



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Civil Appeal 303 of 1996

NJOROGE NGANGA

JOHN M. MALENGA
APPELLANTS

AND

THOMAS OLANDO AGOLA
RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu

(Wambilyangah J) dated 13th May, 1996

IN

H. C. C. C. NO. 102 OF 1992)

JUDGMENT OF THE COURT

THOMAS OLANDO OGOLA, the respondent in this appeal (hereinafter called “the plaintiff”) sued NJOROGE NGANGA and JOHN MALENGA (herein after called “the first defendant” and “the second defendant” respectively) to recover damages for personal injuries sustained by him, and for material damage to his motor vehicle KTK 676 arising out of an accident involving his vehicle and a lorry registration No. KAA 618B, owned by the second defendant, but at the material time being driven by the first defendant, as the servant and agent of the second defendant.

The accident happened on 16.4.91 at about 8 p. m. just outside Ahero township at a road block mounted by the police after Nyando bridge. The plaintiff had been in Kisumu and was returning to his home at Nyabondo in Nyakach. He was accompanied by his brother who was on the steering wheel. When the police stopped them the plaintiff’s brother pulled over and stopped on his correct side and activated the hazard light. It was then that the second defendant’s lorry, which was also travelling in the same direction, rammed into the plaintiff’s motor vehicle , which was stationary, injuring the plaintiff and causing material damage to his motor vehicle. The first defendant was charged with careless driving, convicted on his own plea of guilty, and fined Ksh. 800/- or ordered to serve one month in jail in default.

It was the plaintiff’s case that the accident was caused by negligence on the part of the first defendant. In a joint defence, the defendants denied the plaintiff’s claim and in turn contended that the

accident was caused solely or contributed to by negligence on the part of the plaintiff's driver and the police officers who stopped him at the road block. They alleged that the plaintiff's vehicle stopped in the middle of the road thereby blocking the first defendant's path.

Among the reliefs the plaintiff sought in his plaint, were Ksh. 78,650/- - special damages which included a sum of Kshs. 45,000/- for loss of income and general damages. According to the medical evidence tendered at the trial, the plaintiff suffered back injury (multiple laceration from upper back with involvement of spinal bones) and a sprain of the right knee. According to one of the doctors who examined him, although the injuries were not severe the post-traumatic effects were likely to hinder the plaintiff's performance in his profession as a teacher. Wambilyangah J held the first defendant fully responsible for the accident and awarded the plaintiff Kshs. 180,000/= for his injuries and a total of Kshs. 78,650/- as special damages. It is against that decision that the defendants have appealed to us.

The defendants' first complaint is that the learned judge erred in holding the first defendant was wholly to blame for the accident. This finding is fully justified on the evidence because the first defendant freely admitted that he did not see the plaintiff's vehicle before he rammed into it. There was also evidence that he was trying to overshoot the roadblock. The plaintiff's brother testified that when he was waved down by the police, he brought their vehicle to a stop on his correct side of the road, and not in the middle of the road as alleged by the defendants. There is no substance in this ground of appeal.

The second complaint is that the award of Kshs. 180,000/- for personal injuries is excessive. Taking into account the injuries, the long term effect envisaged by the plaintiffs' medical advisers and the fall in the value of money, we think the sum of Kshs.180,000/- was reasonable in the circumstances. This ground of appeal accordingly also fails.

The last ground of appeal relates to the sum of Kshs. 45,000/- for loss of earning in relation to which the learned judge said:-

"He is also entitled to recover the loss of earning for one and a half months when the vehicle was undergoing repairs. It was never demonstrated by the defence that the repairs could have been carried out within a lesser period and so the aspect of mitigation of damages does not arise here"

In his evidence in chief, the plaintiff had told the Judge:-

"I cannot remember for how long the vehicle was under repair but it was for one and a half months. When it was under repair I resorted to hiring. I have claimed Kshs. 45,000/- as loss of income. I was just estimating that the loss of income would be that."

When cross-examined by Mr. Siganga the plaintiff:-

"The vehicle was in the garage for 45 days. Now I agree that it was ready for collection within 7 days."

From this, it is plain beyond argument that there was no evidence to support the plaintiff's claim for Kshs. 45,000/- for loss of earning. It was pleaded but it was not proved as required by law. Mr. Ombija, for the plaintiff, quite properly, conceded that it was made in error. This ground of appeal accordingly succeeds. To this limited extent only this appeal succeeds and is allowed and the decree is amended accordingly. The defendants will have one third of their taxed costs of this appeal.

Dated and delivered at Kisumu this 19th day of June, 1997.

R. O KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR