



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL NO. 43 OF 2018

NAMACHANJA HIGH SCHOOL.....1ST APPELLANT

RONALD MULILO LUMULI.....2ND APPELLANT

VERSUS

BENARD BARASA WALEKHWA.....RESPONDENT

(An appeal arising from the judgement and Decree of Hon. C.A.S Mutai P.M in Bungoma CMCC No. 455/2014 delivered on 6/7/2018)

JUDGMENT

By plaint dated 31st October, 2014, Benard Barasa Walekhwa, the Respondent sued the appellants; Chairman, Board of Governors Namachanja High School (1st appellant) and Ronald Mulilo Lumuli (2nd appellant) seeking judgement for general damages, future medical expenses, special damages and costs of the suit.

The respondents claim was as contained in paragraph 5 of the plaint that;

On or about 18/7/2014, the plaintiff who was a pedal cyclist was cycling his bicycle from Sibembe area towards Bungoma Town along Mumias-Bungoma road while at Musikoma area or thereabouts when the driver of Motor Vehicle Registration Number KBB 352S Isuzu Bus negligently managed, controlled the said Motor Vehicle that it veered off its lane to the plaintiffs lane and knocked the plaintiff down causing severe injuries to the plaintiff.

PARTICULARS OF NEGLIGENCE ON THE PART OF THE 1ST DEFENDANT

- a. Permitting defective motor vehicle to be driven on a public road.
- b. Failure to train the driver on traffic rules.
- c. Failure to install speed governor on the said motor vehicle.

PARTICULARS OF THE 2ND DEFENDANT'S NEGLIGENCE

- a. Failing to observe and adhere to traffic rules.
- b. Driving while under influence of alcohol.
- c. Failure to observe and respect other road users.
- d. Driving at the speed that was excessive in the circumstances.
- e. Driving on the wrong lane.
- f. Failing to brake, stop, swerve or do anything to prevent knocking the plaintiff.

In so far as it may be necessary, the plaintiff shall rely on the Doctrine of Res Ipsa Loquitor, the Highway Code and the provisions of the Traffic Act Cap 403 Laws of Kenya.

The appellants in paragraph 5 of their defence deny the claim stating;

The defendants deny that an accident ever occurred on 18.7.2014 involving Motor Vehicle Registration Number KBB 352S Isuzu Bus and a pillion passenger on a bicycle in the manner and place as alleged in paragraph 4 of the plaint and further deny the particulars of negligence set out thereunder attributed to the 2nd defendant and invites the plaintiff to strict proof thereof.

The matter proceeded to full hearing. PW1 the Plaintiff testified as PW1 and it was his testimony that on the fateful day he was riding his bicycle when the appellant's bus lost control, swerved onto his lane hitting him occasioning serious bodily injuries whereupon, he was admitted in hospital for 2 months 2 weeks. As a result of the accident he sustained;

- Bruises on left face
- Deep cut wound on head measuring 12 cm long
- Cut wound on gum
- Bruises on fingers
- Fracture of both femurs.

The defendant called the 2nd appellant Ronald Muleo Limuli the driver of the Motor vehicle. In his witness statement which he adopted as evidence in chief he stated:

The motorcyclist suddenly made a U-turn on the road wanting to move to the other lane of the road to pick a passenger who had signaled for him. The motorcyclist actions were too fast and sudden so I immediately hooted at him, reduced speed and swerved to the far right so as to avoid hitting the motorcyclist. I swerved to the far right off the road where I stopped. However, there was on coming pedal cyclist who was over speeding down the slope from the opposite side who as unable to brake the bicycle and thus knocked the front left side of the. I wish to state that I solely blame the pedal cyclist for not braking or serving on the right so as to avoid hitting the bus while he had seen how the accident had occurred. He was over speeding thus unable to avoid the accident.

It is upon considering this evidence that the trial magistrate in his judgment found the appellant 100% liable and awarded the Respondent Kshs 2,000,000 general damages and Kshs 142,560 special damages and costs of the suit.

Aggrieved by the judgment the appellant preferred this appeal on the following main grounds:

- 1. That the learned trial magistrate erred in law and fact in failing to dismiss the respondent's suit in the lower court as he had not proved his case on a balance of probability.***
- 2. That the learned trial magistrate erred in law and fact in holding the appellants 100% liable for the accident when there was no sufficient evidence to support that finding.***
- 3. That the learned trial magistrate erred in law and fact in failing to hold the respondent wholly and or substantially liable for the accident.***
- 4. That the learned trial magistrate erred in law and fact in awarding the respondent a sum of Kshs 142,560/= as special damages that were not proved to the required standards in law.***
- 5. That the learned trial magistrate erred in law and fact by awarding the respondent a sum of Kshs 2,000,000/= as general damages for pain and suffering that was so excessive amounting to an erroneous estimate of loss or damage suffered by the respondent.***
- 6. That the learned trial magistrate's decision albeit a discretionary one was plainly wrong.***

The appeal was disposed of by way of written submissions. Mr Omwenga learned counsel for the appellants raised 3 issues for determination by this court.

