REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 34 OF 2019

FRED NJERU NJAU.....APPELLANT

VERSUS

MUCHANGI NJERU *ALIAS* MORRIS MUCHANGI.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of *Hon. L.K. Mwendwa (SRM)* dated 20th June 2019 delivered in Runyenjes SRMCC No. 15 of 2018.

By way of background, the respondent sued the appellant in the lower court seeking general and special damages for personal injuries sustained on 7th November 2017 in a road accident whose occurrence he blamed on the negligence of the appellant and or his authorized driver.

2. In his plaint dated 29th December 2017, the respondent pleaded that on the aforesaid date, he was walking along Kiwanjara-Ishiara road when the appellant or his authorized driver negligently drove motor vehicle registration number KCF 100Z Toyota Prado at such a high speed and without due care and attention that he lost control of the vehicle which hit him causing him injuries.

3. In his statement of defence dated 26th February 2018, the appellant denied any liability as alleged in the plaint and put the respondent to strict proof thereof. In the alternative, he pleaded that if the accident occurred, it was solely or substantially contributed to by the respondent.

4. At the trial, the respondent was the only witness who testified in support of his case. He adopted as his evidence in chief, his witness statement filed in court on 8th August 2018 and in addition narrated how the accident occurred. He testified that he was walking off the Ishiara Embu Road at Karurumo when a vehicle hit him from behind. He lost consciousness on impact. He found himself in hospital the following morning.

5. In his evidence in cross examination and re-examination, he asserted that the motor vehicle which hit him was registration number KCF 100Z which was being driven by *Fred Njau;* that he was hit while walking off the road.

6. The appellant chose not to call any witness in support of his defence.

7. In the impugned judgment, the learned trial magistrate found the appellant 100% liable for the accident and awarded the respondent KShs.300,000 as general damages for his pain and suffering and KShs.3,500 as special damages.

8. The appellant was dissatisfied with the trial court's decision hence this appeal. In his memorandum of appeal dated 28th June 2019, the appellant challenged the trial court's decision on both liability and quantum. He complained that the learned trial magistrate erred in law and fact by: finding him 100% liable while negligence was not proved against him; relying on witness statements on record without giving the parties an opportunity to be heard; considering irrelevant matters in arriving at his decision; disregarding or failing to appreciate his written submissions; awarding general damages that were manifestly excessive and failing to find that the respondent's pleadings were incapable of sustaining any award of damages.

9. As the first appellate court, my duty as succinctly summarized in ***Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123*** is to subject all the evidence and material presented before the trial court to an exhaustive re-examination and re-evaluation in order to arrive at my own independent conclusions bearing in mind that unlike the trial court, I do not have the advantage of having seen and heard the witnesses who testified before the lower court.

10. I have carefully considered the grounds of appeal, the proceedings before the trial court, the written submissions filed by the parties both in the lower court and in this court and the authorities cited. I have also read the judgment of the learned trial magistrate.

11. Having done so, I find that the key issue for my determination is whether the learned trial magistrate erred in his finding on both liability and quantum.

Before delving into the above two issues, I wish to briefly address the appellant's complaint that the learned trial magistrate erred by failing to appreciate his written submissions; by relying on witness statements without giving parties an opportunity to be heard and considering irrelevant matters in arriving at his decision.

12. In my considered view, the above complaints have no basis whatsoever as the proceedings before the trial court clearly show that both parties were given an opportunity to be heard and while the respondent testified, the appellant chose not to call any witness. The judgment of the learned trial magistrate also leaves no doubt that in arriving at his decision, he considered all the evidence and material placed before him and he did not take into account any irrelevant considerations. My reading of the judgment does not also show that the learned trial magistrate failed to consider or to appreciate the submissions filed by any of the parties including the appellant.

13. Turning now to the issue of liability, I agree with the appellant's submissions that the mere occurrence of an accident is not equivalent to proof of negligence and that in claims based on negligence, the plaintiff must prove some negligence on the defendant's part before liability can attach in line with the maxim that there cannot be any liability without fault. See: **Kiema Muthungu V Kenya Cargo Handling Services Limited, [1991] eKLR; Brian Muchiri Waihenya V Jubilee Hauliers & 2 Others, [2017] eKLR**.

