REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 545 OF 2016

TIMOTHY PETER MAINA MWANGI.....APPELLANT

VERSUS

VIRGINIA KURIA.....1ST RESPONDENT

DANIEL NJOROGE WANGUI.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. Chesang (Mrs.) Resident Magistrate

in Nairobi CMCC No. 2311 of 2013 delivered on 21st July 2016)

JUDGEMENT

1. On 6th October 2012 at about 7:00 p.m., the appellant was riding his bicycle along Dunga road in Nairobi when the 2nd respondent who was driving motor vehicle registration number KBN 990 C knocked him down. As a consequence, the appellant sustained severe bodily injuries. In his plaint, the appellant blamed the accident on the 2nd respondent's negligent control of the vehicle. The 1st respondent, who was the registered owner of the vehicle, and the 2nd respondent filed a joint defence denying the occurrence of the accident. They however accepted that the accident had taken place during trial but shifted the blame on the appellant.

2. When the matter was heard before the trial court, the appellant, Timothy Maitha Mwangi (PW 1) testified that on the material day at about 7:00 p.m., he was on a motor cycle heading to work. He wanted to branch to Lunga- Lunga road. He saw the respondents' vehicle about 60 meters away and gave an indication by hand. The appellant testified that he had already branched into the other road when he was knocked down from behind by the respondents' vehicle. He testified that he was putting on a uniform and a greenish reflector jacket and also stated that there was a yellow line and a turn sign on the road. He asserted that everyone has a right of way and blamed the driver since he failed to give him way.

3. The appellant testified that after the accident he was taken to Mater Hospital and then to Nairobi West Hospital where he was admitted for 18 days. He produced his list of documents and stated that he had a metal implant which ought to be removed at a cost of Kshs. 100,000/=. That when it gets cold, the leg aches and he did not have money to have the implant removed. He also testified that he still felt pain on the shoulder and that he had not healed well but admitted he had nothing to prove this.

4. The 2nd respondent, Daniel Njoroge (DW 1) similarly adopted his witness statement as his testimony and testified that he was driving at a speed of 30 to 60 km/hr and had just passed the junction, when the appellant who was in the middle lane made a frantic turn to the right. He blamed the appellant for the accident for not giving way to the vehicle and entering the junction while there was an oncoming vehicle. He testified that he could not see his hand from far and insisted that the turn had been made in a non designated area.

5. On cross examination, the 2nd respondent stated that the accident had occurred at the junction between Bandari and Dunga road. He testified that the appellant was about 60 meters away and insisted that he was driving at a speed of 30 to 60 km/hr on the main highway. He stated that when the appellant made the wrongful turn, he tried to avoid him but hit him. He stated that he had not hooted as accident occurred abruptly.

6. At the close of the matter, the parties filed their submissions. The trial court considered the arguments, the pleadings and the evidence before it and held that the appellant had not proved liability against the respondents. The court observed that the plaintiff was riding his bicycle in the middle of the road and that there was no proof that he was wearing a reflective jacket at the time. The court dismissed the case and held that it would have awarded general damages of Kshs. 350,000/= if liability had been proved.

7. The appellant, being dissatisfied with the trial court's decision, lodged the present appeal against the court's finding on liability and its assessment on damages.

8. The parties were directed to file written submissions in support of their rival positions in the appeal which I have considered. I have also taken into account the duty of this court as an appellate court to re-evaluate the evidence, bearing in mind that the witnesses did not testify before this court.

9. On liability, the appellant's counsel submitted that the manner in which the accident occurred was the word of the appellant against that of the 2nd respondent. The appellant and the 2nd respondent had differed on whether the appellant was wearing a reflective jacket or not and the trial court erred in finding that he was not wearing one since no independent witness testified to confirm one way or the other.

10. Counsel contended that the appellant had also testified that that he was hit by the 2nd respondent while riding his motorcycle in the middle of the road which evidence the trial court failed to factor in its finding. The appellant complained that the trial court had not pointed out any inconsistencies or absurdities in the appellant's case or laid a basis for disbelieving his account.

11. The trial court's finding that the appellant ought to have been riding his bicycle off the main road was also faulted by counsel who argued that as a cyclist the appellant had every right to use the road. Moreover, there was no evidence that the appellant was riding the bicycle on the wrong lane. It was urged that the Traffic Laws require a driver to keep a safe distance from the traffic in front and the trial magistrate erred in failing to take this into consideration in making her finding on liability. Counsel contended that in the worst case scenario, the trial magistrate ought to have apportioned liability instead of dismissing the appellant's claim altogether.

