REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 16 OF 2019

(Being an appeal from the original judgment and decree of Hon. E. Malesi,

Senior Resident Magistrate, of 29th January 2019

in Kakamega CMCCC No. 259 of 2017)

WEST KENYA SUGAR COMPNAY LIMITED.....APPELLANT

VERSUS

ANDREW CHIROYI SUNGUTI.....RESPONDENT

JUDGMENT

1. The suit at the trial court, in Kakamega CMCCC No. 259 of 2017, was initiated by the respondent herein against the appellant, for general and special damages, arising from a road traffic accident on 19th August 2016, when a vehicle belonging to the appellant allegedly collided with the respondent, who was a pedal cyclist along the Kambi-Lukume road, occasioning on the respondent serious personal injuries and in which he incurred expense. The respondent attributed negligence on the part of the appellant's driver. The respondent filed a defence, in which it denied liability in total, and, in the alternative, accused the respondent of being the sole cause of the accident or having contributed substantially to it.

2. At the oral hearing the respondent testified, as PW1, and called four witnesses. He stated that he was cycling on the left side of the road, when he was knocked down from behind, by a vehicle that was travelling in the same direction with him. He said that he was not joining the road when he was hit, the driver hit a bump and lost control of the wheel, hence the accident. He was rushed to hospital by the same vehicle that had hit him. He was treated and discharged the same day. He described his injuries as two fractures on his left leg, which necessitated application of plaster of Paris, which stayed in placed for six months. He reported the accident at the Malava Police Station, and was assessed for a medico-legal report by Dr. Andayi. He put his expenses, for treatment, police abstract, medico-legal report, and others at Kshs. 11, 490.00.

3. PW2, Kizito Sifuna, was a clinical officer, at Malava County Hospital, who attended to the respondent at the material time. He confirmed that the respondent was given first aid, and an x-ray was done, which revealed a fracture at the head of the fibula and tibia and another at the left ankle joint. The respondent was thereafter referred to the Kakamega County Referral Hospital for further management, which included the application of plaster of Paris, as the same was not available at the Malava facility.

4. PW3, Akwabi Maloba, was a clinician from the Kakamega County Referral Hospital. He confirmed that the respondent was attended to at the facility, and was found to have had suffered a compound fracture of the tibia and fibula, what is known as a Potts fracture. He said that the bone was exposed at one of the sites. He did a reduction, by putting the bones back into position, and applied plaster of Paris. PW4, Dr. Charles Andayi, examined the respondent for the purpose of the medico-legal report, which he produced at the trial. PW5, No. 77930 Police Corporal Asa Pogol, was the officer who issued the police abstract that was placed on record at the trial. He stated that the records in their possession did not indicate whether the scene was visited, he could not tell the point of impact, no one was charged with a traffic offence, that no one was indicated as to blame for the collision, the bicycle was damaged on its front tyre and rim, it was not indicated the lane that the cyclist was on at the material time, the cyclist was negotiating a junction and was hit at the junction. He mentioned that the police occurrence book indicated that the cyclist had negotiated the junction.

5. The appellant called one witness, DW1, Wilson Oduor Osewe, the person who was allegedly driving the accident vehicle. He stated that the he and the respondent were not headed in the same direction, but that the respondent emerged from a feeder road. He blamed the respondent for the accident, as he did not stop and wait for the main road to clear before entering. He asserted that the accident occurred at a junction, and that he had applied brakes. When shown the police abstract, DW1 said that the accident occurred before the junction.

6. After reviewing the evidence adduced at the trial and other material on record, the trial court found the appellant wholly liable for the accident, principally on grounds that the police had intended to charge the driver of the accident vehicle. The court then awarded damages as follows:

a. Pain and suffering …. Kshs. 500, 000.00; and

b. Special damages ……..Kshs. 12, 420.00.

Total Kshs. 512, 420.00.

7. The appellant was aggrieved by the decision, and lodged this appeal, challenging the decision with respect to liability and quantum. On liability it is averred that the trial court made an error in holding the appellant liable in negligence for the accident, erred in finding it 100% liable for the accident in view of the evidence recorded, and for failing to apportion liability as between the parties, for the respondent was crossing the road when it was not safe for him to do so. On quantum, it is averred that the award was excessive in view of the circumstances and in view of the injuries pleaded.

