REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO 60 OF 2017

WELLINGTON ODHIAMBO OWARA.....1ST APPELLANT

ODONDE WALTER.....2ND APPELLANT

VERSUS

ISAAC KONYE MUIRURI.....RESPONDENT

(Being an appeal from the judgment/decree of Honourable Amwayi,

Senior Resident Magistrate, Molo, delivered on 8th March 2017

MOLO CMCC NO 30 OF 2015)

JUDGEMENT

1. The appellants were sued by the respondent who was involved in a road traffic accident involving motor vehicle registration no. KBA 958 N when he was lawfully crossing Eldoret- Nakuru road at Jogoo area on 19th August 2014. He sustained serious bodily injuries and he sued for both general and special damages. After full hearing of the suit, the trial court pronounced itself as follows; Liability: 60:40 in favor of the defendants, general damages: Kshs. 2,000,000, special damages: Kshs. 3,500, total: Kshs. 2,003,500 less 60%, grand total: Kshs. 801,400 plus costs and interests of the suit.

2. Aggrieved by the said judgement, the appellants filed this appeal against the lower courts award on liability and quantum based on the following grounds;

a. That the Honourable Senior Resident Magistrate erred in law and fact by apportioning any liability to the Appellants given the circumstances of the accident, the evidence adduced and applicable law.

b. The Honourable Magistrate erred in law and fact by awarding an excessively high award of Kshs. 2,000,000/= given the injury sustained and the comparable authorities.

c. The Honourable Magistrate erred in law and fact by exercising her discretion to apportion liability and assess damages injudiciously.

d. The judgement of the court was against the weight of evidence tendered and bad in law.

3. The appellants pray that the judgment in the subordinate court be set aside and this court dismisses the lower court suit by finding the Respondent 100% liable and or reducing the award of Kshs. 2,000,000/= which was on the higher side, to a reasonable figure.

4. Parties were directed to canvass the appeal by way of written submissions.

Appellant's Written Submissions

5. The appellants submitted that the respondent did not prove his case as the evidence tendered by himself and the appellants all attribute blame to him for the occurrence of the accident. The trial court in fact made a finding that the appellant was not driving at a high speed in the circumstances. Hence, this court should find that apportioning liability on the appellants at 40% was a legal error. Any liability should have been less than 10%.

6. The appellants guided by the case of **Zarina Shariff and Another v Nashir Pirosesha Setrina and others (1963) EA 239** quoted in **John Wambua v Mathew Makau Mwololo & Another [2020] eKLR** and the case of **Khambi and Another v Mahithi and Another (1968) EA** submitted that this case is of exceptional circumstances warranting interference of the findings of the trial magistrate on degree of the blame attributed to the parties for the reason that the trial magistrate applied the wrong test in apportioning liability in this matter which was not supported by evidence or at all.

7. The appellants urged the court to note that the accident occurred at night and therefore visions of the driver must have been hampered by darkness, the driver was not speeding, the respondent chose to cross the road at about 20 meters away. Indeed, the trial magistrate correctly stated that 20 meters away was so close for anyone to attempt to cross the road.

8. It was submitted that assessment of damages should be guided by the following principles; that an award of damages is not meant to enrich the victim but to compensate the victim for the injuries sustained, the award should be commensurate with the injuries sustained, previous awards in similar injuries are mere guide but each case be treated on its own facts and that previous awards be taken into account to maintain stability of awards by taking inflation into account.

9. The appellants submitted that the award in the instant suit was inordinately high. They urged the court to be guided by a plethora of authorities such as the case of **Frida Mercy Chebii Kiplagat v Kipchumba Chelimo Chebet & Another (2007) eKLR** where the plaintiff who had sustained scar of incisim over the left lateral surface of the chest, 16 cm long, vertical, midline operations sear on the abdomen, both legs were amputated at a level 10cm below the tibia tubercles (below knee amputation) was awarded Kshs: 2,800,000/= as general damages for pain suffering and loss of amenities.