On whether the learned trial magistrate erred in law and fact in holding the appellant 100% liable for the accident.

Counsel faults the learned trial magistrate for finding and holding that the appellants did not tender any evidence or call any witness to rebut the respondents claim when in fact the 2nd appellant had testified as DW1.

That when DW1 was driving the 1st appellant's Bus Registration Number KBB 352S, heading to Kisumu, upon reaching Musikoma Area, a Motor Cycle he had been trailing made an abrupt U-turn on the road whereupon he hit the said Motor Cycle consequent upon which he swerved to the right. That his evidence was corroborated by PW2 that the rider of the Motor Cycle was to blame.

Counsel submits that the respondent did not see the vehicle that hit him as he lost consciousness upon impact. That the respondent was only

told of how the accident occurred and his failure to call the source of the information is fatal to his case for being hearsay thus falling below the requisite standard of proof in civil matters. Reliance has been placed in the decision in **Kimani Muhoro Vs John Mbuthia & Anor. (2015)eKLR**.

The appellants further submit that the respondent is partly to blame for the accident as the accident occurred when it was still dark, he had no reflector jacket and his bicycle had no head lights.

On whether the learned trial magistrate erred in law and fact in awarding the respondent a sum of Kshs 142, 560/= as special damages that were not proved to the required standards in law.

Relying on the authority of **Francis Muchee Nthiga Vs David N. Waweru (2013)eKLR**, counsel submits that by their very nature, special damages must be pleaded with as much particularity and strictly proved.

Counsel submits that there was no recommendation by the Orthopedic Doctor for the metal plates worth Kshs 110,000/= and that the receipts did not have KRA stamps as required by the provisions of Section 19 of the Stamp Duty Act. The case of **Leonard Nyongesa Vs Derrick Righa Ngula (2013) eKLR** has been cited in support of this proposition.

On whether the learned trial magistrate erred in law and fact by awarding the respondent a sum of Kshs 2,000,000/= as general damages for pain and suffering.

The appellants submit that damages awardable ought to correspond to the injuries sustained even though money cannot renew the physical frame of a body. See **Tayab Vs Kinanu (1983)eKLR**.

It is the appellants' submission that the respondent did not produce evidence showing that he actually underwent further treatment after being discharged therefore he was not seriously injured and the award was therefore on the higher side.

The appellants also fault the manner in which the Medical Report (Pexh 6) was prepared. That the mere fact that the report was prepared by a Clinician as opposed to the treating doctor renders the exhibit of no probative value for being prepared by an unqualified personnel.

Citing the authority in **Hassan Noor Mohamoud Vs Tae Youn Ann (2001)eKLR** the appellants submit that the respondent did prove the fractures sustained since no Orthopedic Doctor was called to testify and therefore the award of Kshs 2,000,000/= for pain and suffering was erroneous. That in the absence of X-Ray films, the only conclusion is that the respondent suffered soft tissue injuries and that the author of the Medical Report was not called to testify.

Basing their submissions on the decision in **Thomas Ombima Vs Samson Anindo Mwenje (2018)eKLR**, the appellants propose that the award on general damages for pain and suffering be reviewed downwards from the sum of Kshs 2,000,000/= to Kshs 400,000/=.

The respondent through Mr. Paul Juma submits as follows;

On liability, counsel submits that the appellants have failed to give any evidence showing how the respondent contributed to the accident hence no sufficient reason has been advanced for this court to interfere with the trial court's finding thereon.

On quantum, citing the authority in **Multiple Hauliers (E.A) Limited Vs Josephine Wayua Ndola & Julius Nzika Kyulwa (2021)eKLR**, the respondent submits that the awards were commensurate with the injuries sustained. That the evidence of PW1 and PW3 showed how serious the injuries were.

That the respondent was subjected to further examination by Dr. Z. Gaya who indeed confirmed that the injuries were permanent and assessed permanent disability at 28%.

The respondent finally submits that for an appellate court to interfere with an award of damages, it must satisfy itself of the principles set out in **Butler Vs Butler-Civil Appeal 49/1993**.

