REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 8 OF 2020

JOHN NJOROGE KEROGE.....APPELLANT

VERSUS

SECUNDA NDUKU IRERI.....RESPONDENT

JUDGMENT

1. This appeal challenges the judgment and decree of the trial court in Runyenjes PMCC No. 14 of 2018.

The background to the appeal is that the respondent sued the appellant seeking general and special damages for injuries sustained in a road traffic accident which occurred on 2nd August 2016.

2. In the plaint dated 29th January 2018, the respondent averred that she was travelling aboard motor vehicle registration number KAT 149H (the subject vehicle) along Kawanjara–Ishiara Road when the appellant and or his authorized driver negligently drove or managed motor vehicle registration number KBZ 827F which rammed into the subject vehicle causing her personal injuries.

3. In a statement of defence dated 26th February 2019, the appellant denied any liability as pleaded in the plaint and put the respondent to strict proof thereof. He blamed the driver of the subject vehicle claiming that he caused the accident by ramming into the vehicle he was driving registration number KBZ 827F when it was stationary at the Kathunguri-Ishiara road junction.

4. At the hearing, the respondent testified in support of her case and called one additional witness, *Sgt. James Munyi* who produced a police abstract issued at Runyenjes Police Station as *pexhibit 8*. The appellant also testified in support of his defence and called one witness *Mr. Silas Kariuki Josphat* who was his driver.

5. In her evidence, the respondent adopted her written statement as her evidence in chief and produced, *inter alia*, two medical reports prepared by *Dr. Njiru* (*pexhibit 1 a*) and *Dr. Mwaura* (*pexhibit 2*).

In cross examination, she maintained that at the time of the accident, she was travelling as a passenger in the subject vehicle; that the appellant's motor vehicle caused the accident by turning to join a junction without notice to other road users and in the process collided with the subject vehicle.

6. The appellant in his evidence admitted occurrence of the accident and that motor vehicle registration number KBZ 827F was at the material time being driven by his authorized agent (DW2). He denied that his driver was to blame for the accident and heaped blame on the driver of the subject vehicle who according to him rammed into the right side of his lorry. He did not witness the accident but was called to the scene and on arrival, he found the lorry on the main road with its right indicators on. The subject vehicle was in a ditch. He produced a copy of a police abstract which was similar to the one produced by the respondent as *pexhibit 8.* He also produced a medical report by *Dr. Waithaka Mwaura* as *dexhibit 2* as part of his evidence.

7. On his part, DW2 denied having caused the accident by negligent driving. He blamed the driver of the subject vehicle and a motorcycle which had allegedly overtook the lorry as he was preparing to join a junction on the right side of the road which caused the driver of the subject vehicle to allegedly loose control and hit the lorry when it was stationary on the road. DW2 however admitted that the respondent was a passenger in the subject vehicle and was not to blame for the accident.

8. After hearing both parties, the learned trial magistrate entered judgment on liability in favour of the respondent after finding the appellant vicariously liable for the accident at 100%. He also awarded the respondent general damages for pain and suffering in the sum of KShs.550,000. This is the decision that aggrieved the appellant hence this appeal.

9. In his memorandum of appeal filed on 14th May 2020, the appellant faulted the trial court's decision principally on grounds that it was not supported by the evidence on record. He complained that the learned trial magistrate failed to consider his submissions on liability and

quantum and that the award of general damages was so inordinately high as to constitute a miscarriage of justice given the circumstances of the case.

10. By consent of the parties, the appeal was prosecuted by way of written submissions which both parties duly filed.

11. Being the first appellate court, I am reminded of my duty which is to revisit and to independently re-evaluate and reconsider the evidence tendered before the trial court to draw my own conclusions regarding the validity or otherwise of the trial court's decision. In doing so, I should bear in mind that I did not see or hear the witnesses who testified before the trial court and give due allowance to that disadvantage. See: ***Peters V Sunday Post Limited, [1958] EA 424; Rosemary Mwasya V Steve Tito Mwasya & Another, [2018] eKLR.***

12. I have carefully considered the pleadings, the grounds of appeal, the evidence adduced before the trial court and the parties' rival written submissions as well as the authorities cited. Having done so, I find that only two main issues crystallize for my determination in this appeal which are:

i. Whether the learned trial magistrate erred in finding the appellant vicariously liable for the accident at 100%.

ii. Whether the award of general damages was inordinately high or manifestly excessive as to be erroneous.