10. In **Francis Ndungu Wambui & 2 others v VK (A minor suing through next friend and mother MCWK (2019)**; The High court at Embu upheld an award of Kshs: 1,000,000/= general damages where the plaintiff had sustained Soft tissues to the upper limbs, compound fracture of digital tibia fibula-shaft as well as loss consciousness for more 30 minutes after the accident. The victim was also subject to the risk of secondary stress fractures in the same sit"

11. In **Mwaura Muiruri v Suera Flowers Limited & another 2014 Eklr** the Plaintiff therein sustained multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left submaxillary area), comminuted fractures of the right humerus upper and lower thirds of tibia and compound double fractures of the right upper and lower 1/3 tibia fibula. The court awarded a sum of Kshs: 1,750,000/= general damages for pain and suffering and loss of amenities.

12. In **CM (a minor suing through mother and next friend MN v Joseph Mwanganyi Maina (2018) Eklr,** the court awarded Kshs: 2,000,000/= for pain and suffering where the minor leg below the knee was severely crashed and deritalized and was amputated. This was in 2018 and finally in **John Kipkemboi & Another v Morris Kedolo (2019) eKLR,** the Respondent had sustained injuries including amputation of the left leg below the knee, chest, njury, bruises on the shoulder and back injury and crush injury. The court awarded him Kshs. 2,500,000 in the year 2019.

13. It was submitted that in the foregoing circumstances, the award of Kshs. 2,000,000 was inordinately high considering previous awards of damages as at the time of the judgement and the injuries sustained by respondent. The appellants urged the court to allow the appeal.

Respondent's submissions

14. The respondent submitted that the trial magistrate considered all factors in holding the appellants 40% liable. Section 109 of the Evidence Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the court to belief in its existence. The evidence by the respondent's two witnesses corroborated well as to the occurrence of the accident. It was submitted that the investigating officer never carried any investigations as to how the accident occurred in order to blame the respondent.

15. The respondent submitted that he was immediately hit on the left lane and the 1st appellant never made any effort to avoid the accident. Since the standard of proof in civil cases is on a balance of probability, it was submitted that the respondent discharged his duty well in the trial court and the trial magistrate was right in holding the appellants 40% liable.

16. It was submitted on quantum that the trial magistrate used the right principles in assessing damages, hence this court should not interfere with the same. The injuries the respondent sustained have shattered the physical frame of the respondent and affected his productivity. According to the doctor's report the respondent sustained 45% permanent disability. The appellants never referred the respondent to any other doctor for a second medical opinion hence the respondent doctor's opinion was not challenged.

17. The trial magistrate award considered the respondent's injuries, inflation trends and passage of time. The respondent placed reliance in the case of **Edwin Otieno Japaso v Easy Coach Bus Company Kisumu Civil Appeal No.11 of 2014** where it was held that comparable injuries should be compensated by comparable awards but no two cases are exactly alike.

18. It was submitted that the respondent sustained grievous injuries and he was to wear prosthesis for the rest of his life. The said prosthesis is usually changed regularly and it is costly and the respondent has no any other source of income. He placed reliance in the cases of **Ahmed Mohamud Adam v Jimmy Tomino & 2 others [2006] eKLR and James Joseph Rughendo v Kenya Power and Lighting Co [2012] eKLR** and prayed that the court upholds the award of Kshs. 2,000,000 general damages and Kshs. 3,500 for special damages and dismiss the appeal with costs to the respondent.

Issues for determination

19. This being the first appeal, it is this court's duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and

hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA** 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that:

> ***"An appeal to this Court from a trial by the High 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. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally''.***

20. I have carefully perused the proceedings, the judgement, and the record of appeal as a whole including the parties' submissions. Two issues fall for determination;

i. **Whether the apportionment of liability was well founded.**

ii. **Whether the award on quantum was excessive in the circumstances.**

Whether the apportionment of liability was well founded.

21. The plaintiff had testified that on 19/08/14 he was crossing the road at around 6.00 pm towards 7.00 pm from left hand side to the right facing Eldoret general direction, when he was hit by a vehicle KBA 959 N which was heading to Eldoret general direction. He testified that the accident occurred within a canter and the motor vehicle was at high speed. He blamed the driver of the motor vehicle for failure to warn him by hooting. On cross- examination the plaintiff confirmed that the accident occurred at 8 pm according to the police abstract report. He also confirmed that the police abstract report blamed him for the accident. He testified that he checked the road and saw the lorry at about 20 meters away but nevertheless he decided to cross the road.