12. An award of Kshs. 1,000,000/= was also proposed by the appellant's counsel based on the case of ***Joseph Musee Mua v Julius Mbogo Mugi & 3 Others*** where the court had awarded the plaintiff a sum of Kshs. 1,300,000/= for fractured tibia and fibula, a right shoulder injury, bruises on the left elbow and two broken upper jaw teeth. Counsel also urged the court to award the appellant Kshs. 100,000/= for future medical expenses and Kshs. 216,806/= for incurred medical expenses which sums had been pleaded and proved.

13. For his part, the respondent's counsel supported the trial court's finding on liability contending that the appellant had failed to prove on a balance of probability that the respondents were negligent. On quantum, the respondent submitted that a sum of Kshs. 200,000/= would have been sufficient compensation for the injuries suffered by the appellant. The respondent dismissed the claim for special damages under the head of future medical expenses, arguing that the details given by the doctor were merely speculative as the appellant had not undergone the procedures stated in the proceedings. The case of ***Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006]eKLR*** was cited in support of this position.

14. The issues raised in this appeal are twofold. The first is whether the trial court erred in finding that the appellant did not prove liability. The second is whether the trial court erred in its assessment of quantum.

15. I will begin by considering the question of liability. Having analysed the evidence adduced by both parties, I am of the considered view that the trial court erred in its finding on liability for reasons to be stated. The accident between the appellant and the respondents' vehicle is not disputed. It is also not disputed that the accident occurred at 7:00 p.m. At that hour, both the appellant and the 2nd respondent needed to be vigilant as they travelled along the road. Although the 2nd respondent stated that he was travelling at a reasonable speed when the accident happened, I am doubtful of this. The appellant told the court that he saw the oncoming vehicle 60 meters away and signalled that he was going to make a detour at the junction where the accident occurred. The 2nd respondent admitted that he saw the appellant at the same distance. He also testified that the appellant took a sudden turn off the road. If the 2nd respondent was travelling at a reasonable speed as he claimed, it is likely that he would have controlled his vehicle in a manner that would have avoided the accident. He had a duty to look out for the appellant who was travelling ahead of him at a much slower pace on his bicycle.

16. On the other hand, the appellant was required to look out for his own safety by being careful to cross the road, paying attention to oncoming traffic.

17. The Court of Appeal in ***Farah and Lentol Agencies and Multiple Hauliers Limited v Rahids Muthomi Kimani [2015]eKLR*** held that where there is no concrete evidence to determine who is to blame between two drivers both should be held liable or proportionately to the decree of contributory negligence based on the circumstances after consideration of the entire evidence. (See also ***David Kajoji M'Mugaa vs Francis Muthomi [2012]eKLR***.

18. In our instant case, other than the evidence of PW 1 and DW 1 there is no independent evidence to show exactly how the accident occurred. As it were, the evidence is the word of PW 1 against that of DW 1. **Section 3(4)** of the **Evidence Act** provides that;

> "*A fact is not proved when it is neither proved nor disproved."*

19. Having considered the evidence of the two witnesses I am constrained to make a finding that both explanations of how the accident occurred are plausible. Therefore without any other addition evidence to corroborate the assertion of either party, liability should be apportioned at 50:50.

20. Turning to the issue of quantum, the appellant argued that the trial court's assessment of Kshs. 350,000/= was inordinately low in view of the circumstances. The appellant proposed an award of Kshs. 1,000,000/= as general damages.

21. 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."*

22. The appellant set out the injuries sustained in the accident in his plaint as consisting of a fracture of the left tibia, fibula and an injury to the left shoulder. He also stated that he had spent Kshs. 216,806/= to cater for his medical expenses and would require Kshs. 100,000/= to remove a metallic plate that had been fitted to his leg.

23. The plaintiff testified that he had first been rushed to Mater Hospital and later taken to Nairobi West Hospital where he was admitted for 18 days. He produced a discharge summary in support of this. By consent the medical reports of Dr. Wokabi and Dr. Wambugu were produced in evidence without calling the makers. In the report dated 11th February 2013, Dr. Wokabi indicated that the appellant sustained injuries to the left leg and suffered a fracture at the lower end of the left tibia but had no fracture of the fibula. The appellant was operated on and the fracture fitted with a metallic plate. He had to walk with the aid of crutches. In the doctor's opinion, the appellant would suffer a residual permanent disability of 12%.

