REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 2 OF 2020

CHINA ROAD AND BRIDGE CORPORATION(KENYA).....APPELLANT

VERSUS

JOB MBURU NDUNGU.....RESPONDENT

(Appeal from the judgment and decree Hon R. Ruguru (Mrs) (PM) dated 8th January 2020 in CMCC No. 31 of 2019 at the Chief Magistrate's court, Ngong).

JUDGMENT

1. The respondent sued the appellant for damages following an accident caused by the appellant's motor vehicle KCD 193V which was said to have been carelessly and negligently driven by the appellant's driver.

2. The appellant filed a defence denying occurrence of the accident or negligence on the part of its driver. It attributed negligence to the respondent and stated on a without prejudice, that if an accident ever occurred, it was inevitable. In its judgement dated 8th January 2020, the trial court found the appellant 100% liable for the accident and awarded the respondent general damages of Kshs 2,000,000 and special damages of Kshs, 3,550/-

3. The appellant was aggrieved with the judgment on both liability and quantum. He filed a memorandum of appeal dated and filed on 3rd February, 2020, raising the following grounds of appeal:

> ***1. That the learned trial magistrate erred in law and in fact in failing to appreciate and consider the pleadings and the evidence adduced in support thereof.***
>
> ***2. That the learned trial magistrate erred in law and fact in admitting the evidence of PW1 and PW2 which was not supported by any factual basis.***
>
> ***3. That the learned trial magistrate erred in law and fact in failing to attach due weight to appellant's evidence and submissions and authorities attached to.***
>
> ***4. The learned trial magistrate erred in law and fact in assessing and awarding general damages and special damages wherein the respondent failed to prove her case.***
>
> ***5. That the learned trial magistrate's award lacked legal and factual basis and also amounted to an erroneous estimate of damages due in the particular case and was manifestly excessive.***

4. Parties agreed to dispose of this appeal through written submissions. The appellant filed its submissions dated 4th December, 2020 while those of the respondent were dated 24th November, 2020 a filed on 9th December, 2020.

5. The appellant submitted that although the appellate court should not ordinarily interfere with an award of damages by a trial court, this court should interfere with the trial court's award in this appeal and relied on ***Butt v Khan*** [1977] 1 KLR. It argued that the award was inordinately high compared to the injuries the respondent suffered. According to the appellant, the respondent suffered a fracture of the left radium and ulna and the right tibia and fibula.

6. It was submitted that there was a dispute on the degree of permanent incapacity from the medical reports produced in evidence. According to the appellant, its doctor assessed incapacity at 15% while the respondent's doctor placed incapacity at 50%. The appellant blamed the trial court for ignoring the medical report by its doctor as well as its submissions.

7. The appellant relied on ***Rosemary Wanjiru Kungu v Elijah Macharia Githinji & Anther*** [2014] eKLR, for the argument that in awarding damages, the general picture, the whole circumstances and the effect of injuries on the person concerned must be looked at, and that some degree of uniformity must be maintained with recent awards for similar injuries.

8. The appellant also relied on ***Clement Gitau v G.K.K.*** [2016] eKLR, which upheld an award of Kshs. 600,000 for fracture of tibia and bruises on the neck, and ***Akamba Public Road Services v Abdikadir Adan Galgalo*** [2016] eKLR where an award of Kshs, 500,000 was made for fracture of right tibia/fibula.

9. On liability, the appellant argued that the trial court was wrong in finding the appellant 100% liable and failed to attribute some liability on the driver of the respondent's vehicle. It argued that from the evidence of the respondent's driver, he was not a PSV driver although he was driving a PSV vehicle; and that there was no evidence that he was a competent driver since no driving license was produced.

10. The appellant submitted that a person not fit to drive a motor vehicle, causes more harm than good to innocent road users. It argued that DW1 had testified that he did his best to avoid the accident and had to swerve to the right lane as the only option. Since the respondent's driver was a distance way, he could have stopped or moved to the side. However, given that the responder's driver was not a competent driver he did not understand emergency signs that the appellant's driver gave. It therefore submitted that the trial court failed to take into account the appellant's evidence while dealing with the issue of liability.

11. The respondent opposed this appeal and supported the trial court's decision. On liability, it was submitted that the respondent's evidence and that of his witness was that the driver of the appellant's vehicle was blamed for the accident. It was also submitted that the appellant's driver (DW1) admitted that he swerved to the right in a bid to overtake thus encroached on to the respondent's side. The appellant's driver was thus negligent.

12. According to the respondent, the appellant's blame on him as driver of KBV 734M had no basis. He relied on section 107 of the Evidence Act for the argument that he who alleges must prove. He also cited ***Anne Wambui Nderitu v Joseph Kiprono Ropkoi & Another*** [2005] I EA 334, for the argument that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.

