REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. E009 OF 2021

SAMUEL MUNYANZI MUGENDO.....APPELLANT

VERSUS

WICKLIFFE OMBOTO.....RESPONDENTS

(Being an Appeal from the Judgment/Decree of the Honourable M. C. Nyigei – PM Nyamira delivered on the 16th day of December 2020 in Nyamira CMCC NO. 26 of 2018)

JUDGEMENT

1. This appeal challenges the trial magistrate's judgment on the twin issues of liability and quantum. The appellant was the defendant in a suit wherein the respondent claimed general and special damages in regard to personal injuries sustained in an accident that occurred along the Kisii-Nyamira Road on 8th September 2017. The accident involved the appellant's m/vehicle Registration No. KBN 735R and a motor cycle Registration No. KMED 383B in which the respondent was a pillion passenger. At the trial the respondent testified and called three witnesses but the defence closed its case without adducing any evidence. After considering the evidence before him and the submissions of both parties the trial magistrate found the appellant wholly liable for the collision and proceeded to assess and award the respondent general damages in the sum of Kshs. 800,000/=, future medical expenses of Kshs. 200,000/= and Kshs. 50,150/= special damages. Being aggrieved the appellant preferred this appeal which is premised on grounds that:-

> **"1. The learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the defendant without considering the circumstances of the case.**
>
> **2. The learned trial magistrate erred in fact and in law by apportioning 100% liability to the defendant whereas the police abstract produced as plaintiff's exhibit indicated that the matter was still pending under investigation.**
>
> **3. The learned trial magistrate erred in fact and in law by apportioning 100% liability to the defendant whereas PW1 and PW2 gave evidence that the rider was also overtaking when the accident occurred.**
>
> **4. That the learned trial magistrate erred in law and in fact in the assessment of quantum thereby giving an award on quantum on general damages of Kshs. 1,050,150/= that was overly in excess in the circumstances of the court**
>
> **5. That the learned trial magistrate erred in law and in fact in failing to pay regard to decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.**
>
> **6. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious."**

2. By this appeal it is urged that this court do set aside the trial magistrate's findings on liability and quantum and replace it with its own assessment and that the costs of this appeal be provided for.

3. The appeal proceeded by way of written submissions. On the issue of liability Counsel for the appellant submitted that at the hearing the respondent admitted that the motor cycle was overtaking when the accident occurred and that this fact was also corroborated by PC Dominic Munene (PW2). Counsel contended that the aforesaid evidence and the omission of the police to indicate who was to blame for the accident in the police abstract should have led the trial magistrate to find both parties equally to blame. Counsel relied on the case of **Ali Malik Brothers Motors (K) Limited & another Vs Emmanuel Oduor Onyango [2018] eKLR** to support this submission. Counsel further contended that the respondent did not prove negligence on a balance of probabilities. He blamed the respondent for assuming the risk and not warning his rider of reckless overtaking.

4. On the quantum of damages Counsel submitted that the general damages of Kshs. 800,000/= for pain, suffering and loss of amenities were excessive as the respondent's injuries were mainly soft tissue in nature. Counsel cited the case of **Damaris Ombati V Moses Mogoko Levis & another [2019] eKLR.** Counsel submitted that in that case the award of Kshs. 800,000/= for injuries similar to those of the respondent herein were set aside and substituted with Kshs 350,000/= and Kshs 300,000/=. Counsel proposed an award of Kshs. 400,000/=. He stated that such an award would be more appropriate for the respondent's injuries. Counsel and also argued that the award should be apportioned equally between the parties.

