REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NUMBER 15 OF 2015

CHARLES NDIRANGU MURIITHI.....APPELLANT

-VERSUS-

PAUL OGOMA ONG'AYO.....RESPONDENT

(An appeal from the judgment and decree in Nyeri Chief Magistrates' Court Civil Case No. 78 of 2013(Hon. S.N. Nguni (SRM) on 23 April 2015)

JUDGMENT

On 3 August 2014 the appellant's vehicle registered as KBC 877L (Mitsubishi Canter) rammed into a public service vehicle registration No. KBD 226J (Toyota matatu) in which the respondent was travelling as a fare paying passenger; the accident occurred on Nyeri-Nyahururu road. As a result of the accident, the respondent sustained bodily injuries and in particular, a cut in the anterior lower third of the right lower limb and blunt injuries on his left knee, the back and the right shoulder. The respondent attributed the accident to the negligence of either the appellant or his driver in controlling or managing motor vehicle registration No. KBC 877 L; he thus sued the appellant for both special and general damages.

In his statement of defence, the appellant denied that he was the owner of the vehicle KBC 877 L or that he was the driver, or it was being driven by his driver at the time of the alleged accident; he also denied the occurrence of the accident and, in any event, he denied the respondent's claim in toto.

In the alternative, he contended that if any accident occurred, the same was wholly contributed to or substantially caused by the negligence of the respondent and the driver of motor vehicle registration number KBD 226J.

At the conclusion of the trial, the learned magistrate found the appellant to have been solely responsible for the accident; on quantum of damages, she awarded the respondent Kshs 130,000.00 as general damages and special damages of Kshs. 3,500.00.

In this appeal, the appellant is appealing against the decision of the trial court and in the memorandum of appeal dated 21 May 2015, that decision has been impugned on the grounds that; the learned magistrate erred both in law and in fact when she held that the respondent had proved his case against the appellant; that she also erred both in law and in fact when she held that the appellant was solely responsible for the respondent's claim; that she erred in failing to consider and adopt the written submissions of the appellant; that she erred in considering irrelevant matters; that the award was excessive in the circumstances; and, that the learned magistrate erred both in law and in fact in failing to find that the respondent's pleadings and evidence were incapable of sustaining any award of damages.

The record shows that both the appellant and the respondent testified at the trial; the respondent, who introduced himself as a police officer then attached to Ichuga police base was travelling as a passenger in motor vehicle registration No. KBD 266 J when motor vehicle registration No. KBC 877 L suddenly emerged from what I understand to be a feeder road and hit the former vehicle on the driver's side and in the process pushing it off the road; as a result of the impact, he was injured. He produced the medical treatment notes showing that he was attended to at two different hospitals in Butere and Kisumu. He also produced a medical report to demonstrate the nature and extent of his injuries.

Corporal Susan Nguti, who was attached to Mweiga police station at the time, testified that she visited the scene of the accident immediately after the accident occurred; she found the two vehicles at the scene. She established that motor vehicle registration No. KBC 877 L had joined the main road from the right side of the road as one faces Nyahururu from Nyeri. She also established that it hit motor vehicle registration No. KBD 226 J on its right side; the vehicle was headed towards Nyahururu direction. According to her investigations, this latter vehicle was on its right lane when the accident occurred and that it was the driver of the Mitsubishi canter who was on the wrong. This driver, whom she identified as one Kagwanja, fled immediately after the accident and as the time she testified, he had not been arrested.

Although the appellant had, in his pleadings, denied the occurrence of the accident or the ownership of motor vehicle registration number KBC 877 L, he admitted in his evidence that this vehicle belonged to him and that it was involved in a road traffic accident as alleged by the

respondent. It was his evidence that on the material date he had parked this vehicle at Kiawara shopping centre only to learn later that it had been involved in road traffic accident. He learnt that the motor vehicle had been taken without his authority by a person whom he had previously employed as a conductor in the same vehicle but whom he had dismissed from employment.

It is apparent from the evidence that the basic facts upon which the respondent's suit was founded were either not in dispute or were established on a balance of probability; as noted, for instance, it was established that there was a road traffic accident involving the appellant's motor vehicle and motor vehicle registration No. KBD 226 J on 3 August 2013;that the respondent was travelling in the latter vehicle at the time of the accident; that the respondent was injured as a result of the accident; and, that the accident occurred on Nyeri-Nyahururu road.

Again, the evidence as to the cause of the accident was also not disputed; at least, the appellant did not provide any evidence contrary to that of the respondent on the events that culminated in the accident. In the absence of any evidence to the contrary, it is more probable than not, that the driver of the appellant's motor vehicle drove, controlled or otherwise, managed it so negligently that he caused the accident. In the circumstances, he was liable for the accident.

The only question of concern, as far as liability for the accident is concerned, is whether the appellant was thereby vicariously liable. The appellant's case, as I understand it, is simply this: the driver of his vehicle may have been negligent but since he did not have the appellant's authority to drive it, the appellant cannot be said to have been vicariously liable. In other words, it is the driver who should be held responsible for the accident.

