



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 303 OF 2013

BETWEEN

HARRISON WAFULA KHAMALA APPELLANT

AND

ISAAC NDARWA KIARIE RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Kitale (Karanja, J.) dated 2nd August, 2011

in

KITALE HCCC NO. 20 OF 2005

JUDGMENT OF THE COURT

1. This is a first appeal from the judgment of the High Court (**Karanja, J.**) arising from a road traffic accident that occurred on 7th March, 2002. The accident occurred along Kitale - Kiminini Road at a place known as Kiungami.
2. The accident involved three motor vehicles. The first one, registration number KAJ 298 K, a Toyota Corolla, was being driven by the respondent while the second one, registration number KWR 016, a lorry, was being driven by the appellant. The third motor vehicle, registration number KXR 965, a lorry, was owned by Holman Brothers (E.A) Ltd, who was a third party in the High Court proceedings.
3. Following the occurrence of the accident, the appellant was arraigned before the Senior Resident Magistrate's Court, Kitale, in **SRMCC (Traffic Case) No. 2607 of 2002** on a charge of causing death by dangerous driving. The appellant was acquitted of the said charge.
4. In the High Court matter, the respondent filed suit against the appellant, alleging that he was solely liable for the accident which caused him severe bodily injuries. The appellant on his part initiated Third Party proceedings against Holman Brothers (E.A) Ltd, claiming that it was the third party that was to blame for the occurrence of the accident. The third party filed a defence and denied liability but instead attributed negligence to the appellant and the respondent for the occurrence of the accident.

5. After a full trial, the High Court held that the appellant was fully liable for the occurrence of the accident and awarded the respondent general damage in the sum of **Kshs.1,500,000/=** and special damages of **Kshs.450,000/=** plus costs of the suit and interest thereon.

6. Being aggrieved by that decision, the appellant preferred an appeal to this Court. In the memorandum of appeal, the appellant faulted the learned trial judge for totally disregarding the judgment in the Traffic Case where it was held that the drivers of the three motor vehicles were to blame for the accident and holding that the appellant was wholly liable for the occurrence of the accident; and for relying on documents that had not been produced as exhibits but had merely been marked for identification in his assessment of special damages.

7. The appellant further faulted the learned judge for failing to apply the relevant principles of law regarding liability and assessment of general and special damages and for making awards that were excessive in the circumstances. He urged this Court to set aside or vary the trial court's judgment.

8. This being a first appeal, this Court is enjoined to reconsider the evidence that was tendered before the trial court, evaluate it and draw its own conclusions. This Court should, however, bear in mind that it has neither seen nor heard the witnesses and should therefore make due allowance in that respect. See **SELLE V ASSOCIATED MOTOR BOAT COMPANY [1968] E.A. 123.**

9. What are the circumstances that gave rise to the aforesaid accident? The respondent testified that on the material day and time, he was driving motor vehicle registration number KAT 298 K along Kitale/Kiminini road. At a place known as Kiungami, he saw the third party motor vehicle registration number KXR 965, that was stationary on the road on the opposite right side lane. As the respondent was about to bypass the stationary lorry, the appellant's lorry, registration number KWR 016, overtook the stationary lorry and swerved to respondent's lane. A collision between the appellant's and the respondent's vehicles occurred about 3 metres off the road.

10. The respondent blamed the appellant for overtaking the stationary lorry before slowing down to check whether there was an oncoming vehicle from the opposite direction and for failing to swerve to the off side of his lane.

11. The appellant on the other hand testified that on the material day and time he was driving his lorry registration number KWR 016. The third party motor vehicle overtook him but stopped after a short while. He swerved to the opposite lane as there was a culvert on the offside of his lane. He conceded that he had not seen the oncoming saloon car that was being driven by the respondent.

12. The appellant blamed both the respondent and the third party's motor vehicle driver for the occurrence of the accident. He alleged that the respondent was driving at a high speed while the third party's driver was negligent for suddenly stopping in front without any warning. He contended that the Traffic court did not find him solely liable but held that each of the three drivers were to blame for the occurrence of the accident.

