REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 25 OF 2018

MOSES NG'ETHE.....APPELLANT

VERSUS

BENJAMIN WAMBUA KISILU.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of *Hon. S.K. Mutai (RM)* dated 22nd May 2018 delivered in Embu CMCC No. 158 of 2016.

The impugned judgment was delivered in a suit in which the respondent sued the appellant seeking general and special damages as a result of personal injuries sustained on 22nd June 2015 in a road traffic accident whose occurrence the respondent blamed on the appellant and or his agent's negligence in managing or controlling motor vehicle registration number KAA 693V (the subject vehicle).

2. In his statement of defence dated 25th May 2017, the appellant denied any liability as alleged and put the respondent to strict proof thereof. In the alternative, he pleaded that if the accident occurred, it was caused or substantially contributed to by the respondent.

3. After a full trial, the learned trial magistrate rendered his judgment on 22nd May 2018 and found the appellant 100% liable for the accident. He proceeded to award the respondent general damages in the sum of KSh.1,800,000, KShs.300,000 for removal of implants (*in situ*) and KShs.54,519 as special damages.

4. The appellant was aggrieved by the entire judgment of the trial court hence this appeal. In his memorandum of appeal dated 22nd June 2018, he advanced ten grounds of appeal in which he principally complained that the learned trial magistrate erred in law and fact by : holding him liable when the respondent did not prove negligence against him to the standard required by the law; failing to consider comparable awards for general damages in similar cases and awarding damages that were too high as to be erroneous and unjust; and finally, failing to consider the appellant's submissions on quantum.

5. At the hearing, both parties consented to having the appeal canvassed by way of written submissions.

6. As the first appellate court, my duty is to subject all the evidence and material presented before the trial court to a fresh and exhaustive examination to arrive at my own independent conclusions. In doing so, I should remember that I did not have the benefit of seeing or hearing the witnesses who testified before the trial court and give due allowance to that disadvantage. See: ***Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123*** and ***Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR***.

7. I have carefully considered the grounds of appeal alongside the parties' rival written submissions. I have also re-evaluated the evidence on record and read the judgment of the trial court. Having done so, I find that the key issue that arises for my determination is whether the learned trial magistrate erred in his findings on both liability and quantum.

8. In order to resolve the first limb of the issues isolated for my determination, it is important to briefly restate the evidence adduced before the trial court.

The respondent testified as PW1 in support of his case and called an additional witness, *Chief Inspector John Lugalla*, whose only role was to produce a police abstract issued at Embu Police Station confirming occurrence of the accident. He produced the police abstract as *pexhibit 9*.

9. In his evidence in chief, the respondent (PW1) recalled that on the material date, he was crossing the road and was half way through when he was knocked down by the subject vehicle. The vehicle's driver took him to Embu Level 5 Hospital and after x-rays were done, it was discovered that he had sustained fractures on the ankle joints, tibia and fibula. He was transferred to Makueni Hospital for further treatment which included fixing of metal plates. He produced two medical reports, a P3 form and treatment notes as exhibits by consent of the parties

and a bundle of receipts in support of his claim for special damages.

10. In his evidence on cross-examination and re-examination, PW1 maintained that he had already crossed the road when the accident occurred.

11. To counter the respondent's case, the appellant testified as DW1. He admitted that he was driving the subject vehicle when the accident occurred. He adopted his written statement as his evidence in chief and further stated in cross-examination that though the road was straight at the point the accident occurred and he could see 200 metres ahead, he did not see the respondent before he hit him. In re-examination, he stated as follows:

> ***"I did not see the plaintiff [respondent] crossing the road. I hit the plaintiff all of a sudden."***

12. The appellant blamed the respondent for occurrence of the accident claiming that the respondent had finished crossing the road but suddenly stepped back in a bid to avoid a collision with an oncoming motorcycle; that in the process, he blocked his vehicle's path occasioning the collision.

13. In his judgment, the learned trial magistrate appears to have based his finding on liability on the basis of evidence adduced by the respondent without considering the evidence offered by the appellant.

14. Upon my own re-appraisal of the evidence, I find that both the appellant and the respondent blamed each other for the accident and none called an independent witness to give the court a non partisan account regarding how the accident occurred. It is impossible to tell from the different versions given by the parties whether the accident occurred off the road, in the middle of the road or on the lane which the appellant was supposed to be lawfully driving his vehicle. The evidence of PW2 was not helpful at all since he neither witnessed nor investigated the accident.

15. It is important to note that in cross-examination, the respondent was not clear whether he had already crossed the road or was in the process of crossing the road when the accident occurred. If he was hit when crossing the road, in the absence of evidence showing that the subject vehicle was being driven at such a high speed that it was possible for the respondent to have started crossing the road without having seen it approaching, it is reasonable to conclude that he must have started crossing before ensuring that the road was clear and it was safe for him to do so.

16. On the other hand, the respondent's claim that the road was straight and it was possible for him to see about 200 metres ahead yet he claims to have seen the respondent only after hitting him is sufficient evidence that he was not driving with due care and attention as would be expected of a careful and diligent driver. As the driver of a vehicle which is no doubt, a lethal machine, the appellant owed the respondent and other road users a duty of care to ensure that he drove the vehicle in a way that would not compromise their safety.

