



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER 27 OF 2018

BETWEEN

PETER CHEPTOO KIMUTE.....1ST APPELLANT

FEED THE CHILDREN (AIC).....2ND APPELLANT

AND

ADAN KAMPURE JILLO.....RESPONDENT

(Being an appeal from the judgment, holding and decree of the Hon G. Onsarigo,

Resident Magistrate dated 18th January, 2018 in Kikuyu Chief Magistrate's

Civil Case no. 279 of 2015)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The respondent herein filed a suit against the appellants in the Chief Magistrate's Court at Kikuyu, being Civil Suit number 279 of 2015 in which he sought both general and special damages arising out of injuries he suffered in a road traffic accident which occurred on 20th November 2014 involving the appellant's motor vehicle registration number KBN 665B. After a full trial the learned trial magistrate concluded that the driver of the appellants' motor vehicle was 100% liable in negligence and awarded the respondent a sum of Kshs.1,000,000/- (Kenya shillings one million) for pain, suffering and loss of amenities of life. The learned trial magistrate also awarded Kshs.31,850/- (Kenya shillings thirty thousand eight hundred fifty only) in special damages, plus costs and interests.

The Appeal

2. Being aggrieved by the whole of the trial magistrate's judgment, the appellants brought this appeal which is premised on the following grounds: -

1. **THAT the learned trial magistrate erred in law and fact in holding and finding that the respondent had proved his claim against the appellant.**
2. **THAT the learned trial magistrate erred in law and fact in failing to appreciate that the claim pleaded by the respondent in his plaint departed materially from the one sought to be proved by the respondent in his testimony given in court.**
3. **THAT the learned magistrate erred in law and fact in failing to find that in the absence of an amendment to the plaint and other pleadings filed by the respondent the evidence presented by the respondent could not sustain the pleaded claim.**
4. **THAT the learned magistrate erred in law and fact in finding for the respondent.**

5. **THAT the learned magistrate erred in law and fact in finding that the plaintiff's injuries were of such grievous nature as to merit an award of Kshs.1,000,000/- on general damages.**

6. **THAT the learned magistrate erred in law and fact in making an award of damages that was manifestly excessive and unsupported by the evidence before him.**

3. The appellants pray that the appeal be allowed by setting aside the judgment of the learned trial magistrate and in the alternative, appellants pray that this honourable court reassesses the evidence and comes up with its own assessment on liability and the measure of damages. The appellants also pray for costs of the appeal.

The Cross Appeal

4. On 27th March the respondent, through the firm of Nelson Kaburu & Co. Advocates filed the Memorandum of cross-appeal, with one ground of appeal:

1) **THAT the learned magistrate erred by making an award of Kshs.1,000,000/- for pain, suffering and loss of amenities of life which [award] was too low or did not take into account cited cases, inflation, the injuries and their lifelong effects on the respondent and other relevant factors.**

5. The respondent prays that the award of general damages be enhanced and the appellant's appeal be dismissed with costs.

6. Since this is a first appeal, this court is under a duty to reconsider and evaluate the evidence as a whole with a view to reaching its own conclusions on the evidence. It is only after thoroughly undertaking a review of the evidence that this court can decide whether to support or dismiss the trial court's findings. This court is however cautioned to remember that it does not have the opportunity of seeing and hearing the witnesses, an opportunity which only the trial court had and to make an allowance for the same. In this regard, see *Selle & another versus Associated Motor Boat Company Limited & others [1968] EA 123*, *Simon Muchemi Atako & another versus Gordon Osore [2013] eKLR* and *Hanh versus Singh [1985] KLR 716*.

7. This court is also aware of the long held position by courts that an appellate court will not normally interfere with a finding of fact by a trial court unless it is clear that such a finding is not based on evidence or that the trial court misapprehended the evidence or that the trial court clearly acted on some wrong principle in reaching its conclusions. The first appellate court may only interfere with the findings of a trial court if it is satisfied that the trial court failed to take into account a particular circumstance or probabilities material to an estimate of the evidence or where the impugned finding is generally inconsistent with the evidence on record. See *Ephantus Mwangi & another versus Duncan Mwangi Wambugu [1982-88] IKAR 278*.

8. The duty of the first appellate court was also clearly stated in *Peters versus Sunday Post Limited [1957] EA 424* thus: -

"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses..... But the jurisdiction to review the evidence should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion"

The Respondent's Case

9. By the plaint dated 24th June 2015, the respondent alleged at paragraph 4 thereof that while he was cycling alongside Dagoreti Road, Kikuyu heading towards Dagoreti direction the first defendant who was driving motor vehicle registration number KBN 665B in the same direction so negligently drove, managed or controlled the said motor vehicle that it hit the respondent's bicycle from the rear. The respondent averred that he fell down and sustained head injuries with loss of consciousness, bleeding within the brain matter with semi paralysis on the left side, blunt injuries to the left side of the body, as well as other injuries as set out in the plaint. The respondent prayed for general damages for pain, suffering and loss of amenities of life and also sought special damages in the sum of Kshs.42,850/- costs and interest.

10. The respondent testified and stated that the appellant's motor vehicle was overtaking him when the accident occurred. He was admitted at Kenyatta National Hospital for one month. Later he reported the accident to Karen Police Station who issued him with a P3 form. Hospital documents and receipts were produced in evidence. The respondent alleged that when oncoming vehicles flashed at the first appellant he pulled back, thereby hitting the respondent's bicycle from the rear. The respondent also testified that according to the police abstract, he, as cyclist was to blame for the accident.