14. I however disagree with the appellant's argument that in this case, the trial court's finding on liability was erroneous as the respondent did not prove that the accident was caused by the appellant's negligence. The respondent was clear in his evidence that he was walking off the road when a vehicle which was being driven by the appellant or his authorized agent hit him from behind. This evidence was not controverted by any evidence to the contrary.

15. The respondent in his pleadings also relied on the doctrine of *res-ipsa loquitor*. It is common knowledge that vehicles are driven on the surface of the road not off the road. The fact that the subject vehicle hit the respondent while walking off the road is sufficient evidence to collaborate the respondent's evidence that the vehicle was being driven at high speed and that consequently, its driver lost control causing the vehicle to veer off the road where it hit the respondent. This is the only reasonable conclusion one can make from the material presented before the trial court considering that the appellant did not claim and did not produce any evidence to prove that his motor vehicle was defective at the time of the accident.

16. It must be remembered that unlike in criminal cases, proof in civil cases is on a balance of probabilities and not beyond reasonable doubt. In this case, I am persuaded to agree with the trial court's finding that the respondent established on a balance of probabilities that the accident in which he was injured was caused by the appellant's negligence. Since the appellant did not adduce any evidence to support his claim that the respondent contributed to the accident, I find no reason to fault the learned trial magistrate's finding on liability against the appellant at 100%.

17. On quantum, it is now settled that an appellate court should be slow to interfere with an award of damages made by a trial court since as a general rule, the award of damages is at the discretion of the trial court. An appellate court should only disturb the trial court's award if it was satisfied that in arriving at the award, the trial court considered irrelevant factors or failed to take into account relevant ones or that it applied the wrong legal principles. An appellate court can also interfere with such an award if it was of the view that the award was inordinately high or low as to represent an entirely erroneous estimate of the damage suffered. See: ***Bashir Ahmed Butt V Uwais Ahmed Khan, [1982-88] 1 KAR 1***.

18. At the outset, I wish to state that though the assessment of damages should be determined by the nature and extent of the injuries suffered by the claimant and comparable awards made in previous cases, no two cases can be exactly the same and therefore, each case must be decided on its own peculiar facts and circumstances.

19. In this case, the nature and extent of the respondent's injuries is not disputed. It is clear from *Dr. P.K. Mwangi's* medical report that the respondent sustained multiple soft tissue injuries which healed well leaving only residue scars. The discharge summary from Runyenjes District Hospital (*pexibit 2*) however shows that the injuries were serious enough to justify admission in hospital for treatment for about 6 days.

20. After considering the proposals on quantum made by each party and the authorities cited in support of the different propositions, the learned trial magistrate in his discretion found a sum of KShs.300,000 appropriate guided by the authority of **Charles Gichuki V Emily Kawira Mbina & Another, [2018] eKLR**.

21. In my view, the sum of KShs.150,000 proposed by the appellant was unreasonably low. Taking all relevant factors into account, I am not convinced that the award of KShs.300,000 was manifestly excessive or inordinately high as to give rise to an inference that it was based on a wrong estimate of the damage suffered. I cannot also say that in arriving at his decision, the learned trial magistrate considered irrelevant factors or applied any wrong legal principle. I thus find no basis to disturb the trial court's award of general damages in favour of the respondent. The award is thus upheld.

22. The award of special damages was not contested on appeal and it will consequently remain undisturbed.

23. For the foregoing reasons, it is my finding that this appeal lacks merit. It is accordingly dismissed with costs to the respondents.

It is so ordered.

DATED and **SIGNED** at **NAIROBI** this 9th day of March 2021.

C. W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT EMBU THIS 18TH DAY OF MARCH 2021.

L. NJUGUNA

JUDGE

In the presence of:

No appearance for the appellant

No appearance for the respondent

Esterina: Court Assistant