respondent's case.

9. The respondent opposed the appeal by filing written submissions on the 12th day of April 2011. It is counsel's submissions that the lower court found it fair that the appellant bears 80% contributory negligence and that there was no evidence on record to show that the respondent was to blame wholly and/or substantially for the accident which resulted in his injuries the subject of this matter.

10. Counsel further submitted that an award of Kshs.80,000/= less 20% contributory negligence was fair and reasonable for the same was even supported by the relevant authorities cited in the primary suit.

11. It is respondent's counsel's submission that **Order 17 Rule 10** was complied with as this matter was not heard and concluded by one magistrate. They request that the appeal herein be dismissed with costs and the appellants be ordered to satisfy the lower court's decree with interest from the date judgment was delivered to date. That if the prayers herein are granted then the decree be paid by GIRO COMMERCIAL BANK LTD – KISII BRANCH who committed to pay in the event the appeal herein fails.

12. On the issue of liability the respondent gave evidence that on the 11th November 1999 at around 1.45 p.m., he was cycling together with two others along the road from Kiminga and on reaching Agip Petrol

Station, he was knocked down by motor vehicle Registration No.KAK 254 K a pick up belonging to the Appellants and he was injured. He explained the nature of his injuries and produced **Exhibits 1-4**. He further stated that he reported the accident at Migori police station where he was issued with a P3 form and the police abstract. He was examined by doctor Indagira who prepared the medical report and discharged him.

13. On cross-examination he reiterated that he was cycling with two others namely Tobias Makaga & Prantinus Omolo when the accident occurred. He maintained that they never lost control but he found himself down and that he sustained injuries on the hand, chest, mouth and lost a tooth. The fact that a tooth came out is not in the treatment notes nor are the knee injuries. He also reiterates that he was on the left hand side of the road.

14. The evidence as provided by the respondent was not challenged by the appellants as they chose not to call any witness.

15. On liability therefore the court is guided by the provisions of **Order VI Rule 9 (1)** of **Civil Procedure Rules** which makes provision that failure to controvert a pleading operates as an admission subject to the proof of the said claims to the required standards. The appellants by failing to call evidence make their pleadings/defence mere allegations on paper.

16. The required standards of proof in civil cases have been set by case law. In **BACHU –VS- WAINAINA [1982] KLR 108**, it was held inter alia that at the ex parte hearing the plaintiff was under a legal duty to prove his case against both appellants. The burden of formal proof is the same as that required in any civil cause.

17. In **KABUGI & ANOTHER –VS- KABIYA & 3 OTHERS [1987] KLR 347** , a Court of Appeal decision it was held inter alia that the burden on a plaintiff to prove his case remains the same throughout the proceedings even though the burden only becomes easier to discharge where the matter is not validly defended.

18. Applying these guidelines to the facts herein, it is my humble opinion that the lack of evidence by the appellants during the hearing of the case does not necessarily give the respondent a clean bill of success. He had to establish his claim against the appellant. On liability the respondent has to furnish proof of the appellants' link to the accident vehicle in terms of ownership and driving followed by establishment of blame worthiness in his favour. In this regard, I am required to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter. See **Selle & another –vs- Associated Motor Boat Company & others [1968] EA 123**. I have done so and also carefully considered and weighed the judgment of the trial court.

19. On ownership the respondent has not produced any evidence except a police abstract which lists the 2nd appellant as the driver. This to me is not good enough because there are records on ownership that can be availed on application to the Registrar of Motor Vehicles which the respondent never did.

20. On the causation of the accident, the respondent relies on the contents of the police abstract however this again is not conclusive evidence that the accident occurred. The respondent should at least have endeavoured to call one or the other persons he was cycling with when the accident occurred.

21. In the circumstances as above stated, I am not satisfied that the respondent proved his case on a balance of probability. There was therefore no basis for the finding on liability and consequently, since liability does not lie, damages could not be awarded.

22. The appeal is therefore allowed. The decree dated 28th September 2004 is set aside and in lieu therefore I make an order dismissing the respondent's case in the lower court with costs to the appellant. As for costs for this appeal, each party shall bear its own costs.

23. Lastly, the delay in delivering this judgment is very much regretted. At the time it was due, I was

engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

Dated and delivered at Kisii this 4th day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

M/s Owinoh & Co. (absent) for the Appellants

M/s Odingo & Co. (absent) for the Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.