REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 160 OF 2019

ROBERT MEME.....APPELLANT

VERSUS

JOHN MAULUKU M'MUTUNYI

(Suing as the legal representative of the estate of

Andrew Muthuri (deceased).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Oscar Wanyaga, (S.R.M) in Maua CMCC No. 61 of 2016 delivered on 09/08/2019)

JUDGMENT

1. By a Plaint dated 14/04/2016, the respondent sued the appellant seeking general damages, special damages and costs of the suit on the basis that on or about 01/11/2013, at around11:00 hours, the deceased was lawfully walking along Maua-Meru Road when at Nturuba area, the appellant drove motor vehicle Registration No. KBT 349 V Isuzu Lorry so negligently and carelessly that he hit and knocked down the respondent and as a consequence the respondent suffered bodily injuries.

2. The appellant denied the claim vide his statement of defence dated on 29/07/2016 and prayed for the respondent's suit to be dismissed. The defence filed attributed, in the alternative negligence on the respondent the tenure of which was that the respondent suddenly, negligently and without look out walked to cross the road and on the path of the suit motor vehicle.

3. After trial in which the respondent called two witnesses while the appellant called only one witness, the trial Court found that the respondent had proved his case on a balance of probability and entered judgement in his favour against the appellant by apportioning liability at 90:10 in favour of the respondent the assessed damages in the aggregate sum of Kshs 2,245,716 plus costs and interests.

4. Aggrieved by the said decision, the appellant filed his Memorandum of Appeal on 27/11/2019 listing five (5) grounds of appeal. The appellant complained that the trial Court erred in apportioning him 90% liability when the evidence tendered pointed to the contrary and further erred in awarding highly excessive and erroneous general damages of Ksh. 2,000,000. It was also complained that the trial court erred in failing to consider the appellant's submissions and the legal authorities filed therewith thus allowing itself to be misdirected into arriving at a wrong decision on quantum and awarding damages that were obviously exaggerated and excessive.

5. This being a first appeal, this Court is duty bound to re-evaluate the evidence on record afresh and come to its own independent findings and conclusions. In doing so, the Court must bear in mind that it did not have the advantage of seeing the witnesses testify. See ***Selle v Associated Motor Boat Co. & others [1968] E.A. 123.***

6. The totality of the evidence **PW1 John Mauluku M'Mutunyi** and **PW2 Isaiah Nchooro** for the respondent herein as well as **Dw1 Japhet Ntoiti** was to the effect that the accident occurred on 01/11/2013 at about 1100 hours. The point of divergence however emerged with the respondent and his witness asserting that as he was waiting to cross Maua-Meru Road at Nturuba market, the appellant's motor vehicle Registration No. KBT 349 V Isuzu Lorry lost control and knocked him down and while off the road thereby occasioning him bodily injuries including a fracture of the left hand which had been operated on four times and that it had not healed completely.

7. The respondent, as PW1, added that, before the accident, he was a farmer earning approximately Kshs 40,000 per month but he did not have any proof thereof. He produced with consent of the appellant, demand notice (PExh 1), Police abstract (PExh 2), P3 Form (PExh 3), Medical Reports and the receipts thereto (PExh 4 and 5(a)(b) respectively, Treatment notes (PExh 6), bundle of receipts for medical expenses (PExh 7) and copy of records (PExh 8) in support of his case. For the appellant **Dw1 Japhet Ntoiti** testified that he was the driver of motor vehicle No. KBT 349 V on the material day, was driving from Maua to Meru at approximately 40 Kph and on reaching Nturuba, the respondent suddenly ran across the road from behind a Nissan Matatu, banged himself on the body of the lorry and fell down. That he did not stop after the accident as he feared the people there would burn his lorry and that post the accident, the lorry was inspected and found to have had no pre-accident defects and he was never charged with any traffic offence in relation to this accident.

8. Having reviewed the evidence against the pleadings filed as well as submissions, the trial court found for the respondent as summarised at the beginning of this decision and therefore this appeal.

