REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 127 OF 2017

(An appeal arising from the judgment and decree of the Hon. WK Cheruiyot, Resident Magistrate (RM), in Vihiga PMCCC No. 112 of 2015 of 12th October 2017)

SONGOLE ELAM.....APPELLANT

VERSUS

PAUL KIVISI LUNALO.....RESPONDENT

JUDGMENT

1. The suit at the trial court was initiated by the respondent herein against the appellant for general and special damages, arising from a traffic accident involving his motorcycle and a motor vehicle, either owned or driven or controlled by the respondent. The appellant entered appearance and filed defence, in which he denied liability, and attributed negligence on the respondent.

2. The parties did not compromise the matter, and a trial was conducted, where both parties testified, with the appellant calling witnesses. In the impugned judgment, the trial court settled liability at the ratio of 90:10, in favour of the respondent, on the basis that it was the respondent who had the right of way, and the appellant ought to have yielded to him. On quantum, general damages were awarded at Kshs. 300, 000.00, less contribution, and specials at Kshs. 30, 000.00, making a total of Kshs. 270, 000.00, plus costs and interest.

3. The appellant was aggrieved by the decision, and lodged this appeal. His principal case is that the trial court fell into error in determining liability and in assessing the damages awardable.

4. According to the plaint, the respondent was riding his motorcycle, at Chavakali, along the Kakamega-Kisumu Road, when the appellant made a right turn and knocked the respondent who was on his correct lane. In the defence statement, the appellant did not address himself to the allegation that he made a turn and knocked the respondent who had the right of way. The defence comprised of denial of liability, and an averment that the accident was occasioned by the sole or contributory negligence of the appellant, on account of riding at excessive speed, riding on the wrong side of the road, riding while intoxicated, among others.

5. At the trial , the appellant's version of the happenings was recorded as follows:

> *"When I reached Chavakali near HAM's Hotel, there was a vehicle which appeared from in front of the registration number KBJ 663H. He was coming from the opposite direction. We were to bypass each other. At HAM's left his lane and came to my lane without indication that he was branching to my side. It was so close my front wheel did hit his front left wheel of the said pick up … I saw the vehicle when it has already turned. It was already so close to me. I thought he was moving on for he had not indicated. I saw him in front of me … The vehicle turned and was on my lane. I was on the road hence the impact. I thereafter landed on the road … The motorcycle was still on the road."*

6. The version by the appellant is recorded as follows:

> *"… I was driving from Chavakali towards Kisumu direction … I decided to branch to Arms Hotel in Chavakali which was on the right hand side facing Kisumu. I indicated that I was to turn to the right … suddenly I heard a loud bang on the left side of my car and I stopped the car. On looking outside, I saw a motorcycle lying on the ground. I had seen the motorcycle 100 metres away riding from Kisumu direction that is opposite direction … I blame the motorcycle for careless driving and knocking my vehicle. he did not obey my sign to turn right … I waited to turn the right. I was to leave my lane and go to the opposite lane. There was an oncoming motorcyclist. I indicated I was turning to the right. The motorcyclist was 100 metres away. The motorcyclist was on his correct lane but far enough to notice me and my request to turn to the right. "*

7. After reviewing those two versions of what had transpired, the trial court rendered itself thus:

> *"From the totality of the evidence on record, it is evident that the plaintiff was riding on his lawful lane of the road; that is the left hand side of the road facing Kakamega. The defendant was driving from the opposite direction, he needed to branch to the right, the plaintiff had the right of way, it was incumbent upon the defendant to exercise caution and ensure the road was clear and that it was safe to do so. He may have indicated his intention but that did not grant him the right of way. He told the court he saw the plaintiff at a distance of about 100 metres, he either underestimated the distance or the speed of the motorcycle."*

8. Looking at the testimonies of both sides, as against the analysis and conclusions drawn by the court, I do not see how the trial court fell into error. The respondent was on his right lane, and the collision occurred as the appellant got into that lane as he was turning to the right. I agree with the trial court, the respondent had the right of way, the appellant should have yielded or given way to him.

9. The appellant stated that he had seen the respondent approach on his motorcycle on his correct side of the road, but he chose to turn into the respondent's way, hence the collision. He asserted that he had signaled to indicate his intention to turn right, and that it was the respondent who ignored or disobeyed the signal. The respondent had the right of way, the appellant was bound to yield or give way to him, the giving of the signal notwithstanding. The signal is not a licence to turn, and, therefore, force the road users who have a right of way to yield. No. it is just an indication to other motorists that the motorist indicating intended to make the turn. The indication does not licence him to muscle his way, it does not give him a right of way. He should, therefore, wait till the way was clear for him to turn, or for a charitable motorist with right of way to give up his right and yield to the motorist giving the signal. Quite clearly, the appellant misconstrued the signal he was giving as having given him a right of way, when in fact he had none. By forcing his way into the respondent's lane, he was being negligent.

10. He argued that the respondent was driving fast, and that explained why he was able to get to the spot so soon after the appellant had seen him. It could be that the respondent was riding his motorcycle fast, but the fact of the matter is that he had a right of way, the appellant had seen him and should have given way to him. I agree that it was the appellant who either underestimated the distance between him and the respondent before he made the turn, or otherwise he underestimated the speed of the motorcycle. The trial court took inti account the possibility of the respondent riding at a high speed in the circumstances, and hence assessed him to have been 10% liable for the accident.

