REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 156 OF 2019

EMMANUEL ITHAU NYAMAI.....1ST APPELLANT

DAILY TRUCKS LIMITED.....2ND APPELLANT

-VERSUS-

PAUL KIPSANG SAMOEI.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C. Menya, Senior Resident Magistrate, dated on

11 October 2019 in Eldoret CMCC No. 670 of 2018)

JUDGMENT

[1] This appeal arises from the decision of the Senior Resident Magistrate's Court (Hon. C. Menya) in Eldoret Chief **Eldoret Chief Magistrate's Civil Case No. 670 of 2018: Paul Kipsang Samoei vs. Emmanuel Ithau Nyamai**. The lower court suit had been filed by the respondent vide his Plaint dated **13 June 2018** for special damages, general damages, costs and interest, in connection with injuries sustained in a road traffic accident that occurred at Soy Market along the Kitale - Eldoret Road on **9 May 2018.**

[2] It was the respondent's case that he was travelling as a pillion passenger aboard motor cycle registration number KMDR 678E when the 1st appellant so negligently, carelessly and/or recklessly drove motor vehicle registration KCJ 530Y that it lost control, veered off the road and violently knocked him, thereby occasioning him severe injuries for which he was treated at **Moi Teaching and Referral Hospital.**

[3] The particulars of negligence alleged were set out by the respondent at paragraph 6 of his Plaint; while the particulars of injuries suffered as well as of special damage were set out in paragraph 8 of the Plaint. The respondent also pleaded the doctrine of *res ipsa loquitor* in seeking compensation for his pain, suffering and loss.

[4] The claim was resisted before the lower court by the two appellants. They filed a Statement of Defence dated **26 November 2018** in which they denied each of the allegations set out in the Plaint. For instance, the appellants denied that an accident occurred in the manner alleged by the respondent or at all, and invited the respondent to prove his assertions. In the alternative, they averred that, if indeed the alleged accident occurred, then it was largely contributed to by the negligence of the respondent and the rider of the subject motor cycle. On their part they relied on the doctrine of *volenti non fit injuria* to support their assertion that the respondent voluntarily took the risk he got himself into.

[5] Upon hearing the parties and their witnesses, the lower court found the appellants 100% liable and awarded the respondent a total sum of **Kshs. 312,025/=** as general and special damages. She also awarded the respondent interest and the costs of the suit in a decision rendered on **11 October 2019**. Being aggrieved by that decision, the appellants filed this appeal on **31 October 2019** on the following grounds:

> **[a] That the learned trial magistrate erred in law and fact in holding the appellants 100% liable in negligence without taking into account the evidence on record.**
>
> **[b] That the learned trial magistrate erred in law and in fact by failing to apportion liability on the part of the respondent in view of the evidence adduced.**
>
> **[c] That the learned trial magistrate erred in law and in fact in failing to consider the submissions by the appellants and the evidence tendered by the appellants, particularly that of DW1.**

[d] That the learned trial magistrate erred in law and in fact in failing to take into account the evidence on record, hence arriving at a wrong decision.

[e] That the learned trial magistrate erred in law and in fact in adopting the wrong principles in the assessment of damages payable to the respondent.

[f] That the learned trial magistrate erred in law and in fact in awarding damages which were excessive in the circumstances in view of the evidence adduced.

[6] Hence, appellants prayed for orders that his appeal be allowed; that the Court be pleased to set aside the lower court's judgment and substitute it with an order dismissing the respondent's suit with costs to the appellants. In the alternative, the appellants prayed that the Court be pleased to re-assess the damages downwards. They also prayed for the costs of the appeal.

[7] The appeal was urged by way of written submissions, pursuant to the directions given herein on **11 May 2021**. Consequently, the written submissions, filed herein by the parties on **4 November 2020** and **13 December 2020,** respectively, were deemed duly filed. The appellants proposed the following issues for determination:

[a] Who was to blame for the accident and to what extent?

[b] What damages are payable, if any?

[8] It was the submission of counsel for the appellants that the trial court erred in fixing liability at 100% against the appellants. In his view, the respondent did not prove his case on a balance of probabilities. Counsel urged the Court to note that **PW1** was not the investigating officer; and that in cross-examination he conceded that he did not visit the scene of accident. Hence, counsel posited that the evidence of **PW1** was nothing more than hearsay and therefore of little or no probative value. As for the respondent, counsel submitted that his evidence as **PW2** was of little assistance to the trial court in determining the issue of liability, since he only felt the impact of the accident and therefore was unable to tell how the accident occurred. Counsel relied on **Kennedy Nyangoya vs. Bash Hauliers Ltd** [2016] eKLR; **Ismail Nyasimi & Another vs. David Onchangu Orioki** (suing as the personal representative of Anthony Nyabondo Onchango (deceased) [2018] eKLR and **Evans Mogire Omwansa vs. Benard Otieno Omolo & Another** [2016] eKLR.