9. On the 16/09/2020 the court gave directions on hearing the appeal pursuant to which, the parties filed their submissions in respect to the appeal on 28/09/2020 and 23/10/2020 respectively. The appellant submitted that since both the respondent and the appellant gave conflicting versions of how the accident occurred, liability should have been apportioned in the ratio of 50:50. It was submitted that the absence of any traffic charges against the appellant was proof of his innocence.

10. It was additionally contended that the respondent produced three conflicting medical reports on the nature of injuries he suffered and the court invited to draw the inference that that the respondent merely sustained soft tissue injuries and therefore an award of Kshs 500,000 would have been an adequately compensate him hence the award made was manifestly high and excessive. The appellant then cited to the court the decisions of ***Ann Wambui Ndiritu v Joseph Kiprono Ropkoi & anor (2004) eKLR, Kinyanjui Wanyoike v Jonathan Muturi(2004)eKLR, and Sokoro Saw Mills Ltd v Grace Nduta Ndungu (2006) eKLR,*** in support of his fault on the trial court.

11. On his part, the respondent submitted that the sum of Ksh.2,00,000 was properly awarded considering the numerous number of times he had been operated upon for injuries he sustained as a result of this accident for which the appellant was wholly to blame. The appellant's defence was described as hollow and devoid of any believable material hence the trial court's decision to apportion liability at 90% against the appellant was founded on sound facts.

12. It was thus concluded that the appellant never filed any submissions for consideration by the trial court and that the mere inclusion of the same in the record of appeal is not avail such submissions for consideration by the trial court in a retrospective manner. The case of ***Sabina Nyakenya Mwanga v Patrick Kigoro & anor (2015)*** **eKLR** was relied on in support of those submissions.

<u>Analysis and determination</u>

13. Having gone through the record of appeal and the submissions filed by parties and having taken note

that the grounds of appeal are framed as five in number, my appreciation of those grounds is that they can be coalesced under just two heads: -

a. **Whether the apportionment of liability in the ratio of 90% against the appellant was sound?**

b. **Whether the sum of Ksh.2,00,000 awarded for general damages was reasonable and merited?**

Apportionment of liability

14. While the appellant contends that liability should have been apportioned in the ratio of 50:50 because both gave contradictory accounts on the causation of the accident, the respondent contends that the appellant was wholly to blame for the occurrence of the accident.

15. The outcome of my review and re-evaluation of the evidence tendered is that I find the evidence of the appellant to be both contrary to the defence filed just as much as it is difficult to believe. The defence filed was that the respondent put himself on the way and path of harm by attempting to cross the road without regard to the presence of the appellant's vehicle thus being hit while the evidence is that the respondent hit and knocked himself against the moving lorry at the rear section. The law on pleadings and evidence is that a party is not at liberty to lead evidence running affront his pleadings yet that is what took place at the trial. That is the kind of evidence the court cannot be called upon to reverse the findings of the trial court as the trier of fact. In coming to this conclusion, I have been bound by the position taken by the Kenyan superior court has crystallised that parties are bound by their filed pleadings. In ***Sarah Jelangat Siele vs. Attorney General & 3 Others*** ***[2018] eKLR*** the court of appeal held:

> **"It is trite that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. A court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination. See this Court's decision in Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd. (2000)2 EA 385. However, a court may base its decision on an unpleaded issue if in the course of the trial the issue has been left for the decision of the court. An issue is deemed to have been left for the court's decision when a party addresses the court and leads evidence on the issue. See Vyas Industries v Diocese of Meru [1976] eKLR."**

16. On credibility, I do find that if in deed the lorry was being driven at 40 kph and the respondent had just alighted from a matatu, the kind of a collision expected would be frontal to the respondent. The injuries pleaded and proved were never front focused. In addition, the extent of the injuries would require the respondent to have been moving at a speed hire than walking. In my view and finding, the evidence and account of the appellant on how the collision occurred is inconsistent with the injuries and the ordinary event of such occurrences and to that extent I find it incapable of belief.