Having adopted this line of argument as he was entitled to, the appellant ought to have taken out third party proceedings under Order 1 Rule 15 of the Civil Procedure Rules, 2010 to establish, among other things, the nature and the grounds of his claim against his alleged erstwhile employee; perhaps then, he would be able to demonstrate that the latter was solely responsible for the accident and therefore he was bound to indemnify the appellant to the extent of his liability in the event judgment was entered against him or that they were both liable in damages to the respondent in either equal or varied degrees. That rule states as follows:

> ***15. (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—***
>
> ***(a) that he is entitled to contribution or indemnity; or***
>
> ***(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or***
>
> ***(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.***

Under Order 1 Rules 3 and 6 of the Civil Procedure Rules, the respondent reserved the right to sue the appellant together with driver of the vehicle at the time material to the suit; when he opted to sue the appellant alone it was up to the appellant to take advantage of Order 1 Rule 15 and loop in the driver of his vehicle if he was of the firm view that he was to blame for the accident and was thus liable to the extent or extents prescribed in that rule.

If third party proceedings had been taken against the driver, he would thereby have been given opportunity to enter appearance and either admit or deny the appellant's claims against him. At any rate, the court would have had the opportunity to determine the appellant's main contention that he was no longer his employee at the time he caused the accident.

In the absence of third party proceedings, there was no basis upon which the court could possibly have determined whether indeed the offending driver was the appellant's duly authorised servant or agent and for that reason, the appellant's allegations against the driver of his vehicle were, at best, wild and, at any rate, could not be considered as an appropriate answer to the respondent's claim. I would therefore agree with the learned magistrate that the appellant was vicariously and solely liable for the actions of the driver of his vehicle.

On the question of the extent of the award of damages made I must begin with the caveat that the award of damages is always within the discretion of the trial court and ordinarily, the appellate court is hesitant to disturb the exercise of the trial court's discretion in this respect unless it is apparent that the court proceeded on wrong principles and arrived at an erroneous award in the sense that it is either too high or too low in the circumstances of a particular case. The oft-cited decisions in this regard are Bashir **Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 and Kemfro Africa Ltd T/A Meru Express Service, Gathogo Kanini versus A.M. Lubia & Olive Lubia (1982-1988) 1 KAR 728**. In the former case the C**ourt of Appeal noted:**

> ***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.***

And in the latter case, the same Court said at page 730 that:

> ***The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.***

The appellant submitted that the award for general damages was too high in the circumstances; he opined that an award of Kshs. 30,000.00 was adequate compensation; to this extent, he cited the decision in Nairobi High Court Civil Case No. 2498 of 1988 Esther Wambui versus Francis Githinji & Another where the claimant is said to have sustained an injury to the teeth and a cut on the right leg and was awarded the sum of Kshs. 20,000/= as general damages. Unlike the decisions cited by the respondent, a copy of the judgment, which apparently is unreported, was not included in the record of appeal and therefore I could not vouch for its veracity.

The respondent on the other hand cited the decisions in Nyeri High Court Civil Suit No. 320 of 1998, Catherine Wanjiru Kingori & Others versus Gibson Theuri Gichubi and Nairobi High Court Civil Suit No. 2828 of 1992, Peter Ondiko versus Roter General Traders and asked for the sum of Kshs. 150,000/= as general damages. In the former decision, four different plaintiffs were awarded various sums in general damages for the injuries they sustained in a road traffic accident; the first plaintiff was awarded Kshs. 300,000 for the injuries he sustained on the left ankle, the legs and the chest. The second plaintiff who sustained an injury on the back was awarded Kshs. 100,000/= while the third plaintiff who suffered multiple soft tissue injuries on the left elbow and both ankles was awarded Kshs. 350,000/=. The fourth plaintiff suffered injury on the neck and was awarded Kshs.100,000/=. In the latter decision, the plaintiff sustained cuts on his forearm and head; he experienced chest and back pain. He was awarded the sum of Kshs. 150,000/= in general damages.

In her judgment, the learned magistrate stated that she had considered these awards and the nature of the injuries the respondent sustained and reached the conclusion that the sum of Kshs. 130,000/= would be a near adequate compensation in general damages.

There is nothing on record to suggest that in making this award, the learned magistrate proceeded on the wrong principles or that she misapprehended the evidence and, in the process, arrived at an inordinately high figure; neither can it be said that she took into account an irrelevant matter and failed to consider a relevant one. In short, I do not find any basis upon which I can disturb the exercise of the discretion by the learned magistrate in the award she made under the head of general damages. As far as special damages are concerned, she established that the sum of Kshs 3,500/= was not only pleaded but was also supported by documentary evidence in the form of receipts and hence proved. In any event, as far as I can see, this particular award was not contested in the memorandum of appeal.

In the final analysis, I am inclined to come to the conclusion that the appellant's appeal has no merits and it is hereby dismissed with costs to the respondent.

Signed, dated and delivered in open court this 20th day of September, 2019

Ngaah Jairus

JUDGE