REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 68 OF 2018

JAMES KARIUKI.....APPELLANT

VERSUS

JAMES MUTHEE GAKUU.....1ST RESPONDENT

NICHOLAS KAMAU MUGUCU.....2ND RESPONDENT

CATHOLIC DIOCESE OF NYAHURURU.....3RD RESPONDENT

(Being an appeal arising from the judgment of honourable J.B. Kyalo CM

delivered on 14/05/2018 in Nakuru CMCC No.182 of 2015)

JUDGMENT

1. This appeal arises from suit filed by the 1st respondent against appellant and the 2nd and 3rd respondent seeking damages following an accident along the Nairobi Nakuru Highway involving motor vehicle KAZ 647V and KBN 756J belonging to the 2nd respondent and the appellant.

2. The appellant filed a defence denying negligence on their part and blamed the 2nd and 3rd respondent for the accident. The 2nd and 3rd respondent filed their defence denying the occurrence of the accident or the negligence of its driver. They alleged accident occurred as a result of negligence of the 1st respondent.

3. After trial, the trial court delivered judgment dated 14th May 2018 finding the appellant, the 2nd and 3rd respondent jointly and severally 100% liable for the accident and the 1st respondent was awarded special damages of Kshs.322,374, general damages Kshs 150,000 and the costs of the suit.

4. Being aggrieved by the said judgment, the appellant filed memorandum of appeal dated 12th June 2018 on both liability and quantum on the following grounds:

a. That the learned trial magistrate erred in law and in fact, by failing to find that the 1st Respondent failed to prove his case against the Appellant on a balance of probabilities.

b. That the learned trial magistrate erred in law by failing to apportion liability in definite manner or at all as amongst the parties thereby rendering the judgment inchoate.

c. That the learned trial magistrate erred in law and fact in failing to analyze the totality of the evidence adduced and thereby failing to find that the 2nd Respondent was wholly or substantially liable for the subject accident and the 3rd Respondent vicariously so.

d. That the learned trial magistrate erred in law and in fact by failing to find that in absence of an explanation from the 2nd and/or 3rd respondent(s) rebutting the evidence of the appellant and the investigating officer for the accident, the 2nd and 3rd Respondents were/are solely or substantially to blame for the accident.

e. That the learned trial magistrate erred in law and fact by failing to consider the overwhelming evidence to the effect that the 2nd

respondent not made a dangerous attempt to overtake thereby driving motor vehicle registration number KAZ 647Z onto the rightful lane of motor vehicle registration number KBK 468K causing the two vehicles to hit each other. The collision between Motor vehicle registration number KBK 468K and KBN 756J would not have occurred.

f. That the learned magistrate erred in law and fact by failing to find, despite ample evidence that the collision between Motor vehicle registration number KBK 468K and KBN 756J was caused either by the 1st Respondent's loss of control of the former resulting from the same being hit by motor vehicle registration number KAZ 647V or by the failure of the 1st Respondent to take any measures to avoid the collision or by a combination of both reasons.

g. That the learned trial magistrate erred in fact and in law in awarding the 1st Respondent special damages of kshs. 322,374/= in complete disregard of the fact that the 1st Respondent utterly failed to prove entitlement of the same, strictly or at all and/ or the fact that the learned trial magistrate, in his judgment, found that only a sum of kshs 292, 200/= had been proved.

h. That the learned trial magistrate erred in law and fact by awarding the 1st Respondent repair costs notwithstanding the fact that no assessment report was produced to show the alleged damage to motor vehicle registration number KBK 468K the estimated costs of repair or at all, and regardless of the patent, highlighted defects of the certificate of examination and Test of vehicle produced in lieu thereof.

i. That the learned trial magistrate erred in law and in fact by awarding the 1st Respondent repair costs despite the unexplained discrepancies and/or irregularities surrounding the fact that the invoice for kshs. 157,300/= was issued by J.O. Garage but a receipt for Kshs. 287,600/= was issued by Kadan Auto Spares and the fact that the amounts involved differ.

j. That the learned trial magistrate erred in law and fact by failing to find that, in the absence of evidence that the spare parts allegedly purchased from Kadan Auto spares were used to repair motor vehicle registration number KBK 468K, the 1st Respondent had failed to prove and was therefore not entitled to the repair costs pleaded at all.

k. That the learned trial magistrate erred in law and fact in awarding damages for pain and suffering and loss of amenities that are far excessive, inordinately high and disproportionate to the slight nature of injuries sustained by the 1st Respondent and the fact that he had completely recovered therefrom at the time of trial and that are inconsistent with recent decisions on similar injuries.