13. On liability, upon my independent analysis of the evidence on record and the parties' rival submissions, I find that it is not disputed that the respondent was a passenger in the subject vehicle when the accident occurred. The appellant and his driver (DW2) blamed the driver of the subject vehicle claiming that he rammed into the appellant's lorry when he was avoiding a collision with a motor cycle which had just overtaken the lorry at a junction. According to the appellant, the unnamed motorcyclist was also to blame for the accident.

14. It is however noteworthy that the appellant though shifting blame to the driver of the subject vehicle and the motorcyclist did not enjoin any of them as third parties in order to have his claim that they were to blame for the accident determined during the trial.

15. Having failed to take out third party proceedings against the persons he blamed for the accident and having admitted that DW2 was his authorized driver and that the respondent was a passenger in the subject vehicle, the appellant cannot escape liability given the evidence adduced by the respondent on how the accident occurred. In the premises, I am unable to fault the trial magistrate's finding on liability. It is thus confirmed.

16. On quantum, the appellant has taken issue with the award of general damages claiming that it was inordinately high as to be erroneous. As a general rule, general damages are damages at large and are dependent on the discretion of the trial court. That discretion must however be exercised judiciously in accordance with the law and established legal principles and not whimsically or arbitrarily. The assessment of damages should be determined by the nature and extent of injuries suffered guided by comparable awards made in the past for comparable injuries.

17. For an appellate court to interfere with a trial court's decision on quantum, it must be satisfied that the trial court either acted on wrong legal principles or misapprehended the law or the evidence or took into account irrelevant factors or failed to consider relevant ones. An appellate court may also disturb the award if it is established that it was either too high or too low as to amount to an erroneous estimate of the damage suffered but the court should not substitute its discretion with that of the trial court. See: ***Mariga V Musila, [1984] KLR 251; Kemfro Africa Limited T/A Meru Express Services & Another V Lubia & Another, [1987] KLR 30*.**

18. In this case, I find that the injuries sustained by the respondent are not contested. It is not disputed that she suffered a fracture of the humerus and extensive multiple lacerations on the lower limbs. Though both *Dr. Njiru* and *Dr. Mwaura* were in agreement that the fracture exposed the respondent to post traumatic osteoarthritis of the shoulder joint, *Dr. Mwaura* opined that the respondent suffered permanent disability assessed at 70% while *Dr. Njiru* was silent on the possibility of any residue disability.

19. I have considered the submissions and authorities that were relied on by the parties in the trial court on quantum. I find that though the plaintiffs in those authorities sustained comparable injuries, the authorities cited by the appellant were very old having been decided between 2008 and 2011. The trial court appears to have been more persuaded by the decision in ***Makario Makone Monyancha V George Mokua Mamboleo (Supra)*** in which the trial court's award in the sum of KShs.350,000 was confirmed on appeal. It is however noteworthy that the decision was made in the year 2012 about seven years prior to the trial court's decision. It is the duty of the advocates on record to avail relevant and recent authorities to guide courts in arriving at fair and just awards of course bearing in mind the peculiar circumstances of each case.

20. In her discretion, the learned trial magistrate awarded the respondent KShs.550,000 in general damages as compensation for her pain and suffering. Given the injuries sustained by the respondent and taking into account inflationary trends, I find no reason to fault the trial court's decision on quantum. I am not persuaded that the award was inordinately high or manifestly excessive as to constitute an erroneous estimate of the pain and suffering the respondent endured as a result of the injuries sustained in the accident.

21. As for special damages, the award was not contested on appeal. It is thus confirmed.

22. In the end, it is my finding that this appeal lacks merit. It is accordingly dismissed with costs to the respondent.

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:

Mr. Maloba for the appellants

Mr. Ogweno for the respondent

Esterina: Court Assistant