[9] Counsel invited the Court to instead rely on the evidence of **DW1** and find that the accident occurred on his correct lane, namely, the left lane facing Eldoret direction. He posited that the account by **DW1** as to the point of impact was not challenged in any way during cross-examination and therefore that the only logical finding, which the lower court ought to have made, was that the suit was for dismissal. On quantum, counsel submitted that the main injury sustained by the respondent was a fracture of the right finger, for which an award of **Kshs. 250,000/=** had been proposed to the lower court by the appellants' counsel. He pointed out that the authority that the respondent cited, and which the trial court relied on, namely, **Kenya Steel Fabricators Ltd vs. Tom Moki** [2018] eKLR, in which a sum of **Kshs. 260,000/=** was awarded as general damages, involved 4% permanent incapacitation; which was not the case with the respondent. Hence, counsel took the view that the trial magistrate fell into error by awarding **Kshs. 300,000/=** as general damages in the circumstances. He prayed that the appeal be allowed and the orders prayed for granted.

[10] On his part, counsel for the respondent proposed the following issues for determination in this appeal:

[a] Who is to blame for the occurrence of the accident?

[b] Did the respondent herein contribute in any way to the occurrence of the accident?

[c] Whether the award of general damages by the trial court was excessive in the circumstances.

[11] Counsel urged the Court to find that credible evidence was adduced by the respondent to demonstrate that the point of impact was the left lane facing Kitale direction; and therefore that the 1st appellant was to blame for the accident for which the 2nd appellant is vicariously liable. He further mentioned the fact that it was out of guilt that 1st appellant fled the scene of the accident. He therefore defended the lower court's finding that the appellants were 100% liable. As to whether the respondent contributed to the accident, counsel urged the Court to note that the appellants failed to enjoin the motor cyclist or the owner of the subject motor cycle to the lower court suit; and therefore that their allegations of contributory negligence were not proved. He further submitted that it was not demonstrated how the respondent contributed to the accident, granted that he was only a pillion passenger on the motor cycle who could have done nothing to avoid the accident.

[12] On quantum, counsel reiterated the findings and opinion of **Dr. Sokobe** and **Dr. Gaya**; which confirmed the injuries as being both soft tissue and bone fracture injuries. He took the view that, taking into account the said injuries, the lower court award is defensible. In addition to the authorities cited before the lower court, counsel made reference to the following decisions:

[a] Nyeri High Court Civil Case No. 320 of 1998: Catherine Wanjiru Kilngori and 3 Others vs. Gibson Theuri Gichumbi, in which the plaintiff was awarded general damages of Kshs. 350,000/= for multiple soft tissue injuries, injury to the left elbow joint and injuries on both ankles with no fracture.

[b] Kajiado High Court Civil Appeal No. 12 of 2016: Pembe Flour Mills Limited vs. Ali Omar Swaleh, in which the court upheld an award of Kshs. 350,000/= as general damages for bruises and related soft tissue injuries with fracture of the right ring finger metacarpal bone.

[13] Counsel also relied on **Butt vs. Khan** [1982-1988] KAR 1 for the holding 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. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and arrived at a figure which was either inordinately high or low."**

[14] This being a first appeal, it is the duty of the Court to consider and re-evaluate the evidence adduced before the lower court with a view of making its own findings and conclusions thereon; while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123** it was held that:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[15] I have given careful consideration to the evidence placed before the lower court in the light of the Grounds of Appeal filed herein, as well as the written submissions filed herein by learned counsel. The issues are basically the question of liability; and whether the quantum of damages awarded by the lower court is reasonable in the circumstances.

[16] The respondent testified before the lower court as **PW2.** His evidence was that, on **9 May 2018**, while travelling as a pillion passenger on a motor cycle from Eldoret to Kitale along the Eldoret-Kitale Highway, a lorry attempted to overtake from the opposite direction and hit them in the process. He added that he found himself at Moi Teaching & Referral Hospital where he was admitted for treatment for the injuries suffered; and that he got to learn that the rider of the motor cycle died. He produced his treatment documents as well as receipts for the expenses incurred on his treatment as exhibits before the lower court. The respondent blamed the appellants for the accident and for his injuries and prayed for compensation therefor.

[17] The respondent called **PC Simon Nyaguu** of Moi's Bridge Police Station, who testified before the lower court as **PW1**. He produced the Police Abstract dated **11 May 2018** to confirm that an accident occurred on **19 May 2018** involving motor vehicle registration number KCJ 530Y Truck and motor cycle registration number KMDR 678E, in which the rider died on the spot. **PW1** further testified that, although the truck driver did not stop at the scene, he reported the accident to the police; and that the body of the deceased was removed from the scene and taken to the mortuary. He exhibited the Abstract as an exhibit in the lower court case and it was marked **the Plaintiff's Exhibit 1.**

[18] The respondent's third witness was **Dr. Paul Rono**, based at Moi Teaching and Referral Hospital. He produced a consultation request form, CT Scan report, radiology request form and a prescription form in respect of the respondent as exhibits before the lower court and confirmed that the respondent was attended to at their hospital for injuries sustained in a road traffic accident. He also confirmed that the respondent sustained head injuries, chest injuries as well as a fracture of the left 2nd finger.