5. Parties agreed to dispose of this appeal by way of written submissions. The appellant filed submissions on 13th July 2021 while the 1st respondent filed the submissions on 4th October 2020.

APPELLANT'S SUBMISSIONS

6. The appellant submitted that the duty of the court to re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusion and cited the case of **Selle Vs associated Motor Boat Company Ltd (1968) EA 123.**

> **"The court must consider the evidence, evaluate itself and draw its own conclusion though doing so it should always bear in mind that it neither heard witnesses and should make due to allowance in respect. However, this court is not bound necessarily to follow the trial judge's finding of fact as it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally"**

7. It was submitted that the trial court failed to find the 1st respondent had not proved his case against the appellant on a balance of probabilities and did not apportion liability and failed to take into consideration that the appellant was trying to avoid hitting KBK 468K that he hit the 1st respondent vehicle and court has stated it's immaterial on which side the party swerved with an intention of avoiding an accident.

8. The appellant cited that case of **Cornelia Elaine Wamba Vs Shreji Enterprises Ltd & Others (2012) eKLR** where the court stated as follows:-

> **"…. Despite the absence of any signal to support it. I do not consider that incoming to its collision the defendant was negligent and it is apparent that once the possibility of a collision arose he acted properly and promptly in attempting to avoid or minimize it, notwithstanding that on so doing he crossed over to the incorrect side of the road and there struck the other vehicle … primary cause of the accident was the negligence of k intended to turn off the main road and acted properly and promptly in attempting to avoid the collision notwithstanding that in doing so he crossed over to his incorrect side of the road."**

9. Further counsel submitted the appellant was not to be apportioned any liability as he tried to avoid the accident before the collision. Thus the trial court failed to analyze in totality the evidence adduced failing to find the 2nd respondent was wholly to blame for the accident and the 3rd respondent vicariously liable.

10. The appellant submitted that the 2nd and 3rd respondents failed to rebut evidence adduced. Further in respect to special damages, the trial court stated only Kshs 292, 200/= was proved but proceeded to award Kshs 322,374/= and the trial court erred in cardinal rule requiring special damages to be specifically pleaded and proved and cited case of **Christine Mwigina Akonya Vs Samuel Kariru Chege (2017) eKLR** where the court held as follows:-

"In regard to special damages the law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved before they can be awarded by the court…"

11. Counsel further submitted that the trial court awarded the 1st respondent repair costs for the damages occasioned to his motor vehicle notwithstanding no assessment report was adduced as evidence and cited the case of **Omari Gulea Jana Vs BM Muange (2010) eKLR** where the court stated as follows:-

"Although it was alleged that the Motor vehicle KAC 996F was damaged, the assessment report was not produced as evidence. This was crucial evidence as without the assessment report it was impossible for the court to establish the damages to a motor vehicle on the estimated costs of repairs. The fact that UAP insurance paid a sum of Kshs 271,874/= to Unity Garage is not sufficient to establish that payment was in respect of repairs to the damage to motor vehicle KAC 996F arising from the accident subject of this suit. I find the evidence adduced by the respondent was inadequate to strictly prove his claim. The trial magistrate appears to have been swayed by the fact that the appellant did not call any evidence. The trial of the magistrate lost sight of section 107 of the Evidence Act which placed the burden of proof squarely upon the respondent. Her judgment cannot be supported."

12. The appellant further submitted that there were unexplained discrepancies and irregularities in the repair costs; that there was an invoice of Kshs 157,300 issued by **J.O Garage** and a receipt of Kshs 287,600/=was issued by **Kadan Auto Spares** but the trial court failed to ascertain the truthfulness of the invoices; that the figures quoted were fictitious.