17. In his decision, the trial court, as the trier of facts who also observed the demeanour of the witnesses concluded that, *'the version of the events presented by the plaintiff is largely more believable than the defence'*. I am unable to disagree with the trial court on its conclusion based on the analysis of the evidence tendered and to that extent I find that the apportionment of liability was accurately and properly made. The limb of the appeal on liability thus fails and is dismissed.

The assessment and award sum of Kshs. 2,000,000 awarded for general damages

18. The principles upon which a first appellate court would interfere with the findings by way of exercise of discretion by the trial court on quantum were laid out in ***Bashir Ahmed Butt v. Uwais Ahmed Khan [1982-88] KAR 5,*** to be that 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. That it must be shown that the trial Court proceeded on wrong principles or that it misapprehended the evidence in some material respect and thereby arrived at a figure which was either inordinately high or low."* In this matter I find

no fault with the trial court to have been demonstrated and established by the appellant. In those circumstances, there is no justification in seeking to interfere. It is now agreed that assessment of damages in personal injury claims is a difficult task and must reside with the trial court without the appellate court striving to substitute its discretion upon the trial court. This court in, **Revital Healthcare (EPZ) Ltd v Mark Anyama [2019] eKLR,** held: -

> **Award of general damages is largely an exercise in judicial discretion by the trial court and it is not for an appellate court to slightly freely and in every even interfere. It is also said that assessment of damages in personal injury claims is a difficult task and that an appellate court should not interfere merely because it would have awarded a different sum had it sat as the trial court.**

19. I am unable to accept the appellant's contention that the trial court erred in awarding Kshs 2,000,000 for general damages merely because the respondent had adduced three conflicting medical reports as to the injuries he had sustained. I also do not agree that the sum of Kshs. 500,000 would adequately compensate the respondent. Looking at the injuries, I take the view that an award of Kshs 500,000 would be niggardly to be avoided. I adopt the words of Madan, j (as he then was) in ***Ugenya Bus Services vs James Kongo Gachohi*** CACA 66 OF 1981 when he underscored the need to be reasonable in making awards for personal injury claims by taking into account the effect of inflation in erosion of valve of money and the fact that the days of small and stingy awards are long gone. The Judge said:

> **"I also know that the days of small and stingy awards are long gone… even without the curse of inflation they were niggardly.**
>
> **I remember but ignore them. We have inflation with us. We all have to live with the exorbitance which the inflation has brought into one lives".**

20. That the trial court had taken into consideration the many surgeries the respondent had undergone and the confirmation that his hand will never recover to full functional status in arriving at the sum of Kshs 2,000,000 for general damages. On the principles applicable, I find no reason to disturb the award of general damages made by the trial court.

21. There is a last matter I must comment on before I pen off and it concerns the 4th ground of appeal accusing the trial court of failure to consider the submissions filed by the appellant. My perusal of the record and trial court file and established that the appellant despite having intimated to court that he intended to file submissions, the same were never filed. At page 78 of the record of appeal, Miss Mbijiwe for the appellant told court on 14/01/2019 ***"We apply to close our case. We will do submissions."*** At page 81 of the record of appeal, Mutembei for the respondent on 16/05/2019 said ***"I have filed submissions."*** At page 86 of the record of appeal, the trial court in its judgement said ***"only the plaintiff filed submissions."***

22**.** It is clear from the record that the appellant never filed any submissions and in incorporating written submissions at page 64 of the Record of Appeal, the appellant was merely sneaking into the record what did not belong there and to justify an otherwise unmerited fault upon the trial court. That goes against the counsel's duty to the court and falls not so far from an attempt to mislead the court. Such conduct must be avoided at all costs.

23. The upshot from the foregoing facts is that the entire appeal lacks merit and is therefore dismissed with costs.

Dated, signed and delivered online, By MS TEAMS this 19th day of April, 2021

Patrick J O Otieno

Judge