[19] **Dr. Sokobe (PW4),** testified on **8 August 2019** and confirmed that he examined the respondent on **28 May 2018** in respect of injuries sustained by him in a road traffic accident that occurred on **9 May 2018**. His findings were that the respondent suffered soft and bony tissue injuries and had recovered well. He further confirmed that he charged **Kshs. 6,000/=** for his services which was duly paid by the respondent; and that he also filled the P3 Form and assessed the degree of injury as minor. He produced both his medical report and the P3 Form as exhibits before the lower court.

[20] On behalf of the defence, the evidence adduced in **Eldoret Civil Case No. 669 of 2018** by **DW1** was adopted by consent and the medical report prepared by **Dr. Gaya** accordingly produced as **Defence Exhibit 1.** The Judgment of the lower court confirms that the 1st appellant herein was **DW1** in that case; and that he told the lower court that he was transporting luggage to Nairobi on **9 May 2018** when the accident in question happened. He however denied that he was overtaking or that he was driving at a high speed. The 1st appellant is on record as having blamed the cyclist for the accident.

[21] In the light of the foregoing evidence, it is manifest that the appellants' account differed significantly from the version presented by the respondent as to the point of impact and therefore liability. It was therefore a question to be resolved by the trial magistrate on the basis of the evidence, including her observations on the credibility and demeanour of the witnesses. As was observed by **Sir Kenneth O'Connor** in **Peters vs. Sunday Post Limited [1958] EA 424**:

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."**

[22] Hence, whereas the respondent admittedly did not see the appellant's lorry approach, he was categorical that the cyclist whose pillion passenger he was, was riding on the left side of the road, facing Kitale direction; and that the accident occurred on their side of the single carriage highway. The trial magistrate was thus faced with two differing accounts and had to choose which version was more credible. She opted to believe the respondent and gave her reasons for taking that position.

[23] It is noteworthy too that whereas allegations of contributory negligence were levelled against the deceased rider, no attempt was made to prove those allegations. Hence, as correctly urged by counsel for the respondent, the trial court cannot be faulted for fixing liability at 100% against the appellants. In **Stapley vs. Gypsum Mines Ltd (2)** [1953] A.C. 663 at p. 681, **Lord Reid** had the following to say, which has been quoted with approval by the Court of Appeal in **Michael Hubert Kloss & Another vs. David Seroney & 5 Others** [2009] eKLR

"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it…The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

[24] It was therefore imperative, in a case such as the instant one where contributory negligence was alleged, for credible evidence to be availed in proof thereof. In the absence of such proof as was the case herein, it is my finding that the decision arrived at by the trial magistrate on liability is justified in the circumstances and is hereby upheld.

[25] On quantum, it is trite that assessment of damages is a matter of discretion; and that an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome. In **H. West & Son Ltd vs. Shephard [1964] AC 326**, for instance, it was held that:

"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

[26] Similarly, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR, the Court of Appeal held that:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court 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 high that it must be a wholly erroneous estimate of the damages." (Also see **Butt vs. Khan** [1981] KLR 349)

[27] The approach taken by **Hon. Wambilyanga, J.** in **HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf**, and which I find useful, was thus:

"The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."

[28] And in **Stanley Maore vs. Geoffrey Mwenda** [2004] eKLR, the Court of Appeal suggested thus:

"…we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

[29] As pointed out herein above, the respondent pleaded the following injuries:

[a] Head injury with loss of consciousness for a while;

[b] Bruises on the right temporal scalp;

[c] Blunt injury and bruises on the right hand;

[d] Fracture of the 1st phalange of the right index finger;

[e] Blunt injury to the chest;

[f] Bruises on the back;

[g] Bruises on the right ankle;

[30] The medical reports exhibited herein, prepared by **Dr. Sokobe** and **Dr. Gaya**, were largely in agreement as to the injuries sustained and the fact that the respondent has healed well from those injuries with no permanent disability. The learned trial magistrate predicated her

decision on quantum on the case of **Kenya Steel Fabricators Ltd vs. Tom Moki** (supra). But as was observed by counsel for the appellants, in that matter, the injuries entailed 4% permanent disability, which is not the case herein; and even then, the award, made on **27 September 2018** was for **Kshs. 260,000/=** only. For my part, I find **Oluoch Eric Gogo vs. Universal Corporation Ltd** [2015] eKLR to be a better guide. The plaintiff in that matter suffered a crushed injury to the left thumb with fracture of mid phalanx. He was awarded **Kshs. 200,000/=** on 7 May 2015.

[31] In the light of the foregoing, I am satisfied that the lower court's award was on the higher side; and therefore that the learned trial magistrate committed an error of principle in arriving at the sum of **Kshs.300,000/=** as general damages for the fracture of one finger. I would reduce the same to **Kshs. 200,000/=**. As the special damage component was not challenged, the same is left undisturbed; with the result that the appeal is partially successful. The lower court's judgment dated **11 October 2019** is hereby set aside and is substituting with the judgment of this court in the sum of **Kshs. 212,025/=** together with interest and costs, including the costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF JULY 2021

OLGA SEWE

JUDGE