13. The appellant further submitted that the award of damages for pain and suffering and loss of amenities were excessive, inordinately high and disproportionate; that the medical report from **Dr. Obed Omuyoma** provided by the 1st respondent confirmed the 1st respondent sustained soft tissue injuries with no long term effects yet the trial magistrate awarded him Kshs 150,000/= as general damages for pain and suffering. Counsel urged the court to interfere with the award of damages, as it is inordinately too high.

14. The appellant submitted that damages for injuries must be within consistent limits; that they should represent fair compensation and should not be excessive and urged this court to allow the appeal and quash the decision in the impugned judgment of the trial court. On costs, the appellant urged this court to exercise its discretion and direct the respondents herein to bear the costs of the appeal as per **Section 27 of the Civil Procedure Act.**

1ST RESPONDENT SUBMISSIONS

15. The appellant submitted that the evidence of the 1st respondent which was corroborated by the investigating officer PW2 was not controverted or challenged during the trial court hearing and submitted that the appeal lacks merit and in light of the uncontroverted evidence of the 1st respondent before the trial court and thus the appeal must fail.

16. The 1st respondent further submitted that the trial court was lenient in not finding the appellant solely liable for the accident despite the express admission and testimony of the appellant of swerving on the right side into the proper and oncoming lane of the 1st respondent motor vehicle KBK 468K causing the accident.

17. The appellant submitted that finding on liability was fair and there is no need to disturb it and argued that the appellant has not furnished the court how liability should be apportioned by this court.

18. The appellant submitted that the court was correct in holding the appellant was responsible for the accident for swerving onto the right side of the 1st respondent.

19. The 1st respondent urged this court to reevaluate evidence but be slow in interfering with the trial court's judgment that had the opportunity to hear the witnesses during the trial.

20. The 1st respondent further submitted that he pleaded the damages awarded by the court in the plaint through the production of the medical report, medical expenses receipts of kshs 15,573, receipts from Kadan Auto Spares of Kshs 287, 000/=, receipt for towing fees, receipts for KRA for monies paid to KRA. The total of the amounts paid is Kshs 322, 374 which amounts were pleaded.

21. The 1st respondent submitted that there is no requirement in law for the 1st respondent to submit an assessment report as proof of special damages and that the appellant failed to counter the evidence of the 1st respondent by availing his assessor to assess the 1st respondent vehicle.

22. The 1st respondent further submitted that the authorities cited by the appellant are different and distinguishable from this case in that, payment by an insurance company to a garage are not proof that repairs were actually done on a particular motor vehicle and thus an assessment report was required.

23. The 1st respondent further submitted that receipt from J.O garage of Kshs. 157, 300 was not adduced in court as exhibited by the 1st respondent. Further, the damages for pain and suffering amounting to kshs 150,000/= are reasonable, fair and not inordinately high as the 1st respondent suffered a blunt injury to the anterior chest leading to severe soft tissue injuries of the chest, severe soft tissue injuries around the pelvic region and residual pains in the pelvis as evidenced by the doctor report on page 156 of the record of appeal; that the trial court looked at the injuries and awarded a fair amount.

24. The 1st respondent submitted that during the trial, he submitted for general damages of Kshs 650,000/=. The record of appeal is incomplete as the 1st respondent's submissions have not been included. In conclusion, the 1st respondent submitted that the 2nd and 3rd respondents have already complied with the award of the trial court and paid their 50% and urged this court to dismiss this appeal and award costs to the 1st respondent and further make orders for interest on the decretal sum awarded by the lower court.

ANALYSIS AND DETERMINATION

25. This being the first appellate court I am obligated to reevaluate evidence adduced before the trial court and arrive at an independent decision. This I do with the knowledge that unlike the trial court I never got the opportunity to take evidence first hand and observe demeanor of witnesses, for this I will give due allowance. This position was held in the case of in ***PIL Kenya Limited v Oppong [2009] KLR 442*** where the court stated as follows:-

> ***"It is the duty…of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that".***

26. In view of the above, I have perused the trial court pleadings and proceeding together with submissions herein and consider the following as issues for determination:-

a. Whether the liability should be apportioned.

b. Whether the quantum of damages should be disturbed.