17. The evidence on record considered as a whole establishes on a balance of probabilities that both the appellant and the respondent contributed to the accident but it is clear that the appellant bore the greatest responsibility for its occurrence.

18. The learned trial magistrate failed to thoroughly interrogate the evidence placed before him and arrived at the erroneous conclusion that the appellant was solely to blame for the accident which was not the case. I therefore find that the trial court erred in its finding on liability and the same is hereby set aside. It is substituted with a finding on liability in favour of the respondent against the appellant in the ratio of 80:20.

19. On quantum, it is settled law that general damages for personal injuries are at large and are at the discretion of the trial court. However, like all other judicial discretions, that discretion must be exercised judiciously in accordance with legal principles and not whimsically or capriciously.

For an appellate court to interfere with a trial court's discretion on quantum, it must be satisfied that when assessing damages, the trial court misapprehended or misapplied the law or took into account irrelevant matters or failed to consider relevant ones. An appellate court can also interfere with an award if it is convinced that the award was too high or too low as to represent an erroneous estimate of the damage suffered.

20. As a general rule, the assessment of damages should be based on the nature and extent of the injuries suffered and must take into account previous awards made for comparable injuries.

In this case, it is not disputed that as a result of the accident, the respondent sustained fractures of the malleoulus and distal fibula as well as soft tissue injuries. The injuries including the fractures healed without leaving any residual disability.

21. The learned trial magistrate awarded the respondent KShs.1,800,000 as general damages for pain and suffering but did not give any basis or reasons for arriving at that award.

22. In his submissions, the appellant relying on several authorities including ***Akamba Public Road Service V Abdikadir Adan Galgalo, [2016] eKLR*** and ***Vincent Mbogoli V Harrison Junje Chilyalya, [2017] eKLR*** urged me to find that an award of KShs.500,000 was sufficient compensation for the respondent's injuries.

23. The respondent on his part implored me to uphold the trial court's decision relying on the authority of ***Geoffrey Mwaniki Mwinzi V Ibero (K) Ltd & Another, HCC No. 578 of 2010*** in which the plaintiff who had sustained fractures of the left tibia, fibula and collarbone and soft tissue injuries was awarded KShs.2,000,000 general damages.

24. Having taken into account the nature and extent of the injuries sustained by the respondent in this case and even after considering the fact that the respondent was admitted in hospital for about $1^1/_2$ months during which time he underwent some operations which must have caused him great pain and suffering, I find that the award of KShs.1,800,000 was inordinately high as to lead to an inference that it was an erroneous estimate of the damage suffered. I make this finding in view of the medical evidence on record that the injuries healed completely without leaving any residue disability. I find that an award of KShs.1,000,000 would have been sufficient compensation for the respondent's pain and suffering at the time the trial court made its decision. Consequently, I set aside the trial court's award and substitute it with an award of KShs.1,000,000.

25. Regarding the costs of future medical expenses, I agree with the appellant that a claim for future medical expenses is in the nature of special damages which must be specifically pleaded and proved. In this case, the respondent at paragraph 7 of the plaint specifically claimed KShs.300,000 as cost of removal of the implants that were used to fix the fractures. Both *Dr. Kimula* and *Dr. Maina Ruga* in their reports agreed that the implants will need to be removed in future but were not in agreement on the costs of such removal. *Dr. Kimula* opined that the operation would cost KShs.300,000 in a private hospital while *Dr. Ruga* was of the view that the operation would cost KShs.150,000 but did not specify whether the cost was applicable to public or private hospitals.

26. In the circumstances, I find that the trial court's award of KShs.300,000 for future medical expenses was proper as the claim was specifically pleaded and supported by the evidence on record. The award is hereby upheld.

27. Regarding special damages, the appellant has submitted that the amount pleaded in the sum of KShs.54,519 was not specifically proved. I have gone through the documentary evidence produced in evidence by the respondent in support of his claim for special damages and I am in agreement with the appellant that two of the documents produced in evidence were invoices for the total sum of KShs.20,200.

28. It is settled law that invoices are not evidence of payment and cannot be used to support a claim for special damages. The learned trial magistrate failed to appreciate this legal principle and erroneously awarded the respondent the pleaded amount instead of the amount that was specifically pleaded and proved which was KShs.34,519. The award of KShs.54,519 special damages is thus set aside and is substituted with an award of KShs.34,319.

29. In the end, I am satisfied that this appeal is merited and it is hereby allowed. The judgment of the trial court is hereby set aside and is substituted with a judgment of this court apportioning liability in the ratio of 80:20 in favour of the respondent. The respondent is also awarded damages as follows:

Pain and suffering	-	KShs.1,000,000
Cost of future medical expenses	-	KShs.300,000
Special damages	-	KShs.34,319
Less 20% contribution	-	(KShs.266,864)
Total		**KShs.1,067,455**

30. The award of general damages will attract interest from date of judgment of the trial court until payment in full. The award of special damages will earn interest from the date of filing suit till payment in full.

31. Costs follow the event and are at the discretion of the court. The order that best commends itself to me on costs is that the respondent is awarded costs of the suit in the lower court but each party will bear his own costs of the appeal.

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