13. On quantum, it was submitted that the respondent suffered several injuries and had a permanent incapacity of 50% and for that reason, he had sought damages of Kshs. 2,500,000. He cited ***Zipporah Nangila v Eldoret Express Ltd & 2 Others*** [2016] eKLR where an award of Kshs. 2,400,000 was made; ***Dorcas Wangithi Mwaura v Samuel Kaburu Mwaura & Another*** CA No 58 of 2013 where an award Kshs. 2,000,000 was made and ***Michael Njagi Karimi v Gideon Ndungu Nguribu & Another*** [2013] eKLR where an award of Kshs. 2,000,000 was also made.

14. According to the respondent, the decisions cited by the appellant before the trial court namely**,** ***Peterson Waweru Ndege v Douglas Njue Kuria*** (HCC No. 4 of 1996) and ***Peter Mureithi Munene v Douglas Njue Kuria*** (HCCC No. 41 of 1995)**,** involved accidents that occurred in 1995, thus those decisions could not be equated to the present case. He relied on ***Mutua Kaluku v Muthini Kiluto*** [2018] eKLR, that awards should be comparable for similar injuries and amount of the award is influenced by the amounts of awards in previous cases.

15. He also cited ***Peter Nanu Njeru v Philemone Mwagoti*** [2016] eKLR that an appellate court should not interfere with the discretion of a trial court in assessing damages unless it is demonstrated that the award was inordinately high or low as to present an entirely erroneous estimate of compensation to which the respondent was entitled to, or the court took into account irrelevant factors or failed to take into account relevant ones. He urged that he appeal be dismissed with costs.

16. I have considered the appeal submissions and the impugned judgment. This being a first appeal, it is the duty of this court, as the first appellate court to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

17. In ***Williamson Diamonds Ltd and another v Brown*** [1970] EA 1, the court held that:

> ***"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."***

18. Further, in ***PIL Kenya Limited v Oppong*** [2009] KLR 442, it was held that:

> ***"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".***

19. PW1 No. 76361 PC Shem Ondieki of Kiserian police station, testified that on the night of 28 / 29th March 2018, a serious injury accident occurred involving the respondent and the appellant's vehicle. The driver of motor vehicle KCD 193V was blamed for the accident. He produced the police abstract as an exhibit.

20. The respondent testified as PW2 and told the court that on 29th March, 2018 at around 9.30 p.m., he was driving his motor vehicle KBV 734M from Nairobi to Ngong. Motor vehicle KCD 193V overtook another vehicle and came to his lane. He swerved to avoid a head on collusion but KCD 193V hit his vehicle. He sustained a fracture on the right leg, left shoulder and hands and was rushed to hospital and a plaster of Paris was applied on his leg. He still attended clinic due to the injuries he sustained. He blamed the driver of motor vehicle KCD 193V for the accident. He produced copies in the list of his documents as exhibits, 1 – 11.

21. In cross-examination, he told the court that he was a PSV driver but had not produced a copy of the driving license. He stated that he did not drive passenger vehicles but drove Lorries. He stated that the driver of the offending motor vehicle was overtaking another vehicle and that he saw the vehicle about 20m. away. He denied that he was carrying passengers.

22. DW1 David Wachira Wambugu adopted his witness statement as his evidence. In his witness statement dated 18th June 2019, he stated that on 28th March, 2018 at around 10.40 pm, he was driving motor vehicle KCD 193V along Ngong road towards Bulbul in a convoy of other Tippers belonging to the appellant. Suddenly a matatu that was parked off the road entered the road on his side without a warning. He could not serve to his left because there were pedestrians and other vehicles. There was an oncoming matatu but it was not near. He flashed the respondent signaling him to give way but he failed to respond. He drove to the extreme right to avoid the accident but the respondent also moved off the road and they collided.

23. He stated that in the circumstances, the accident was inevitable as he had applied all skills to avoid it. He blamed the matatu that had been parked off the roadside for suddenly joining the road, thus causing the confusion. In cross-examination, he admitted that he was on the right side of the road.

24. After considering the evidence, the trial court held the appellant's driver wholly liable for accident and awarded the respondent both general and special damages prompting this appeal. The appellant faulted the trial court for holding that its driver was wholly to blame for the accident and failed to attribute some contributory negligence to the respondent. According to the appellant, the respondent should also have shared some blame for the accident given that he failed to give way and that he did not prove that he was a competent driver. The appellant also argued that the award of damages was inordinately high as to represent an erroneous estimate of damages.

25. The respondent on his part supported the trial court's finding on liability and quantum. On liability, he argued that DW1 the driver of the motor vehicle moved to his side causing the accident a fact he had admitted in evidence. On quantum, he argued that based on the injuries he sustained and the permanent incapacity assessed, the award of general damages was fair and reasonable.