13. In holding that the respondent was wholly liable for the occurrence of the accident, the learned trial judge stated:

“The plaintiff also indicated that he had already by-passed the third party's lorry when the defendant's lorry emerged suddenly in front of him thereby causing the collision. This implied that in his attempt to by-pass or overtake the third party's lorry, the defendant failed to keep safe distance and keep proper look-out for other road users. If the defendant was indeed driving at a speed of 40 KPH and had kept safe distance and proper look out for other road users, he would not have caused his lorry to collide with the plaintiff's vehicle, the presence of the third party's vehicle on the road notwithstanding.”

14. On appeal, **Prof. Sifuna**, learned counsel for the appellant, submitted that as regards liability, the learned trial judge disregarded the findings of the Traffic court that each of the three drivers

contributed to the occurrence of the accident. In his view, therefore, the trial court ought to have apportioned liability accordingly.

15. Responding to the appellant's counsel's submissions on liability, **Ms Munialo**, learned counsel for the respondent, submitted that the High Court was not bound by the findings of the learned magistrate in the Traffic case. That notwithstanding, the learned judge had taken into consideration the proceedings and the judgment in the Traffic case, but having done so, he was rightly persuaded that the appellant was solely responsible for the occurrence of the accident.

16. Ms Munialo added that the third party was neither served with the notice of appeal nor the record of appeal. In her view, that was contrary to the provisions of **rule 77 (1) of the Court of Appeal Rules** which states that:

“(1)An interested appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal ...”.

This being the case, liability cannot be apportioned against a person who is not a party to this appeal, counsel submitted.

17. As we have already stated, the respondent had suffered severe head injury, fracture of the right femur, fracture of the right radius. He testified that as a result of fractures to the right leg, some metal plates had to be implanted into his limbs and he now walks with a limp. Dr. Samuel Njenga who examined the respondent and prepared a medical report also testified. He stated, *inter alia*, that the respondent's use of the right arm was reduced by 25% and the right leg was shortened by about 2.5cm. The respondent was totally incapacitated for 100 days, out of which he was in a coma for one month. The degree of permanent incapacity was assessed at 25%. In addition, the respondent was predisposed to post traumatic epilepsy and arthritis of joints.

18. Regarding special damages, counsel submitted that although the respondent claimed a sum of Kshs.601,500/=, Kshs.600,000/= being on account of treatment expenses, Kshs.1,000/= for medical report and Kshs.500/= for police abstract report, the only amount proved was Kshs.53,705/=. He faulted the learned trial judge for relying on documents that had only been marked for identification to award a total of Kshs.450,000/= as special damages.

19. Ms Munialo submitted that the award of Kshs.1,500,000/= as general damages was reasonable, considering the nature of injuries sustained by the respondent. The respondent had suffered severe head injury, fracture of the right femur, fracture of the right radius and ulna and dislocation of the head of the right radius. As regards special damages, counsel conceded that part of the award of Kshs.450,000/= was premised on documents that had been merely marked for identification but had not been produced and admitted in evidence. She, however, argued that the doctor who had authored the receipts and other documents that had been marked for identification was not available to produce them. In any event, the said documents had been supplied to the appellant's counsel and no prejudice had been occasioned to the appellant by their admission into evidence. She urged the Court not to disturb the award.

20. We have carefully considered the record of appeal as well as submissions by counsel. We shall first deal with the issue of liability as between the appellant, the respondent and the third party who is not a party to this appeal. In the traffic case, the appellant was charged with causing death by dangerous driving. The appellant, the respondent, the third party, the police as well as other witnesses testified. The traffic court held that the prosecution had not proved the charge against the appellant beyond all reasonable doubt. The standard of proof in criminal cases is always higher than in civil cases.

21. The High Court, having considered all the evidence that was tendered before it as well as the evidence adduced before the traffic court, delivered itself thus:

“Consequently, it is the finding of this court that as between the plaintiff and the defendant, the defendant must be held wholly liable for the accident, and as between the defendant and

the third party, the defendant must again be held wholly liable for the accident. In the circumstances, the plaintiff would be entitled to both special and general damages against the defendant only.”