22. PW2 a police officer who was not the investigating officer, testified that the road has two lanes at the scene of the accident and the point of impact was on the left side of the road. He produced a police abstract and indicated that the investigating officer had blamed the plaintiff for the accident.

23. DW2 the driver of Motor vehicle KBA 959N testified that the pedestrian emerged from the two parked tracks, he tried to avoid him but it happened too fast. He said he was driving at around 20-30KPH. That the pedestrian's leg was ran over by the left front tyre. PW2 testified that he tried to swerve but it was too fast, so he applied brakes and stopped immediately. He blamed the pedestrian for the accident.

24. It is not disputed that an accident occurred on the material day involving Motor vehicle KBA 959N and the pedestrian. What is not clear is who was to blame for the accident. For this court to interfere with the conclusions of facts by the trial court, it must be convinced that the finding is based on no evidence at all or just perverse. This is because the trial court had the benefit of hearing, seeing and observing the witnesses as they testified.

25. The totality of the evidence is that the pedestrian emerged from between two lorries which were parked along the road. It was at around 8.00 P.M and definitely it was already dark. As much as the driver owed the road users a duty of care, it was also the responsibility of the pedestrian to confirm if the road was clear before he embarked on crossing the road. The respondent confirmed that he saw the motor vehicle at about a distance of 20 meters away but still opted to cross the road.

26. On the other hand, I must say that as much as the driver tried to avoid the accident, he didn't do much as he only applied emergence brakes and stopped the motor vehicle but unfortunately the pedestrian was ran over by the left front tyre. This being a two lane road, the driver would have avoided the accident by swerving to the right side and avoid hitting the respondent. it cannot also be ignored that the respondent failed to take reasonable care when he decided to cross the road while the motor vehicle was 20 meters away and it was also dark.

27. All in all, this court finds that the accident was caused by want of care on the part of the appellants and the respondent and agree with the lower court's finding that more negligence should be attributed to the respondent who ignored the close distance of the motor vehicle and opted to cross the road. This being a main highway and the respondent having been there for the last twenty years as he stated, he ought to have known that the said road was usually busy with motor vehicles of all kinds.

Whether the award on quantum was excessive in the circumstances.

28. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the locus classicus **Bashir Butt v Khan Civil Appeal No. 40 of 1977 [1978] eKLR** thus;

> ***"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 so arrived at a figure which was either inordinately high or low."***

29. The respondent testified that he was examined by Dr. Wabore who testified and produced the medical report as an exhibit in court. In his report Dr. Obore confirmed that the respondent sustained crush fractures of the left lower limb, small multiple wounds on the upper limbs, lateral right scapula- clavicular joint subluxation which deformed the joint with swelling still visible. The report also indicated that

the respondent's lower limb was amputated above the knee at the middle 1/3 of the thigh. The doctor indicated that the respondent needs prosthesis for the rest of his life and he assessed him to have suffered 45% degree of permanent incapacity.

30. The assessment of damages by courts in personal injury cases is guided by the following principles:

(a) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

(b) The award should be commensurable with the injuries sustained.

(c) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

(d) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

(e) The awards should not be inordinately low or high (See Boniface Waiti & Another –Vs- Michael Kariuki Kamau (2007) eKLR.

31. The scenario given by the above authorities cited by the appellants and the respondents show that damages for amputation of one's leg would range from Kshs.1.2 million to Kshs.2.5 million. The trial court awarded Kshs.2 million on 22nd February 2017. I have considered the above stated comparative authorities and the principles for assessment of damages stated above. It is my considered view that the award of Kshs. 2 million by the trial magistrate in the case under consideration was not excessive. The award was supported by recent comparative authorities from the High Court.

32. Taking into consideration the case of **John Kipkemboi & Another v Moris Kedolo (2019) eKLR** (supra) the respondent who had sustained similar injuries as those of the respondent herein was awarded Kshs. 2,500,000 in 2019. Therefore, an award of Kshs. 2,000,000 in 2017 cannot be excessive.

33. Taking all the circumstances of the case into account, I do find that the findings of the trial court on both liability and quantum objective, fair and within the legal principles applicable in such cases.

34. **For the forgoing reasons the court does not find any merit in this appeal and the same is hereby dismissed with costs.**

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 16TH DAY OF DECEMBER 2021.

H K CHEMITEI.

JUDGE