



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 73 OF 2019

THE THIRD ENGINEERING BUREAU CHINA CONSTRUCTION GROUP LIMITED....APPELLANT

VERSUS

EDWIN KINANGA ATUYA.....RESPONDENT

(Being an appeal from the judgment and decision of the Hon. N.S Lutta (PM)

in the original Kisii CMCC No. 294 of 2018)

JUDGMENT

1. This appeal concerns liability and the quantum of damages awarded by the trial court. According to the respondent's claim, on 19th March 2019 he was riding a motorcycle registration No KMDS 102S along Kisii-Nyamataro Murram road when the appellant's driver negligently drove motor vehicle KCA 629M causing it to collide with the motor cycle. The respondent as a result sustained the following injuries: bruises on the scalp, hands and right leg, compound left tibia fracture and compound left fibula fracture.

2. The defendant denied being the owner of the motor vehicle and also denied causing the accident. In the alternative it was pleaded that the injuries occasioned on the respondent was as a result of the respondent's own negligent acts.

3. After assessing damages, the trial court found the appellant to be wholly responsible for the accident and awarded the respondent Kshs. 800,000/- and Kshs. 91,370/- as general and special damages respectively.

4. The appellant dissatisfied with the finding of the trial court has now filed this instant on the following grounds;

1) *THAT the trial learned magistrate erred in law and in fact by apportioning 100% liability on the appellant despite the existence of contrary evidence.*

2) *THAT the trial magistrate erred in law and in fact by failing to appreciate the testimony of the defence witness that he was never charged with any traffic offence.*

3) *THAT the trial magistrate erred in law and in fact by failing to appreciate the testimony of the respondent that he was not wearing protective gear.*

4) *THAT the trial magistrate erred in law and in fact by awarding general damages that were inordinately too high.*

5) *THAT the trial magistrate erred in law and in fact by failing to appreciate the appellant's submissions and the authorities quoted therein.*

6) *THAT the judgment herein was against the weight of the evidence offered before the court.*

5. At the hearing of this appeal, I directed the parties to file written submissions and both parties have complied. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified (see **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA**).

6. The respondent, Edwin Kianga Atuya, testified before the trial court as (Pw1) and adopted his witness statement. In his witness statement he averred that the motor vehicle was being driven at a high speed thus causing the accident. He stated that he was admitted at Kisii Teaching

and Referral Hospital for 4 days. On cross examination he testified that both the vehicle and motor cycle were moving in the same direction but did not know that the vehicle was behind him. At the time of the accident Pw1 testified that he had worn his uniform and helmet.

7. Upon calling for CMCC NO 285 of 2018, I note that the parties before the trial court agreed to have the evidence of Dw1 given therein to apply to CMCC 294 of 2018. Wilbird Kimaro Senge (Dw1) adopted his witness statement dated 11th June 2018. According to his statement he was driving the vehicle at 60-70 Kmph while keeping left and saw the motorcycle in front of him. Suddenly the motorcycle swerved to the right side without indication. In his statement, Dw1 admits to hitting the respondent despite applying the brakes and attributes it to the abrupt move by Pw1 and the close proximity the vehicles had to the motorcycle. He stated that the vehicle hit the motor cycle on the side of the pillion passenger on its right side causing it to fall down.

8. In their submissions, the appellant submits that he respondent had an equal duty to road users which he failed to discharge and thus ought to be 50% liable. They relied on the case of *Helle Sejer Hansen & 2 Others v Julius Kakungi Mukavi (2020) eKLR*. They faulted the trial court for omitting the evidence of Dw1 in **CMCC NO. 285 OF 2018 Evalyne Kerubo Orangi v Third Engineering Bureau of China City** which ought to have been applied in this case.

9. The respondent advanced that the appellant did not call any witness to support the allegations in the defence. The respondent further argued that the appellant failed to demonstrate how the respondent's failure to wear gloves caused the accident.

10. Having considered the evidence before the subordinate court together the rival submissions, it is not in dispute that an accident occurred on 19th March 2019 involving the appellant and respondent. Dw1 testified that he was driving at 60-70 Kmph and the respondent was in front of the appellant's vehicle. The respondent admitted to have been driving at a high speed as he testified that despite applying the brakes he hit the respondent who was in front of him. He admitted that he had not maintained proper distance between his vehicle and the respondent's motor cycle. I also find the explanation offered by Dw1 does not tilt the balance in the appellant's favour for reasons that if indeed the respondent swerved the motorcycle to the right side of the road, then this could only mean that the left side of the road was clear and the vehicle would not have hit the motorcycle that would have been on the right side of the road. The respondent also testified that he was wearing protective gear while riding the motor cycle.

11. Although the trial magistrate misdirected himself when he failed to consider the testimony of Dw1, having evaluated the evidence of Pw1 and Dw1, I find the appellant is 100% liable for the accident for the reasons given above.

12. I now turn to the issue of quantum. The principles upon which this court should interfere with damages by a lower court were stated in the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR**:

"... 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 damage."

The Court of Appeal in **Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR** observed that:

"The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

13. The appellant before the subordinate court cited the case of **Harun Muyoma Boge v Daniel Otieno Agulo [2015] eKLR** where the plaintiff suffered compound fracture of the right tibia and fibula as well as soft tissue injuries and was awarded Kshs. 300,000/-. The respondent on the other hand cited the case of **Alphonse Muli Nzuki v Brian Charles Ochuodho [2014]** where the plaintiff was awarded Kshs 800,000/- as general damages for suffering compound comminuted fracture of the right tibia and fibula; and degloving injury of the right leg. The respondent also cited the case of **Francis Ndungu Wambui & 2 Others v VK (a minor suing through next friend and mother MCWK) 2019** and **Clement Gitau v GKK [2016] eKLR** both of which did not feature in their submissions before the subordinate court for the trial magistrate's consideration.

14. In my view, the award in **Harun Muyoma Boge v Daniel Otieno Agulo (supra)** was in regard to general damages of an accident that occurred in 2010 and I find that in the circumstance the award does not reflect the recent, and comparable awards. On the other hand, the injuries sustained by the plaintiff in **Alphonse Muli Nzuki v Brian Charles Ochuodho [2014]** were slightly severe compared to injuries sustained by the respondent herein.

15. In **Aloise Mwangi Kahari v Martin Muiya & another [2020] eKLR** the plaintiff had sustained compound fracture of right tibia and fibula, bleeding from left lower limb and swollen leg and was awarded Kshs 500,000 as general damages. In **Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR** the plaintiff sustained compound fractures of the tibia/fibula bones on the right leg; deep cut wound and tissue damage on the right leg; head injury with cut wound on the nose; blunt chest injury and soft tissue injury on the left lower limb involving the high and ankle region. The court set aside the trial court award of Kshs 600,000/- and substituted it with an award of Kshs 400,000/-.

16. Having taken into account the nature of the injuries including the fracture, awards from comparable cases and the element of inflation, an award of Kshs. 500,000 would be reasonable compensation for the respondent.

17. I set aside the award of general damages and substitute the same with an award of **Kshs. 500,000/-**. This amount shall accrue interest at court rates from the date of judgment in the lower court. The appellant shall have costs of this appeal

Dated, Signed and Delivered at KISII this 22nd Day of JUNE 2020

R.E. OUGO

JUDGE

In the Presence of;

Miss Anyango For the Appellant

Mr. Omotto For the Respondent

Ms. Rael Court Assistant