26. Two issues arise for determination in this appeal, namely; whether the trial court fell into error in holding the appellant's driver wholly liable for the accident and whether the quantum was inordinately high.

Liability

27. The trial court considered the issue of liability and stated at page 4 of the judgment;

> ***"I have considered the pleadings, oral evidence, witness statements as well as submissions. It is not in dispute that the accident vehicle namely KCD 193V belonged to the defendant. It is also not in dispute that at the material time an accident occurred involving the defendant's and plaintiff's vehicles. It is further not in dispute that the accident occurred on the lane of the plaintiff's vehicle. Indeed, DW1 told the court that, he swerved to the right into the path of the plaintiff's vehicle. He flashed his lights to alert the plaintiff unsuccessfully and the accident occurred. From the above analysis, the defendant's vehicle is to blame for the accident…"***

28. The trial court went on to consider appellant's driver's evidence and concluded that the defendant was liable 100%.

29. I have gone through the record and reevaluated the evidence. It is true that the appellant's driver (DW1) was driving on the road at the material time and his vehicle was involved in an accident with the respondent's vehicle. DW1 admitted that he swerved to the respondent's lane and blamed an unknown matatu which he claimed abruptly joined the road without warning forcing him to act the way he did. As the trial court correctly observed, the appellant did not join the driver or owner of that matatu as third parties to enable the court resolve the issue of who was to blame for the accident. The appellant's driver did not even give particulars of that matatu. It was difficult for the trial court or even for this court to accept the appellant's complaint that an unknown vehicle was responsible for the accident.

30. The appellant further blamed the respondent for contributing to the accident. From the evidence on record, I am unable to agree with the appellant that the respondent was in any way to blame. DW1 testified that the respondent was not a qualified driver; that he was not a PSV driver but was driving a PSV vehicle. The issue before the trial court was on the causation of the accident and not competence of the driver. I note from the record that there was no evidence that the respondent was charged for any traffic offence relating to what DW1 was alluding to. If the respondent was an incompetent driver, that was a traffic offence and the trial court or this court for that matter, could not decide on the issue. In the circumstances, I am unable to fault the trial court on its finding on liability.

Quantum

31. The appellant argued that the award was inordinately high compared to the injuries the respondent suffered. It was the appellant's case that the injuries the respondent suffered namely; fracture of the left radium, fracture of the left ulna, fracture of the right tibia and fracture of the right fibula could not attract the amount awarded. It was also submitted that there was a dispute on the extent of the degree of permanent incapacity, bearing in mind the two medical reports produced in evidence. The appellant's doctor assessed permanent incapacity at 15% while the respondent's doctor placed permanent incapacity at 50%. The appellant further blamed the trial court for ignoring its doctor's medical and its submissions.

32. The respondent argued that he suffered severe injuries and had a permanent incapacity of 50%. For that reason, the award of damages was appropriate. According to the respondent, the appellant had relied on old decisions in accidents that occurred in 1995 and, therefore, those decisions were not appropriate to his case. He submitted that an appellate court should not interfere with the discretion of the trial court on assessment of damages unless it is demonstrated that the award was inordinately high or low as to present an entirely erroneous estimate of the compensation.

33. I have considered respective parties' arguments on this issue. The appellant argued that the trial court did not consider its doctor's medical report and their submissions. That was however not true according to the trial court's judgment. The court stated at page 5 of the judgment:

> ***"I have carefully considered the pleadings, filed submissions, cited authorities and exhibits produced. I have also noted that, the injuries sustained by the plaintiff are not in dispute per the medical reports produced save for the variance in the degree of permanent incapacity. Dr. Madhiwala assessed it at 15% whereas Dr. Okere put at 50%."*** (Emphasis)

34. It is clear from the above extract that the trial court considered the appellant's submissions and was alive to the fact of the appellant's doctor's medical report. Furthermore, the court also referred to the decisions cited by the appellant on the issue of quantum, that is; ***Jane Wambui Kamau & 4 others v Douglous Njue Kuria*** [1999] eKLR. The court also noted that the appellant's counsel proposed general damages of Kshs. 250,000/=. It is incorrect, therefore, for the appellant to argue that their medical report and submissions were not considered.

