



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appeal 148 of 2006

1. JOSEPH KOGI NGOTHO.....1ST APPELLANT

2. ESSO MOTORS LIMITED.....2ND APPELLANT

AND

1. SYLAVANO N. NYAGA.....1ST RESPONDENT

2. JEREMIAH J.M. NYAGA.....2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya

Nyeri, (Okwengu, J) dated 6th May 2005

in

H.C.C.C. NO. 95 OF 2002)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court of Kenya at Nyeri (Okwengu, J) on liability in negligence and damages arising from an accident on 18th July, 1999 along Kiganjo – Nyeri road.

2. The respondents in the appeal were the plaintiffs in the superior court while the appellants were the defendants. It was the respondents' case that the 2nd respondent is the owner of motor vehicle registration number KAC 308 U and that at the material time (at or about 9.30 pm) it was being driven by the 1st respondent who is one of his sons. As the 1st respondent drove past Kerichu, the road curved and there is a depression. He testified that at that time the road thereat was slippery as it had drizzled. He was driving at a speed of about 80kph. As he approached the curve he saw the lights of a motor vehicle which was approaching from the opposite direction. It was moving very fast and it appeared to be taking almost the whole road, including his side. He braked and swerved to his left but the approaching motor vehicle veered towards his side and hit his vehicle with its rear side. The 1st respondent sustained grave injuries rendering him unconscious for five days. He underwent two surgical operations followed by treatment both at home and in the United States of America.

3. Simon Kariuki (DW3) and Richard Ngoro (DW4) were the driver and turn-boy, respectively, of the canter motor vehicle registration number KAH 235B. They were travelling from Nairobi to Nanyuki carrying empty tomato crates. They admitted that the accident did occur at a corner around Kerichu road area, but, they blamed the 1st respondent for causing it alleging that he drove towards them on the wrong side of the road and at a high speed with full lights on.

4. It would appear, therefore, from the synopsis of the evidence on record that the accident did occur at night at about 9.30p.m along a corner; the road surface was wet and slippery and there were no yellow or white lines dividing the main road or defining the lanes for traffic.

5. The learned Judge held that the canter vehicle veered off onto the 1st respondent's side of the road as a result of the slippery road surface and also due to excessive speed at which the canter vehicle was being driven by the 1st appellant. However, she apportioned liability as between the two drivers at 80% to the 1st appellant and 20% to the 1st respondent.

6. The 1st respondent had suffered:-

§ A severe closed head injury resulting in unconsciousness for 5 days and contusion for 12 days.

§ A closed fracture of the right radius and ulna with dislocation of the elbow joint for which he underwent two operations.

§ Diffusely swollen brain with contusion of the cerebellum.

The 1st respondent was admitted in hospital for about 35 days. The injuries have resulted in post-traumatic epilepsy, poor memory, cognitive function, feeling of inadequacy, reduction of right upper limb function and chronic post-traumatic brain syndrome. He will require regular medication for the rest of his life. There is no doubt that he will need further operation to remove a plate in his right arm.

7. The learned Judge after a consideration of the awards made by the courts in comparable cases made the following awards:-

General Damages

1st respondent

Pain & Suffering Kshs. 2,000,000/-

Loss of future earning Kshs. 9,082,000/-

Future medical expenses Kshs. 1,132,000/-

2nd respondent

Damages

-Loss of use of motor vehicle Kshs. 54,000/-

Special damages

1st respondent Kshs. 1,223,704.50/-

8. The appellants have preferred seven grounds of appeal upon which the decision of the superior court is being challenged and all grounds were vigorously and persuasively argued on their behalf by the

Honourable Justice (Retired) Shah, Advocate.

9. The appellants are nevertheless, entitled to expect from us that we will, on a first appeal as this one, subject the evidence on record to fresh evaluation and reach our own conclusions thereon. In **Selle & Another vs Associated MotorBoat Company Ltd & Others [1968] EA 123**, the court held:-

“An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally....”