8. Directions were taken on 17th February 2020, for disposal of the appeal by way of written submissions. Both sides have complied with those directions by filing their respective written submissions.

9. The appellant's written submissions are dated 19th May 2020. On liability, it is argued that the correct version of the accident was more consistent with the evidence adduced by the appellant, that the collision occurred at a junction. It is submitted that the respondent's police witness, PW5, produced a document which showed that the respondent's bicycle was damaged at its front tyre, which was consistent with the DW1's testimony, that the respondent failed to slow down as he entered the main road, and he ended up hitting the accident vehicle on front right door. It is argued that had the respondent's bicycle been hit from behind, then it should have been damaged on its rear tyre and not the front tyre. The appellant submitted that the trial court had only considered the evidence of the respondent and not that of the appellant.

10. On quantum, the appellant submits that the injuries proved were a fracture of the left fibula and tibia (a Potts fracture with medial displacement) and bruises to the left leg. It is submitted that the award of general damages ought to have been between Kshs. 250,000.00 and Kshs. 300, 000.00, and a decision in *Tabro Transporters Limited vs. Absalom Dova Lumbasi* [2015] eKLR, where an award of Kshs. 500, 000.00, for similar injuries, was reduced to Kshs. 400, 000.00, is cited.

11. The respondent's submissions are dated 3rd October 2020. He submits on the two issues addressed by the appellant, liability and quantum. He submits that his testimony was supported by the police abstract that was put in evidence, and specifically that the police had intended to prefer charges against the appellant's driver. He cited decisions in Kisumu HCCA No. 49 of 2004 *Kenya Pipeline Co. Limited vs. Erick Ouma Ogendo, Jona Venzi Nguko & another vs. John Mwaka Amisi & another (suing as the father, brother and personal representative of the estate of Joseph Mbatha Mwaka)* [2015] eKLR, *Kimunya Abednego alias Abednego Munyao vs. Zipporah S. Musyoka & another* [2019] eKLR and *David Kajogi M'Mugaa vs. Francis Muthomi* [2012] eKLR. On quantum, the respondent supported the decision of the trial court, on the basis that the appellant had not demonstrated that the trial court fell into any error in assessment of damages. He cites two decisions to support his case that the award was within the range. In *Stephen Mutisya Muumbi vs. Peter Mutuku Katuli* [2008] eKLR an award of Kshs. 600, 000.00 was given. In *Alphonce Muli Nzuki vs. Brian Charles Ochuodho* [2015] eKLR an award of Kshs. 800, 000.00 was made.

12. I will deal first with liability. In his plaint, the respondent pleaded that the appellant's driver lost control of the accident vehicle which veered off its path and hit the respondent. On its part, the appellant pleaded in its defence, that the respondent cycled on the wrong side of the road, in a zigzag manner, exposing himself to danger, he was careless without regard to his own safety, his bicycle was unroadworthy and he failed to take evasive action to prevent the accident. At the oral hearing, the respondent testified that the appellant's driver hit him from behind, while he was on his rightful lane. He called a police officer as a witness. The officer was not the investigator of the accident, but came principally to produce the police abstract of the accident. Its salient points were that there was no indication that the accident scene was visited by the investigating officer, that no one was charged, that he could not tell the point of impact, that he could not tell the direction the vehicle was coming from nor the lane on which the respondent was on, that the bicycle was damaged at the front tyre and rim, that there was an intention to charge the appellant's driver and that the respondent was hit at a junction. The appellant's case was divergent from that of the respondent. Its case was that the collision occurred at a junction, that the appellant's driver and the respondent were not going in the same direction and that the fact that the respondent's bicycle hit the appellant's vehicle at the right front door meant that he was not hit from behind

13. The narratives given by both sides presented two versions of what transpired, a fact that the trial court took note of. The divergences in the two stories could only be resolved by evidence. However, the testimony from the police, through PW5, did not help much. The investigation file was not produced, and it would appear that no investigator visited the scene of the accident. The police witness apparently came forward only to produce the police abstract as evidence that an accident did occur involving the two sides. As who was to blame for the accident, the police evidence was wholly unhelpful.

