



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 542 OF 2018

MATTHEW THUKU.....APPELLANT

VERSUS

CYRUS NDUNGU.....RESPONDENT

(Being an appeal against the Judgment of Hon.Mr. Muholi Senior Resident Magistrate

delivered on 28th April 2017 in Milimani CMCC No. 168 of 2012)

JUDGMENT

The respondent was involved in a road traffic accident on 29th August 2009 along Outering Road involving motor vehicle registration number KBH 859N driven by the appellant. He was awarded Kshs.500,000 as general damages by the trial court. The appellant was also found 100% liable. The appeal is against the trial court's findings on both liability and quantum. The grounds of appeal are:-

- 1. That the learned magistrate erred in law and fact in apportioning liability at 100% against the Appellant in total disregard of the evidence adduced and the Appellant's submissions.**
- 2. That the learned magistrate erred in law and in fact in awarding general damages at Kshs.500,000/= which award was excessive and unwarranted in light of the evidence adduced.**
- 3. That the learned magistrate erred in law and in fact in awarding the claim of Special Damages at Kshs.4,200/= which award was not proved and was excessive and unwarranted in light of the evidence adduced.**
- 4. That the learned magistrate erred in law and fact in not taking into account entirely the written submissions of the Appellant.**
- 5. That the learned magistrate's finding and decision were against the weight of the evidence adduced.**

Mr. Nyamwaya appeared for the appellant. It is Counsel's submission that the respondent was excessively intoxicated at the time the accident occurred. This makes his claim to be frivolous, vexatious and an abuse of the court process. The respondent recklessly stepped into the path of the appellant's moving vehicle while under the influence of alcohol. Blood samples of the respondent showed that he had concentration levels of 200mg in 100mls of blood meaning that the respondent had taken an equivalent of five half litre bottles of beer or eleven (11) shots of whiskey.

It was submitted that the respondent did not prove any negligence on the part of the appellant. Contrary to the findings of the trial court, the respondent was negligent. The evidential burden on the part of the respondent was not discharged. Counsel referred to the case of **WINFRED NYAWIRA MAINA –V- PETERSON ONYIENGO GICHANA (2015) eKLR** where F. Gikonyo J stated:-

“I think the foregoing justifies a little rendition on evidential burden for a fuller understanding of the decision of the court in this matter. The way I understand the law, the term Burden of proof, entails the Legal burden of proof and evidential burden. The two terminologies are most of the time misunderstood; albeit distinct. I am concerned mostly with the evidential burden which initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See HALSBURY'S Laws of England, 4th Edition, vol. 17. Therefore, the Applicant must first lay prima facie evidence against the Respondent if evidential burden is to be created on the shoulders of the Respondent.”

On the issue of liability, it is submitted that the award of Kshs.500,000 is excessive, unwarranted, and not commensurate to the injuries sustained by the respondent. An award of Kshs.150,000 would have been sufficient compensation. A medical report by Dr. Wambugu P.M. dated 3rd May, 2012 states that the respondent has fully healed. Counsel relies on the case of **FAST CHOICE LTD & ANOTHER –V- HELLEN NUNGARI NGURE (2011) eKLR** where Justice Wendoh reduced an award of Kshs.450,000 to Kshs.180,000 for comminuted fracture of the shaft of the right humerus middle 1/3, bruised small finger and soft tissue injuries of the chest and anterior wall.

Mr. Nyamwaya also referred to the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE & ANOTHER –V- A.M. LUBIA & OLIVE LUBIA (1982-88) I KAR 727 AT 730** where 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 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 damages. See *ILANGA V MANYOKA*, [1961] EA 705, 709, 713; *LUKENYA RANCHING AND FARMING CO-OPERATIVE SOCIETY LTD V KAROKOTO*, [1979] EA 414, 418, 419.”

Mr. Muhuni appeared for the respondent. Counsel supports the findings of the trial court and maintain that the appellant was properly held 100% liable. The respondent was walking on the road side when he was knocked down. He became unconscious and was taken to Nairobi West Hospital where he was treated for two days and transferred to Kenyatta National Hospital. The respondent still has a metal plate in his leg that would cost Kshs.140,000 to remove as stated in the medical report of Dr. Jacinta Maina. Although the appellant took the respondent to hospital, he first sped off before being stopped by members of the public. The appellant's evidence is contradictory as he stated that the respondent was hit by the side mirror but the evidence shows that the respondent was hit on the lower part of his body. The mere fact that there was alcohol in the respondent's system is not proof that he was drunk. Counsel relies on the case of **STEPHEN OBURE ONKANGA –V- NJUCA CONSOLIDATED LIMITED (2013) eKLR** where the court of appeal at Kisumu stated:-

“General apportionment of liability is an exercise of discretion by the judge. This court can only interfere with the apportionment of liability made by the superior court where it is satisfied that the same was based on no evidence or on wrong principle and is, therefore, wrong.”

On the issue of quantum, Mr. Muhuni referred to the case of **MARAGA –V- MUSILA (1984) I KLR 251** where the Court of Appeal held:-

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower judge acted on the wrong principles”.

It is submitted that the award is not excessive. The trial court considered the injuries suffered and the authorities provided by the parties.

This being a first appeal the court is required to evaluate the evidence afresh before drawing its own conclusion. The respondent testified that on 25th August 209 he was coming from his place of work together with PW2 at around 6.30p.m. They crossed the road and the accident motor vehicle knocked him while off the road. He suffered a fracture of the right leg at the ankle. He became unconscious after the accident. He underwent surgery and metals were inserted in his leg. The plates have not been removed because it is expensive. He was not drunk.