11. The appellant, in his testimony, made a lot of play about the respondent having been charged at the Vihiga court, of careless, where he, the appellant, testified as a prosecution witness. He expressed surprise that at the end of that trial the respondent was acquitted. From the record, it is indeed true that the respondent was charged in Vihiga SPMCCRC. No. 175 of 2014, of careless driving, with respect to the accident the subject of the instant appeal. Both the appellant and the respondent, among others, testified in the traffic matter. In the end, the trial court acquitted the respondent, on grounds that the case had not been proved to the required standard, the incident had been poorly investigated and the witnesses for the prosecution had given contradictory testimonies. In sum, the traffic court did not find the respondent to have had caused the accident by his negligence. I may add that the mere fact that a person has been charged with a traffic offence does not mean that he was guilty of negligence, or should be treated as bearing the greatest responsibility for the accident, in the absence of a conviction.

12. Overall, it is my finding that the trial court did not fall into any kind error with regard to the matter of liability. I shall accordingly not disturb its findings on that score. The appellant cited several decisions to support his contention, but none of them dwelt on a motorist, who had a right of way, being inconvenienced by another, coming from the opposite direction, who decides to swerve into his lane in an effort to get off the road.

13. According to the plaint on record, it is pleaded that the appellant had sustained a fracture of the 4^{th} and 5^{th} phalanges of the right hand fingers, was swollen on both lower limbs, had chest pains, had injury on the right knee, multiple cuts and swellings on both lower limbs, head injury, injury to the mouth causing bleeding, injury to left arm with swelling, bruises and swelling on the face and a swollen neck.

14. Two medical reports were placed on record by consent. There is a medico-legal report by Dr. James Obondi Otieno, dated 29^{th} July 2016, which reflected his injuries as bruises on the chest, blunt trauma to the knee, bruises on the right knee, blunt chest trauma and bruises on the right and left leg, 4^{th} and 5^{th} metacarpals left. The prognosis was that the fractures of the metacarpals had healed with no permanent disability. The report by Dr. John Ouma Odondi, dated 10^{th} July 2017, reflects that the respondent had bruises on the right knee and leg, a painful swollen hand, soft tissue injuries on the chest and knees and fracture of the 4^{th} and 5^{th} phalanges. The doctor opined that the injuries had healed well.

15. At the trial court, the respondent sought general damages at Kshs. 400, 000.00. He cited one High Court decision, *Isaac Katambani Iminya vs. Firestone East Africa (1969) Limited* [2015] eKLR, where the appellant had sustained a fracture of the 5^{th} metacarpal, and was awarded Kshs. 250, 000.00 compensation in 2015. On his part, the appellant cited two High Court decisions and one decision of the Employment and Labour Relations Court, being *Masinga Ndonga Ndonge vs. Kualam Limited* [2016] eKLR, *Odinga Jacktone Ouma vs. Moureen Achieng Odera* [2016] eKLR and *Kennedy Mutinda Nzoka vs. Basco Product (Kenya) Limited* [2013] eKLR. In *Masinga Ndonga Ndonge vs. Kualam Limited* (supra), the appellant had sustained a fracture of the 1^{st} phalange, a crush injury on the left foot and soft tissue injuries, and the court, in 2016, awarded Kshs. 150, 000.00. In *Odinga Jacktone Ouma vs. Moureen Achieng Odera* (supra), the respondent had sustained a fracture of the 2^{nd} rib, fracture of the 4^{th} left proximal phalanx, head injury, concussion and shoulder dislocation, and was awarded Kshs. 180, 000.00 in 2018. In *Kennedy Mutinda Nzoka vs. Basco Product (Kenya) Limited* (supra), the claimant had a crush injury with fracture of the middle phalanx right index finger, with permanent mal-union and angulation of the finger, and an award of Kshs. 210, 000.00 was made in 2013.

16. For the purpose of the instant appeal, the appellant has cited two authorities. In *Victor Ndege Manase vs. Ashton Apparels (EPZ) Limited* [2016] eKLR, the claimant suffered chemical burns of the soft tissue, leading to amputation of the last two phalanges and loss of part of his right index finger. An award of Kshs. 200, 000.00 was made in 2016. In *Francis Ngelechei Tarus vs. Robert Barasa Khaemba* (2019) eKLR, the appellant lost two fingers and suffered multiple soft tissue injuries and an award of Kshs. 200, 000.00 was made in 2019.

17. My searches have led me to *Herman Onamu vs. Spin Knit Dairy Limited* [2019] eKLR, where the appellant had sustained a fracture of the distal phalange of the ring finger and injury to the tufts of the little finger, and the appellate court awarded general damages at Kshs. 200, 000.00, In *African Apparel (EPZ) Limited vs. Rhoda Nyambura Weru* [2017] eKLR, the appellant had sustained a crush injury to the distal phalanx of the right index finger and a fracture of the left distal phalanx. The trial court made an award of Kshs. 220, 000.00, which was upheld on appeal in a decision rendered in 2017.

18. From the review of the recent decisions on the comparable injuries, it would appear to me that the trial court made an award that was slightly on the higher side. I shall accordingly set aside the award of Kshs. 300, 000.00 general damages, and substitute therefore an award of Kshs. 250, 000.00, subject to contribution.

19. The final order is that the appeal on liability is hereby dismissed, but that on general damages is allowed to the extent indicated in paragraph 18 here above.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF MARCH, 2020

W. MUSYOKA

JUDGE