22. In the first ground of appeal, the appellant faulted the learned trial judge for failing to find that the third party contributed to the occurrence of the accident. That notwithstanding, the appellant did not serve a notice of appeal upon the third party as required under **rule 77 (1)** of this **Court’s Rules**.

23. If the appellant wanted this Court to make adverse findings against the third party in the High Court matter, nothing would have stopped him from serving him with a notice of appeal. The appellant decided to leave out the third party and served a notice of appeal upon the respondent only. In the circumstances, we cannot make adverse findings against a person who is not a party to this appeal, not having been afforded an opportunity to be heard.

24. As regards apportionment of liability between the appellant and the respondent, the appellant was driving behind the third party’s motor vehicle in the same direction. It was along a straight stretch of a road. The appellant said that he could see upto a distance of 100 metres ahead. He further alleged that he was doing a speed of about 40 kilometres per hour. If indeed that was so, even if the third party’s motor vehicle suddenly stopped, assuming he had kept a reasonable distance between him and that other lorry, he ought to have stopped at a short distance.

25. The appellant chose to swerve onto the opposite lane, the respondent’s lane, and the collision occurred at the extreme edge of the road. The respondent was on his proper lane and did the best he could to avoid the collision by swerving to his extreme left side.

26. Had the appellant swerved to his left, he would most likely have ended up in the culvert and avoided a head on collision with the respondent’s vehicle. We cannot therefore fault the learned judge for finding that the appellant was wholly liable for the accident. Consequently, we dismiss the appeal against the High Court’s findings on liability.

27. Regarding the appeal against the award of Kshs.1,500,000/= for general damages for pain suffering and loss of amenities, this Court has severally re-stated the principle in **BUTT V KHAN [1981] KLR 389** that:

“... An appellate court will not disturb an award of damages unless it is so inordinately high or low as 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”

28. On the issue of quantum of general and special damages, Prof. Sifuna submitted that the respondent should not have been awarded more than Kshs.100,000/= as general damages. He submitted that the award of Kshs.1,500,000/= was excessive.

29. Considering the kind of injuries that the respondent sustained and the residual effects thereof, we do not agree with the appellant’s counsel that the award of Kshs.1,500,000/= was excessive. We are therefore unable to disturb that award.

30. We now turn to the grounds of appeal challenging the award of Kshs.450,000/= on account of special damages. It is trite law that special damages must be strictly proved, see this Court’s decision in **DAVID BAGINE V MARTIN BUNDI [1997] eKLR**.

31. The appellant contended that only a sum of Kshs.53,705/= was proved. There were several receipts for various expenses that were referred to by the respondent in his examination in chief and were marked for identification but were never produced as intended. However, the trial court in its assessment of special damages treated the said documents as exhibits and included them in computation of special damages at Kshs.450,000/=.

32. This Court in **KENNETH NYAGA MWIGE V AUSTIN KIGUTA & 2 OTHERS [2015] e KLR** stated as follows:

“The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence of the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents, this is at the final hearing of the case. ... The marking of a document is only for purposes of identification and is not proof of the contents of the document.”

33. We respectively concur with the aforesaid rendition of the law. The learned judge was plainly in error in treating documents that had merely been marked for identification as if they were exhibits that had been duly produced and proved by the respondent. Consequently, we must therefore interfere with the award of special damages by accepting the sum of Kshs.53,705/= only which is the amount that was strictly proved as required by law.

34. The result thereof is that the award of **Kshs.450,000/=** for special damages is hereby set aside and substituted with an award of **Kshs.53,705/=**.

35. In conclusion, this appeal partially succeeds to the extent of the variation of the award on special damages as aforesaid. The appellant shall pay to the respondent general damages in the sum of Kshs.1,500,000/= plus special damages of Kshs.53,705/=. Interest on general damages shall accrue at court rates from the date of the High Court judgment until payment in full while on special damages interest shall accrue at court rates from the date of filing suit until payment in full. The appellant shall bear three quarters of the costs in both the High Court as well as the costs before this Court. It is so ordered.

DATED and delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.