PW2 GEOFFREY THUKU was with the respondent when the accident occurred. They crossed the Outering road at Total Petrol Station. He was ahead of the respondent. A vehicle that was overlapping hit the respondent. PW2 jumped into a ditch. The appellant took off and he ran after him. PW2 caught up with the appellant at the Kariobangi roundabout and he agreed to go back to the scene. They were on the side of the road when the accident occurred.

The appellant testified for the defence. It is his evidence that on the material day he was driving at a speed of 30-40kph when suddenly two (2) gentlemen crossed the road. He hit the 2nd pedestrian. He hooted, and swerved on the right side. He missed the first pedestrian and hit the second one. Police went to the scene and noted that the victim was drunk. The respondent was taken to Nairobi West Hospital. Blood samples detected alcohol in his system. According to the appellant, the respondent was hit by the side mirror.

The trial court found the appellant 100% liable. The evidence on record is that the respondent was hit by the accident vehicle. According to the appellant, the respondent was hit by the side mirror of the vehicle and he could have fallen down thereby sustaining the other injuries. It was incumbent upon the appellant to adduce evidence to that effect. Such evidence could include a motor vehicle inspection report showing the damage to the vehicle as well as photographs. The appellant's evidence is that he was driving at between 30-40 kmph. If that was the case and the respondent was pushed by the side mirror, it is not logically expected that the respondent would have suffered the injuries on his legs.

It is the evidence of PW2 that the appellant was overlapping. PW2 testified that he jumped and landed into a ditch. His colleague, the respondent was not lucky and was hit by the vehicle. The respondent and PW2 testified that they had crossed the road and the accident occurred off the road. The police investigations blamed the appellant for causing the accident.

The appellant contend that the respondent was drunk. That in itself cannot prove negligence on the part of the respondent. There is no evidence to the effect that the respondent was too drunk to the level of not being able to cross the road. The report from the Ministry of Public Health dated 26th August, 2009 indicate that the respondent could have taken five half litre bottles of beer. That in itself cannot prove

negligence. What is important is how the accident occurred. There is PW2's evidence that the appellant took off after the accident and PW2 had to run after him. It is not unusual for a driver to run away from the accident scene should he/she suspect that his/her life is in danger. There is no evidence that members of public wanted to harm the appellant. The appellant's position is that he went to notify the police who were near the accident scene.

From the evidence on record, I do entirely agree with the findings on liability by the trial court. The appellant was negligent and tried to overlap. In the process he knocked the respondent. The appeal on liability is not merited and is hereby disallowed.

The respondent's injuries are described by Dr. Jacinta Maina as per her medical report dated 3rd May, 2021 in the following terms:-

Fracture Bimalleoluslars right leg.

Fracture tibia distal third right leg.

The doctor noted that the injuries had not healed completely and there was partial disability. The metal plate will have to be removed at a costs of Kshs.140,000/=.

There is a second medical report by Dr. Wambugu dated 30th May 2012. The doctor described the injuries as:-

Right bimalleoluslars fracture

According to Dr. Wambugu, there were implants on the respondent's leg that would require Kshs.65,000 to remove at Kenyatta National Hospital. Dr. Wambugu assessed permanent incapacitation at 6%. The respondent was admitted from 26th August 2009 until 18th September, 2009.

Before the trial court, the respondent relied on the case of **ATHUMAN SIMIYU –V- LUDOVICA MWANDOE & 2 OTHERS (1999) KLR** where Kshs.565,000 was awarded as general damages for fracture of the tibia and fibula and potts fracture of the right ankle. Reliance was also placed on the case of **NJENGA KARANJA –V- TRANSAMI TRANSPORTERS (K) LTD (1999) eKLR** where Kshs.250,000 was awarded exclusively for fracture of right tibia/fibula by Justice R. Nambuye (as she then was). The Judge made specific awards for the other injuries named Kshs.30,000 for head injury (concussion), and Kshs.20,000 for soft tissue injuries.

Counsel for the appellant is of the considered view that an award of Kshs.150,000 is sufficient compensation. Counsel relied upon the case of **JOHNSON MOSE NYAUNDI (Minor suing through next friend and Father Wilfred Wadimbe Nyaundi) –V- PETROLEUM & INDUSTRIAL SERVICES LIMITED (2014) eKLR** where Justice Muchelule awarded Kshs.180,000 for bruises on the face, chest contusion, cerebral concussion, bruises on the elbows and the fracture of the right tibia and fibula bones.

In the case of Hideya case, the then Court of Appeal for East Africa held:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the Appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

From the medical evidence as per the two medical reports, I am satisfied that the respondent suffered serious injuries. The authorities by both parties provide comparative injuries. The respondent's fracture combines both the ankle and the tibia. He was admitted for about three weeks. He will have to spend between Kshs.65,000 to Kshs.140,000 to remove the implants on the leg. I do find that the award of Kshs.500,000 as general damages by the trial court is not inordinately excessive as to amount to an erroneous estimate. The award falls within the range of awards for comparable injuries. I see no reason as to why I should interfere with the award.

A sum of Kshs.4,200 was awarded as special damages. The respondent did not make a claim for the expenses incurred in hospital as well as for future medical costs. Part of the special damages claimed is a police abstract at a cost of Kshs.200, Kshs.500 for search certificate and Kshs.3,500 as transport expenses. Ground three (3) of the grounds of appeal is against the award of KShs.4,200/- as special damages. I am satisfied that the respondent proved that claim.

In the end, I do find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF MAY, 2021

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S. CHITEMBWE

JUDGE