24. In a subsequent report dated 11th February 2013, Dr. Wokabi rectified his earlier report adding that the discharge summary had indicated that the appellant had sustained an injury on the left shoulder and shoulder blade. He indicated that when he reviewed the X ray done it clearly showed that the appellant had suffered a fracture of the superior margin of the left shoulder blade.

25. Dr. Wambugu's report dated 14th October 2015 stated that the injuries sustained by the appellant were closed fractures of the left tibia and blunt trauma on the left shoulder joint with fracture lateral border scapula. He confirmed that the fracture of the tibia had been managed by fixation of metal implants which he stated could be removed at a cost of Kshs. 65,000/=. The doctor assessed the degree of permanent incapacity at between 8 % and 12 % incapacitation.

26. From the two reports, it was confirmed that the appellant had sustained a blunt trauma on the shoulder with a fracture and had also sustained fractures of the left tibia. Both reports affirmed that metallic implants had been fixed in the appellant's leg which needed to be removed.

27. Before the lower court, the appellant proposed a sum of Kshs. 900,000/= based on the case of ***Kornelius Kweya Ebichet vs C&P Shoe Industries Ltd & Anor Civil Case No. 1152 of 2002[2008]eKLR***. In that case the court awarded the plaintiff a sum of Kshs. 1,000,000/= for pain and suffering and loss of amenities. He had sustained fractures of the left tibia and fibula which had to be fixed with metal implants and had been admitted into hospital for a week. The court also awarded the plaintiff a sum of Kshs. 120,000/= for further surgical intervention.

28. The respondent proposed an award of Kshs. 180,000/=. The cases of ***Isaac Mwenda Micheni v Mutegi Murango [2004]eKLR*** and ***Simon Mutisya Kavii v Simon Kigutu Mmwangi [2013]eKLR*** were cited in support of the proposition. In the case of ***Isaac Mwenda (supra)*** the court observed that the plaintiff was young and his healing was good. It awarded the plaintiff general damages of Kshs. 100,000/= for a fracture of the left tibia and fibula. In ***Simon Mutisya (supra)***where the plaintiff had suffered compound comminuted fracture of the left tibia with severe friction burn left thigh and leg, the court upheld an award of Kshs. 200,000/=.

29. In determining the appropriate compensation in injury claims, it is necessary to bear in mind that the court has a duty to maintain consistency in awards for similar injuries. The Court of Appeal in ***Stanley Maore v Geoffrey Mwenda Civil Appeal No. 147 of 2002 [2004] eKLR*** held;

> *Having so said, 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.*

30. Guided by the foregoing authorities and those cited by the parties in this appeal, I am persuaded that the injuries suffered in the case of ***Kornelius Kweya Ebichet (supra)*** are more or less similar to those suffered here. The case of ***Isaac Mwenda (supra)*** had been decided more than a decade earlier, while in the case of ***Simon Mutisya (supra)*** no incapacity was noted.

31. It is evident that the appellant in the present case suffered excruciating pain as a result of the accident. He was admitted in hospital for 18 days where he underwent surgery to have metal implants fixed to his leg. The appellant has to go back to hospital to have the implants removed. His permanent disability was assessed at between 8% and 12%. Considering the gravity of the injuries the element of inflation and the principle that an award must reflect the trend of previous, recent, and comparable awards I find that an award of Kshs. 1,000,000/= for general damages is an appropriate award for the appellant.

32. Both medical reports also indicated that the appellant would need surgery to remove the metal implants on his leg. I am inclined to go with the figure of Kshs. 65,000/= given by Dr. Wambugu, who based his estimate on procedures conducted at Kenyatta National Hospital.

33. The appellant produced medical receipts to prove his claim that he had incurred a total of Kshs. 216,806/= for medical expenses at Nairobi West Hospital. He also produced a receipt of Kshs. 2,000/= for his medical report and a generic payment advice for Kshs. 500/= for the motor vehicle search. I therefore find that he is entitled to the sums claimed as special damages.

34. The upshot is that the appeal is allowed. The award made by the trial court is substituted with the following award:

i. General damages for pain and suffering Kshs. 1,000,000 /=

ii. Future medical expenses Kshs. 65,000/=

iii. Special damages Kshs. 219,306/=

Total 1,284,306/=

Less contribution of 50%

Total 642,153/=.

35. The interest on special damages shall be at court rates beginning from the date of filing suit until payment in full. Interest on general damages shall be at court rates from the date of this judgment until payment in full. The appellant shall have half costs both at the trial and on the appeal.

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

A. K. NDUNG'U

JUDGE