5. In regard to the costs of this appeal Counsel urged this court to award the costs to the appellant as provided in **Section 27 of the Civil Procedure Act.**

6. Learned Counsel for the respondent vehemently opposed the appeal and submitted that the learned trial magistrate took into account the law and evidence in arriving at his findings on liability and quantum. Counsel argued that the award is commensurate with past awards and the nature of injuries sustained by the respondent and this court ought not to disturb the same. Counsel urged this court to find the appeal unmerited and to dismiss it with costs to the respondent. In support of his submissions Counsel for the respondent cited the following cases:-

- **Toyota (Kenya) Limited V Express (Kenya) Limited [2013] eKLR**
- **Paul Kipsang Koech & another V Titus Osule Osore [2013] eKLR**
- **Kiwanjani Hardware Ltd & Another V Nicholas Mule Mutinda [2008] eKLR**
- **Kemfro Africa Limited t/a Meru Express Service, A M Lubia & Another**
- **Telkom Orange Kenya Limited V I S O (minor suing through his next friend and mother JN [2018] eKLR**
- **Peter Nyangacha V Nyagaka Bisera Peter [2018] eKLR**
- **Cecilia Mwangi & another V Ruth W. Mwangi [1997] eKLR**
- **John Wainaina Kagwe V Hussein Dairy [2013] eKLR.**

7. On the issue of liability, this being a first appellant court, I must consider the evidence in the trial court so as to arrive at my own independent conclusion while bearing in mind that I did not hear or see the witnesses. The respondent's evidence, as contained in a statement which was adopted as his evidence, was inter alia that the appellant's motor vehicle was being driven at an excessive speed; that its driver failed to keep a proper lookout for other road users and more especially motor cycle KMED 383B; that the driver was driving under the influence of alcohol and that the driver did not take any measures to avoid the accident. The appellant did not adduce any evidence to rebut or controvert the respondent's evidence and my finding is that the evidence which clearly proves negligence against the appellant or the driver of the appellant's motor stands. My holding is anchored on the decision of the Court of Appeal in the case of **John Wainaina Kagwe V Hussein Dairy Limited [2013] eKLR** where the court stated:-

> **"....the Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning that the allegations in its defence with regard to the blame- worthiness of the accident on the Appellant either wholly or substantially remained just that, mere allegations. The Respondent thus never tendered any evidence to prop up its defence, whatever the respondent gathered in cross examination of the Appellant and his witnesses could not be said to have built up its defence as it were, therefore, the Respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident....."**

8. Similarly in this case the appellant did not adduce any evidence to controvert that of the respondent and therefore his averments in the statement of defence are just but allegations. I am obviously not persuaded by the argument that because the police abstract did not apportion liability then both parties must be found equally liable. This is because causation is an issue of fact which must be proved through evidence. It cannot be presumed. It is my finding that the respondent proved negligence against the appellant on a balance of probabilities and in the absence of evidence to attribute contributory negligence to the respondent I must agree with the trial magistrate's finding that the appellant was wholly to blame.

9. On the quantum of damages, as correctly submitted by Counsel for the respondent and as was held in the cases of **Paul Kipsang Koech & another V Titus Osule Osore (supra) and Kiwanjani Hardware Ltd & another V Nicholas Mule Mutinda (supra)** an appellate court will only interfere with the award of the trial court if it is inordinately so high or low as to represent an entirely erroneous estimate or it is based on some wrong legal principle or on a misapprehension of the evidence.

10. In this case the respondent sustained injuries which included compound fractures of the right patella and also the 2nd, 3rd, 4th and 5th right metatarsal bones. In assessing the damages, the trial magistrate considered not just the nature and extent of these injuries but also past awards for similar injuries. He also considered the passage of time. Counsel for the appellant cited two cases where the plaintiffs allegedly sustained similar injuries but their awards were reduced from Kshs. 800,000/= to Kshs. 350,000/= and Kshs. 300,000/= respectively. He therefore urged this court to reduce the award herein to Kshs. 400,000/=. Counsel did not afford this court the opportunity to see the cases as he has not annexed them to his submissions and I am not therefore in a position to compare the injuries therein with those of the respondent. Be that as it may I am satisfied that the award of the lower court is commensurate with the injuries. There is therefore no justification for me to interfere with same. In the premises I find no merit in this appeal and the same is dismissed with costs to the respondent. It is so ordered.

Signed, dated and delivered electronically this 28th day of October, 2021.

E.N. MAINA

JUDGE