35. The question to be answered is whether the award of damages was inordinately high. It has long been held that an appellate court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors. This was aptly put by ***De Lestang***, Ag VP in ***Mbogo v Shah*** [1968] at page 94:

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

36. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal stated:

> ***"[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

37. The principle had earlier been stated in ***Butt v Khan*** [1981] KLR 349, where the Court (***Law. J.A***), held 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."***

38. And in ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia*** [1985] ***Kneller. J.A,*** stated:

> ***"The principles 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 that 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 damage. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419. This Court follows the same principles."***

39. In this appeal, the trial court considered the injuries the respondent suffered and the degree of permanent incapacity as well as the decisions the respondent had relied on. The court in particular cited the decision in ***Dorcas Wangaithi Nderi v Samuel Kiburu Mwaura & another*** [2015] eKLR where an award of Kshs. 2,000,000/= was upheld on appeal for multiple injuries, blunt injury to the head, fracture of the left radius/ulna, compound fracture to the right tibia/fibula and compound fracture of the left tibia/fibula. The trial court awarded general damages of Kshs. 2000,000/= in favour of the respondent. It is this award that the appellant argued was inordinately high and urged this court to interfere with.

40. Assessment of damages involves exercise of discretion, and as already pointed out, the principles on which this court, sitting on appeal may interfere with exercise of that discretion are clear. It must be satisfied either, that the trial court in assessing the damages, took into account an irrelevant factor, or failed to take into account a relevant one, or the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

41. In his plaint, the respondent pleaded that he sustained fracture of the left radius, fracture of the left ulna, fracture of the right tibia and fracture of the right fibula. As a result, he had recurrent pain on the left and right hands, weakness of the left hand and walked with a limp.

42. The medical report by **Dr. Okere,** dated 20th September 2018, confirmed the injuries the respondent sustained. Present complaints were; recurrent pain on the left hand and right lower leg, weakness on the left hand, difficulty in walking and inability to carry heavy objects. He assessed permanent incapacity at 50%.

43. The appellant filed a report by **Dr. Madhiwala** dated 17th June 2019. The doctor was in agreement with **Dr. Okere** on the injuries the respondent sustained. He added that the respondent also sustained **bilateral liner fracture of posterior wall of maxillary sinus** which was

not in Dr. Okere's report. On examining the respondent, he found no injury over the leg and left upper limp, no scar, pain, swelling or tenderness. There was a small bone hard, protrusion on the left wrist joint, but the movement was normal. There was slight hard swelling of union of fracture on right upper and lower leg but no pain or tenderness over the fracture site. He stated that the respondent was working and walked normally without a limp. In his opinion, the injuries had healed well and only left mild pain. He assessed permanent disability at 15% and temporary disability of six months.

44. The trial court referred to the medical reports by the two doctors, and the fact that there was disagreement on the permanent disability. The trial court did not however say anything about that discrepancy. The two reports were seven months apart and the appellant's doctor observed that injuries had healed well and the respondent now walked without a limp.

45. The two medical reports disagreed on the assessment of permanent incapacity. Whereas the respondent's doctor who had seen the respondent six months after the accident and put permanent incapacity at 50%, the appellant's doctor saw the respondent seven months later and put permanent incapacity at 15%. It would have been important for the trial court to state whether to accept the assessment of 50% by the respondent's doctor, or 15% by the appellant's doctor. In my view, to reconcile this discrepancy it is appropriate to take the average of the two assessments which would put disability at 32.5%.

46. Further, whereas the respondent's doctor opined that the respondent walked with a limp, the appellant's doctor stated that all the fractures had healed well and the respondent worked and walked normally with no limp. would that significantly change the position regarding the award?

47. *In **Millicent Atieno Ochuonyo v Katola Richard*** [2015] eKLR, the court stated that the effect of injuries on the person concerned must be looked in assessing damages. In this appeal, there is no doubt that the respondent sustained multiple injuries that were fairly serious had has a significant level of permanent disability of over 30%. The appellant's doctor even confirmed that the respondent also sustained *bilateral liner fracture of posterior wall of maxillary sinus.*

48. In ***Gicheru v Morton & another*** **[2005] 2 KLR 333**, the Court of Appeal stated that *in order to justify reversing of the trial court's amount of damages, it is generally necessary that the appellate court should be convinced either that the trial court acted upon some wrong principle of law, or that the amount awarded is so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the appellant was entitled.*

49. At the same time, the Court of Appeal observed in ***Denshire Muteti Wambua v Kenya Power and Lighting Co. Ltd*** [2013] eKLR, that:

> ***"[M]onetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness."***

50. Similarly, ***Lord Morris*** of ***Borthy-Gest*** stated in ***West (H) & Son Ltd v Shepherd*** [1964] A.C. 326 pg. 345:

> ***"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."***

51. Applying the above principles to this appeal, and considering the injuries the respondent sustained, the level of permanent incapacity resulting there from, as well as the decisions parties relied on, I do not find good reason to interfere with the trial court's award. It is always important to remember that an appellate court should only interfere with a trial court's assessment of damages in very clear cases, and not to impose its own view on what it would have awarded had it tried the matter.

52. In the end, this appeal is declined and dismissed with costs.

Dated, signed and delivered at Kajiado this 26th day of February, 2021.

E.C. MWITA

JUDGE