14. In cases such as the instant one, where the testimony provided by both sides is conflicting, and, therefore, the trial court is unable to find one way or the other, the best approach would be to find both drivers equally to blame. That position was stated in *Hussein Omar Farah vs. Lento Agencies* [2006] eKLR, *Matunda Fruits Bus Services Ltd vs. Moses Wangila & another* [2018] eKLR and *Eliud Papoi Papa vs. Jigneshkumar Rameshbai Patel & another* [2017] eKLR.

15. The trial court was cognizant of the diverging narratives from the two sides, when it observed that there were two versions of how the accident occurred. The trial court went on to mention that the witness who ought to have shed light on the matter was the police officer, PW5, but noted that his testimony was wholly unsatisfactory in that regard. The only thing that that the trial court took into account, to found a basis for finding the appellant wholly liable, was the endorsement in the police abstract that the police intended to charge the appellant's

driver, as that appeared to suggest that the police were blaming the driver for the collision.

16. This is case where no sketch of the accident scene was drawn, and, therefore, the point of impact was not identified. No independent eyewitness was called by either side to shed light on what transpired. In such case it was impossible to apportion liability as between the two sides. The fact that the police intended to charge the appellant's driver, alone, would not suffice to blame the driver for the collision. The fact that the police had such intentions by itself is not sufficient proof that the driver was liable. Indeed, even if the driver had been charged that alone would have been evidence of blameworthiness. Nothing short of a conviction for a traffic offence could place liability at the doorstep of the appellant. The trial court, no doubt, fell into error, by clutching on this fact alone, without considering other factors.

17. There were other factors. Indeed, the police evidence favoured the appellant more than it favoured the respondent, the side that had called him to the stand. The appellant had denied that the collision occurred at a junction, yet the police witness, relying on the police abstract, stated that the collision was at a junction, which tallied with the appellant's narrative. Secondly, the police witness described the damage on the bicycle as being to the front tyre, which contradicted the respondent's allegation that he was hit from the back. Logically, if he had been hit from his rear, then it would have been expected that the rear part of his bicycle should have suffered damage. Damage to the front side of the bicycle is not consistent with a rear hit. The police evidence, therefore, on this score, is consistent with the appellant's version, that the respondent hit the appellant's vehicle, at a junction. If the trial court had taken these facts into account, it would not have come to the conclusion that the appellant was wholly to blame. Clearly, therefore, there was contribution from the respondent, which the court should have taken into account.

18. That, however, still leaves the court in the darkness as to who had greater responsibility. I agree with the trial court that the police could have shed light on the matter, to assist the court assess liability as between the two sides. The police evidence is, however, inadequate, so far as the matter of liability is concerned. It only shows that a collision occurred between the appellant's vehicle and the respondent's bicycle. It does not show that the appellant was wholly to blame for the collision, given the damage on the respondent's bicycle. Neither is it possible to tell who as between the two sides, bore greater responsibility for what happened. That being the case, the trial court ought to have found the two equally wholly to blame.

19. On quantum, the appellant argues that the award was excessive. To support that contention, it has cited *Tabro Transporters Limited vs. Absalom Dova Lumbasi* (supra), a decision tendered in 2015 on appeal, where the court had awarded Kshs. 400, 000.00. I do not think that the decision helps the appellant much. The decision challenged was made in 2019, four years after *Tabro Transporters Limited vs. Absalom Dova Lumbasi* (supra). I do not believe the trial court went off tangent in assessing damages at Kshs. 500, 000.00. The respondent has not placed before me copies of any decisions to support his case, although he has cited two cases. *Stephen Mutisya Muumbi vs. Peter Mutuku Katuli* (supra) was decided in 2008, and it cannot possibly be of much relevance. *Alphonce Muli Nzuki vs. Brian Charles Ochuodho* (supra) is also not relevant, for it related to far more serious injuries, being a compound communited fracture of the right tibia and fibula and a degloving injury medial aspect of the right leg and foot.

20. Taking everything into account, I find and hold that the appeal succeeds in part, with respect to liability, but fails on quantum. With regard to liability, I hereby set aside the finding and holding by the trial court, that the appellant was wholly to blame for the subject accident, and substitute it with a finding that liability is to be shared equally between the two sides. The quantum of general damages assessed and awarded by the trial court shall be subjected to 50% contribution. Each party shall bear their own costs. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF JANUARY, 2021

W. MUSYOKA

JUDGE