(i) **Whether the liability should be apportioned.**

27. In respect to liability, **t**he trial court in holding the defendants liable had stated as follows:-

> **"The point of impact was on the rightful lane of the fielder, that is to say the right lane as one faces the general direction of Nairobi. Secondly, the defendant did not adduce any evidence to controvert the plaintiff evidence. And thirdly the 3rd defendant admitted swerving to the right and onto the lane of the fielder thereby causing a collision."**

28. The appellant/3rd defendant who was the owner of motor vehicle registration number KBN 756J faults the trial court for apportioning liability at 100% to him and the 2nd and 3rd respondent/1st and 2nd defendants driver and owner of KBK 468K respectively without apportioning each party the amount.

29. From record, I note that the 2nd defendants while registration number KAZ647U which was driven by the 1st defendant was moving from the opposite direction with the plaintiff's/1st respondent's vehicle number KBK 468K when he saw a lorry from the front and trying to overtake, he moved to the lane of KBK 468K hitting it and KBN756J which was behind tried to swerve to avoid hitting KBK 468K but could not avoid head on collision as it was moving in high speed.

30. It is evident that KBK 468K was hit by two vehicles first by 2nd defendant's vehicle KAZ 647U on the right side and head on collusion by KBN 756J. From evidence adduced, both vehicles were moving in high speed. KAZ 647U was not able to control his vehicle upon seeing an oncoming lorry and was the first to hit KBK468K. PW1 said the two vehicle were on middle lane headed to Nairobi from Nakuru and the accident occurred on the left side facing Nakuru which was the lane of KBK 468K. That the trailer was in front of the two vehicles KBN 756J following KAZ 647V. PW1 said after being hit by KAZ 647V he did not lose control but continued on the same lane.

31. There is no doubt that drivers of the two vehicles KAZ 647V and KBN 756J were moving in high speed, were not able to control their vehicles causing them to collide with the 1st respondent's vehicle KBK 468K. In my view, liability should be apportioned between the two vehicles at 50:50.

(ii)Assessment of damages

32. Award of damages is a discretionary remedy, which has to be exercised judiciously. The appellate court can only interfere with the award of damages if the award was inordinately too high or too low. This was held in **Butt –vs Khan (1977)1KAR** where the court stated as follows:-

> ***"An appellate court will not disturb an award for damages unless it is 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."***

33. From the lower court proceeding the 1st respondent PW1testified that he incurred the following expenses as a result of the accident and produced receipts to prove the same: -

a. Repair of motor vehicle……. Kshs 287,600

b. Medical expenses……. Kshs 15,573.73

c. Towing fees …….. Kshs. 14,000

d. Search……. Kshs. 200

e. Medical report ……..kshs 5000

f. GRAND TOTAL…….322,373.73

34. In the plaint filed in the lower court the 1st respondent pleaded special damages of Kshs.322,373/=. The above special damages have been proved by receipts produced, I have no reason to interfere with the award.

35. In respect to general damages for pain and suffering I note from **Dr. Obed Omuyoma** dated 5th January 2015 that the 1st respondent sustained soft tissue injuries of the chest, severe soft tissue injuries around the pelvic region and residual pains in the pelvis and in my view award of kshs 150,000 for pain and suffering in respect to the above injuries is not inordinately high and will not interfere with the award. The appellant disputes the award of Kshs 150,000/= as general damages for pain, suffering and loss of amenities and states the same is inordinately too high.

36. <u>FNAL ORDERS</u>

1) Liability apportioned at 50:50 between the 1st & 2nd defendants/2nd & 3rd respondent on one part and the appellant/3rd defendant on the other part.

2) Assessment of damages to remain as assessed by the lower court

3) Costs of the appeal to the 1st respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF MARCH, 2022

.....

RACHEL NGETICH

JUDGE

<u>In the presence of</u>:

Francis Lepikas – Court Assistant

Mr. Oseko holding Mr. Githiru for 1st Respondent

No appearance for 2nd and 3rd for Respondent and Appellant