



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Civil Appeal 183 of 1992

KENYA BUS SERVICE LIMITED.....APPELLANT

AND

JOSEPH K. AYORA.....RESPONDENT

(Appeal from the Judgment and decree of the High Court of Kenya at Eldoret (Mr Justice D.K.S. Aganyanya) dated 24th day of May 1991

in

H.C.C. SUIT NO R 91 OF 1989)

JUDGMENT OF THE COURT

This appeal arises out of a suit decided in the High Court of Kenya at Eldoret (Aganyanya, J) in which the respondent claimed damages for the injuries he sustained when he fell off a motor omnibus registration KWX 892 belonging to the appellant along Juja Road, Nairobi on July 1, 1986. The trial judge found in favour of the respondent and awarded him Shs 350,000/- general damages less 45% contributory negligence attributed to the respondent.

From this judgment the appellant, represented by Mr Billing, has appealed. The first ground of appeal is that the respondent’s evidence and that of his witness (PW2) is contrary to what is pleaded in the plaint and that the learned trial judge misdirected himself in failing to reconcile that contradictory evidence. The plaint averred that the respondent was thrown out of the moving bus through the rear door but both he and his witness (PW2) in evidence agreed that the respondent fell out through the front door. We observed from the record that the learned trial judge was quite alive in his judgment as to the apparent contradictions in the respondent’s case. He held that those contradictions did not go to the root of the case since he was satisfied that the accident nevertheless occurred as averred. The respondent’s inability to recall through which door he was flung out of the bus could have been due to the fact that he was rendered unconscious immediately after the accident and did not come to himself for several days afterwards. However, in our view, the issue of which door the respondent was thrown out was immaterial as far as the particular circumstances of this case are concerned and did not, in fact, affect the appellant’s negligence. With the evidence presented before him, we have no doubt that the learned judge was right in holding that the appellant was guilty of contributory negligence. The plaint as filed set out the facts which showed that the appellant acted negligently and was in breach of duty of care owed to the respondent.

In any case during the trial the respondent never raised a different or fresh case from the one grounded on the plaint. The appellant thus knew the care he had to meet and was not taken by surprise at the trial. However, it is worthy of note that the appellant offered no evidence at the trial. This ground of appeal accordingly fails.

Mr. Billing finally submitted that the learned trial judge's award is so manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the respondent and accordingly asked us to set it aside and reassess afresh the damages payable.

Dr Abira, who examined the respondent and compiled a medical report on him on April 21, 1989, observed that the respondent had frequent headaches, dizziness, diminished hearing in both ears and that epileptic fits had developed despite intensive treatment. In assessing the general damages the learned trial judge took into account the injuries suffered by the respondent as set out in the medical report and in the testimony of Dr Abira. Authorities of comparable injuries were cited by both counsel for the parties to the learned judge and he duly considered the awards made in those previous cases before making his own award. The appellant did not challenge the medical report presented to the court.

We have considered the evidence on record and the injuries sustained by the respondent. We are satisfied that on the material before the trial judge, the award he made was not so inordinately high as to represent an entirely erroneous estimate of the loss suffered by the respondent and neither was it shown that he proceeded on wrong principles or that he misapprehended the evidence in any material respect and so arrived at a figure which was inordinately high. The award was reasonable in the circumstances and the appeal must fail in respect of this ground as well. In the result this appeal fails and is dismissed with costs.

Dated and delivered at Nakuru this 30th day of September 1994.

J E GICHERU

JUDGE OF APPEAL

R O KWACH

JUDGE OF APPEAL

P K TUNOI

JUDGE OF APPEAL

I certify that this is a true copy of the original

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DEPUTY REGISTRAR