We reiterate that in the exercise of that jurisdiction however, we must as the first appellate court, bear in mind the caution given in **Peters Vs Sunday Post Ltd [1958] EA 424**, that is to say:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.....”

The court must also be mindful of the further caution, and allow for it, that the trial court had the advantage of hearing and seeing the witnesses and is generally a better judge of their demeanour.

10. The main issues in the appeal, as far as we are concerned, are two. First, who was responsible for the accident? And second, whether the award of damages made by the learned Judge was so inordinately high as to represent an entirely erroneous estimate of the same.

11. Admittedly, it is a difficult issue to determine whether the accident was substantially due to the 1st appellant’s negligence as the learned Judge found, or whether the 1st respondent was to blame wholly or in part. It is manifest from the record that there is only contradictory evidence of the two parties as to what could be said to be the actual cause of the accident. We note that it can be correctly taken that the 1st respondent’s recollection of the relevant events is hazy due, no doubt, to his severe injuries. Further, to complicate matters, there is no sketch plan or accurate measurements or any other evidence as to the exact position of the two motor vehicles after the accident.

12. The learned counsel for the appellants contends that in these circumstances the learned Judge completely misdirected herself in her findings and should have held both drivers equally to blame as there was no concrete evidence to distinguish between the blameworthiness or otherwise of each of the two drivers.

13. Mr Arimi Kimathi on the other hand avers that the learned Judge cannot be faulted in her findings as she had correctly considered all the evidence based on the demeanour and impression of the witnesses.

14. We have considered the submissions of both counsel and reconsidered the evidence on record afresh and evaluated it bearing in mind, with the necessary safeguard that an appeal to this Court from the superior court is by way of a retrial.

15. We think that there is every justification to conclude that both drivers are equally to blame. We say so because it was admitted by both drivers that the accident occurred along a bend. It was at night and drizzling and the road was slippery. In those circumstance, the speed of each motor vehicle could not be estimated. Both could either have been speeding or not.

16. Thus, on our full consideration of the entire evidence we are satisfied that there is no concrete evidence to distinguish between the blame worthiness or otherwise of each driver and the two drivers should therefore be held equally to blame. We shall apportion negligence on 50%:50% basis for each driver. In reaching this decision we have been guided by the principles of law laid down by the

predecessor of this Court in **Lakhamshi v Attorney General [1971] EA 118.**

17. The consequence of our holding is that the learned Judge's finding on negligence seems not to have been based on the entire evidence tendered before the trial court but on misapprehension of that evidence. We are indeed satisfied that on the question of law and fact she was wrong and so this Court is under duty to interfere with her decision on the aspect of apportionment of liability between the parties. We do so.

18. The appellants complain that the quantum of damages; both special and general, were so inordinately high as to represent an entirely erroneous estimate and that the learned Judge had acted on wrong principle.

19. The 1st respondent was about 40 years old at the time of the accident. He was a successful businessman. As a result of the accident he suffered a permanent incapacity of 70% which has occasioned him much loss and damage. His business empire collapsed and he had to shift residence from the exclusive upmarket areas of Nairobi to the estates. The learned Judge in assessing damages adopted a multiplier of 15 years and awarded loss of future earnings at Kshs. 90,000/- per month, together with special damages and future medical expenses.

20. During their submissions both counsel furnished us with awards made by courts in comparable cases. We have carefully considered them. However, taking into account the considerable decline in the value of money since the awards were made and the fact that money cannot restore the 1st respondent to his previous health status, we think that it is not fair and just in the circumstances to interfere with them. We decline to disturb the awards.

21. This appeal partly succeeds and accordingly, we set aside the decision of the superior court so far as it only relates to liability. We re-assess liability on negligence on 50%:50% basis between the 1st appellant and the 1st respondent and thus all the awards shall be reduced by 50%.

22. The total awards so made shall bear interest at court rates. The appellants are awarded half the costs of this appeal.

Dated and delivered at Nairobi this 12th day of October 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR