REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 192 OF 2019

MOSES GICHIGI GITHIRU.....APPELLANT

VERSUS

PADDY DISTRIBUTORS LIMITED.....1ST RESPONDENT

JOYCE WANGUI WACHIRA.....2ND RESPONDENT

(AN APPEAL FROM THE DECREEE AND JUDGEMENT OF HON. M. KYALO (RM)

DATED 17TH OCTOBER 2019 IN CIVIL CASE NO. 142 OF 2019 AT NAKURU)

JUDGEMENT

1. The appellant was involved in a road traffic accident along Geoffrey Kamau road, Nakuru- Nairobi highway near KFA on **26th July 2016** when he was hit by motor vehicle registration number **KBA 670N** after it hit motor vehicles registration numbers KAP 211N and KAS 447Z. The appellant was lawfully walking along the said road.

2. As a result of the said accident he sustained **fracture of the left lateral malleolus, soft tissue injuries of the chest, soft tissue injuries of the hands, and bruises on the knee**. In his plaint at the trial court he attributed negligence upon the respondents for causing the said accident.

3. The respondents on their parts denied liability by blaming the appellant as well as the owners and or drivers of the other vehicles that were involved in the said accident.

4. The matter went to a full hearing where the appellant tendered his evidence though he did not call any witnesses. The respondents on their part did not tender any evidence but chose to rely on their written submissions.

5. The trial court found all the parties equally liable for the accident namely, 50:50 percent and awarded the appellant general damages of Kshs. 500,000, loss of income of Kshs. 40,000 and special damages of Kshs. 18,634. Each party was to meet its own costs.

6. Aggrieved by the said verdict, the appellant has filed this appeal citing basically three grounds that is on liability, quantum and costs.

7. When the matter came up for hearing the court directed that the same be disposed by way of written submissions. As at the time of preparing this judgement the appellant alone had filed his submissions.

8. The appellant submitted that the court was wrong in attributing a 50% liability on him for the simple reason that there was no evidence tendered by the respondents to prove his negligence. That all that the trial court relied on was the submissions by the respondents which came after they closed their case. There was no evidence for example that the appellant was crossing a marked bump or a zebra crossing area. That line of argument taken by the respondent was simply in their submissions and the appellant was not accorded an opportunity to cross examine or at all as there was no witness called.

9. The trial court according to the appellant was right in finding that the respondent's driver was supposed to keep a reasonable distance to avoid any collision in the event that the vehicle ahead was to stop abruptly. The act of the lorry ramming on the vehicles ahead and which caused the accident clearly indicated that he did not keep the reasonable anticipated distance.

10. He submitted that other than not calling any witness, the respondents did not bring in the owners or drivers of the other vehicles either as

third parties to the suit or in any way attribute blame upon them. In essence the respondents ought to carry the blame for causing the accident.

11. Essentially therefore by closing their case without calling their witness, the evidence by the appellant remained uncontroverted and unchallenged.

12. On the issue of damages, the appellant contents that the general damages awarded were too low in the circumstances and not commensurate to the injuries. He said that the trial court relied on old decisions without taking into considerations the injuries suffered by the appellant viz a viz those by the parties therein.

13. He proposed that the appellant ought to be awarded a sum of Kshs. 1,100,000 considering that the appellant had suffered grievous harm and the doctor had found disability at 5%.

14. He as well faulted the trial courts finding on the issue of diminished earning capacity. The court failed to appreciate that he had suffered some serious disability and was unable to carry his work normally which in this case was selling cereals and delivering goods. He had therefore been forced to venture into some new business of driving which he could not do for long distances.

15. Finally, on costs the appellant submitted that it was wrong for the trial court not to have awarded him the same. He prayed that based on his submissions on liability, he was merited to be awarded costs of the case both at the lower court and on this appeal.

ANALYSIS AND DETERMINATION.

16. The court has perused the appeal herein as well as the trial courts proceedings, the evidence tendered, the exhibits produced and the appellant's submissions herein.

17. There is no doubt as to how the accident occurred. The same was caused when the respondents vehicle hit motor vehicles registration numbers KAP 211N and KAS 447Z. This was not controverted.

18. Who then was negligent? Was it the appellant or the respondents? The evidence showed that the appellant was crossing the road with others numbering about four or five. He said on cross examination that he had not seen the lorry that hit the other vehicles.

19. In my view, it is evident that in as much as the appellant may have been careful on crossing the road there was not much he could do on the respondent's vehicle which had hit the other two vehicles. It is not always foreseeable that the pedestrian will know or suppose that the vehicle he is looking at would be hit by the one behind and subsequently hit him or cause the accident. As a matter of practice it is always correct and indeed it's a traffic norm that every driver must ensure to keep a reasonable safe distance between it and the vehicle ahead.

20. There was no evidence from the respondents to the contrary. There was therefore no reason to doubt what the appellant was stating to the court. Mere denial in the statement of defence is not sufficient. It must be followed by hard evidence. Again it is not enough to submit evidence that was not tendered to court and tested in cross examination if need be. The common practice is to call real evidence which will be subject to cross examination if necessary and thereafter a party may submit over the same if permitted to do so. The facts submitted on must be in consonance or in tandem with the tendered evidence.

21. The trial court as rightfully submitted by the appellant should not have relied on the issues raised in the submissions. The issue of the marked bumps or zebra crossing raised by the respondents in their submissions was not tested through oral evidence, and it was simply plucked from the air. They should have called a witness to explain the same.

22. The details of the police abstract on the face of it blames the respondents for the accident despite the same pending under investigations. The production of the said abstract as a piece of evidence by consent in my view lends credence to the fact that the accident was solely caused by the respondent's negligence.

23. In the premises, this court faults the holding by the trial court that the appellant contributed partially to the accident. He had nothing to do with it. It was the respondents who ought to have been careful and ensure that he kept safe and reasonable distance between him and the motorist ahead. I therefore find the respondents 100% liable for the accident.

24. On the issue of damages, the Court of Appeal in BUTT **V. KHAN (1977) 1KAR** gave directions and guidance on how to deal with the same. The court shall disturb the trial courts finding if it is too low or high or excessive or the court proceeded on wrong principles.

25. In the case at hand the only serious injury was the fracture of the left lateral malleolus. The rest were generally soft tissue in nature. The proposal by the appellant is too high in the circumstances. All the authorities cited have more serious injuries comparatively.

26. The three authorities cited by the trial court were reasonable in my view as they are not excessive nor exaggerated. In the end I hold that the general damages of Kshs. 500,000 was reasonable in the circumstances.

27. As to the loss of amenities and or diminished returns, this court does not find any evidence at all. The appellant testified that he was a businessman dealing with selling of cereals and he was earning Kshs. 30,000 on average. He has as a result of the said accident unable to work and he was now a driver but he could not travel long distances.

28. Other than his oral evidence under oath there was nothing else. He who alleges must prove as espoused by **Section 107 and 108 of the Evidence Act.** In the absence of any documentary or any other convincing evidence I find that this ground ought not to have been allowed by

the trial court.

29. The issue of special damages was well established and I do not find any reason to disturb the same.

30. I'm inclined to grant the appellant the prayer on costs. Clearly he was not the author of the accident. The respondents were negligent as found above. Costs as **per Section 27 of the Civil Procedure Act** follow the events. In this case it ought to follow.

31. **In conclusion the court hereby makes the following orders;**

a) The trial court's judgement is hereby set aside together with all the attendant consequences.

b) The respondents are hereby found wholly liable for the said accident.

c) The general damages shall remain at Kshs. 500,000 as found by the trial court.

d) Special damages shall remain at Kshs. 18,634.

e) The appellant shall have the costs of this appeal as well as at the lower court.

f) The general and special damages shall attract interest at courts rates from the date of the lower court's judgement till payment in full.

DATED SIGNED AND DELIVERED VIA ELECTRONIC LINK AT NAKURU THIS 23RD DAY OF SEPTEMBER 2021.

H K CHEMITEI

JUDGE.