This is a first appeal. The duty of this court on first appeal was explained in the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR**, where it was held;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

The only issues this court finds due for consideration are firstly, whether the trial magistrate erred in holding the appellants 100% liable for the accident and secondly whether the trial court's finding on quantum was erroneous and based on irrelevant factors.

On liability, counsel faulted the trial magistrate on finding them 100% liable. As far as relevant to the trial court's finding on liability, it is not contested that the respondent was riding on the right side of the road heading to Bungoma Town from Mumias direction and he was hit on that right side of the road.

PW1 and PW2 stated that the respondent was hit after the 1st appellant's bus lost control and veered off to the right side knocking down the appellant and one other pedal cyclist. The appellants blame the respondent for not wearing a reflective jacket or fitting his bicycle with

headlights.

The first issue raised by the appellant is that the trial magistrate erred in finding that the appellant was 100% liable. It is common ground that an accident occurred. Indeed, the defendant's driver (DW1) confirmed the occurrence of the accident and a cyclist sustaining injury as a result. The defence however blames the accident on a motor cyclist who made a U –turn and the defendant's driver knocked him and thereby losing control of the motor vehicle and knocking the Respondent pedal cyclist. The Motor cyclist died in the accident.

PW2 No. 81473 PC Geoffrey Kahiga attached to Bungoma Traffic Department in explaining how the accident occurred stated:

***“I was able to ascertain how the accident took place. The rider of the motor cycle was riding from Bungoma towards Mumias direction. He was being followed by the said bus. While at the location of the accident, the motor cycle rider abruptly made a U-turn whereby he was knocked down. The bus lost control went to the right side of the road and knocked down the 2 pedal cyclists who were riding towards the opposite direction. The scene of the accident was visited. Investigations were carried out. The file was forwarded to ODPP and recommended to be held as a public inquest. The inquest pending before court. The inquest is to the entire episode. Yes, the bus driver lost control of the bus and it swerved to the right. That is all.*”**

Cross examined by Mr. Onkangi:

There is a motor cycle which made a U turn. The bus driver lost control after hitting it. The rider of the motor cycle died at the scene.

From this evidence the accident was not caused solely by the defendant/appellant. Indeed, the cause is attributed to the rider of motor cyclist Registration KMDD 990L Make T.V star who made the abrupt U-turn therefore causing the appellant's driver swerve, knocked him and lost control of the bus thus hitting the Respondent. That motorcyclist sadly died in the accident.

Upon perusal of the proceedings, I find that it is not true that the defence did not call any witness. Indeed, the 2nd appellant the driver of the motor vehicle testified on 18.1.2018 and was cross examined by the Respondent counsel. He explained how the accident occurred.

Considering all the evidence I am satisfied that the rider of the motor cyclist KMDD 990 L also contributed to the occurrence of the accident. I find that the finding that the appellants were 100% liable in error. I therefore set aside the finding of appellant liability at 100% and substitute thereof that the appellant will bear 50% liability.

On general damages the principles on the award were settled by the Court of Appeal in ***Catholic Diocese of Kisumu vs. Sophia Achieng Tete (2004) 2 KLR 55*** where it was held:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entire erroneous estimate.”

It is no doubt the respondent was admitted for 2 months, 2 weeks. In proof of injuries, the respondent produced treatment notes, P3 Form and Medial Report as Pexh 2, 4 and 6 respectively. He had suffered fractures of both bones of both legs, head injuries, bruises on the left side of the face, 12 cm cut wound on the right top of the head, cut wound on the left side of the gum with a displacement of the canine tooth and bruises on the back of the fingers. That the patient was unable to walk and had to use a wheel chair to move.

A second examination was done by Dr. Z Gaya. The report was produced by consent as Dexh 1. From the report, the doctor found the respondent to have suffered permanent disability at 28%.

In their submissions at the trial court, the appellants relying in the case of ***Power Lighting Company Ltd & Anor Vs Zakayo Saitati Naingola & Another (2008) eKLR***, proposed an award of Kshs 200,000/- in general damages while the respondent relying on ***Sabina Nyakenya Mwangi Vs Patrick Kigoro & Another (2015) eKLR*** proposed Kshs 3,000,000/- where disability had been assessed at 42%.

On quantum, I have considered the injuries sustained by the Respondent and find that they were serious and that led to 28% incapacity. I find no reason to interfere with the damages awarded.

In the result, the appeal on liability succeed to the extent that the appellants will bear 50% liability of the damages awarded. i.e Kshs 1,000,000/= general damages and Kshs 71,280/= special damages. Each party to bear his own costs of the appeal.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF JUNE, 2021

S.N RIECHI

JUDGE