11. PW1 was Dr. Washington Wokabi who examined the respondent. Dr. Wokabi testified that the respondent sustained major head injuries and was hospitalized while in a coma. Dr. Wokabi also testified that the respondent had bled in the brain, and suffered semi-paralysis, and further that possibility of epilepsy was high, though respondent was expected to make full recovery within 6 – 8 months. The medical report and the two receipts were produced as Pexhibits 1 and 2 respectively.

The Appellant's Case

12. The first appellant testified as DW1 and stated that on 20th November 2014, at around 7.00am, he was driving from Karen to Dagoretti when a cyclist suddenly appeared from the offside of the road to the main road on the right hand side of the road and then went to the left. DW2 denied causing the accident though he admitted taking the respondent to hospital. He also testified that the respondent's wife was given Kshs.11,000/- towards the hospital bill. He confirmed that he was neither charged with a traffic offence nor blamed for the accident.

The Submissions

13. I have read through the rival submissions. The appellants have urged this court to interfere with the findings of the learned trial court both on liability and quantum, the reason being that the respondent's testimony does not support the pleadings. Further, that though the respondent alleged in the plaint that he was cycling alongside Dagoreti road, the evidence adduced showed that he was actually on the road when the accident occurred. In further submissions, the appellants contend that the police abstract absolved the appellants from liability and that it was the respondent who was held to be responsible for the accident. The appellants also contended that the respondent's testimony was contradictory and that in the circumstances the appellants ought to have been given the benefit of the doubt.

14. The appellants also took issue with the trial court for what they call a predetermined mindset before writing the judgment. Further, the appellants contend that the learned trial court shifted the burden of proof from the respondent to the appellants which is untenable in law.

15. On quantum, the appellants submit that the award made by the learned trial court was excessive in the circumstances. The appellants submit that for the kind of injuries suffered by the respondent, an award of the sum of Kshs.600,000/- would be adequate in the circumstances. In this regard, the appellants placed reliance on the case of *Ali Issa Ali versus East African Portland Cement Company [2016] eKLR*. The appellant in the said case sustained subdural haematoma, and was admitted in hospital 10 days. On recovery the appellant was left with a frontal parietal bony depression, which was permanent in nature. He was awarded Kshs.600,000/-. The appellants also relied on a 1991 case, *Samuel Hure Murage versus Moses Kiiru Kamau & another Nairobi HCCC No. 6779 of 1991 (unreported)*. The respondent in the case suffered cuts on the shoulders, loss of consciousness, subdural haematoma, severe head injuries and hypotonic and respiratory embarrassment. The respondent recovered from the injuries, though his walking remained clumsy. The court awarded him Kshs.450,000/- on 7th September 1994.

16. The respondent countered the appellant's submissions and urged the court to find that the learned trial court properly assessed the evidence before reaching the conclusion that the appellants were 100% liable for the accident.

17. Regarding alleged contradictions in the respondent's case, counsel relied on the case of *Kiruga versus Kiruga [1988] KLR 348* in which the court held, *inter alia*,

“Where it happens that a decision may seem equally open either way the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available for the appellate courts becomes of paramount importance and ought not to be disturbed.”

18. Also see *Makario Makony Monyanche versus Hellen Nyangena [2014] eKLR*. In any event, counsel argues, departures in variation of the evidence of a party is not fatal to that party's case. Reliance was placed on *Uganda Breweries Limited versus Uganda Railways Corporation [2002] EA 634*.

19. On damages, counsel for respondent submits that the nature of the injuries sustained by the respondent justified the award. Counsel specifically relied on the testimony given by Dr. Wokabi in which he stated that though the respondent would be healed within 6-8months, risk of epilepsy was a high possibility. In the respondent's view and based on authorities cited by the respondent during the trial, this court was urged to enhance the award from Kshs.1,000,000/- to Kshs.1,500,000/-.

20. I have already stated elsewhere in this judgment that it is a strong thing for an appellate court to overturn the findings of a trial court which has had the opportunity of seeing and hearing witnesses.

21. With regard to the quantum of damages, it is an established principle that the damages awarded must be fair compensation in each case. So where the plaintiff establishes his financial loss which is fair to both himself and the defendant, the court has no option but to award the same. The purpose of such an award is to make good a financial loss incurred by the plaintiff as a result of injuries sustained in the accident. In cases where the pecuniary loss cannot be adequately calculated then the issue of a fair compensation comes in. In each case, and according to R. Kuloba in his book **MEASURE OF DAMAGES FOR BODILY INJURIES, Law Africa 2006 at pp 6 and 7,**

“The amount should not be niggardly or an example of parsimony. It should be a realistic assessment to compensate the victim for all that he has suffered, for all he will have to suffer and for all that which he will have to pay for additionally and unnecessarily as a direct result of the accident. Also see, Madan J (as he then was) in Wachira Kimondo versus Kenneth L. Hunter, Nairobi High Court Civil Case no. 169 of 1971 (unreported).

Analysis and Determination

22. First is the issue of liability. In the plaint, the respondent alleged that he was cycling alongside Dagoretti Road, Kikuyu towards Dagoretti direction when he was hit from the rear by the appellant's motor vehicle. The word **“alongside”** according to the Concise Oxford English Dictionary means **“(a) close to the side of; next to; (b) at the same time as or in co-existence with.”** In the context of this case, it is the first definition that is applicable. In his statement which is found at page 8 of the Record of Appeal, the respondent also added the following: **“while he was approaching from behind and was about to start overtaking he was flashed by an oncoming motor vehicle and he pulled back hitting my bicycle.”** In addition to denying the respondent's allegations, the appellant's witness, Peter Cheptoo Kimuge stated as follows in his statement: **“it was while I was driving along the said road when suddenly a pedal cyclist who was ahead of me and trying to overtake another motor vehicle abruptly swerved to the right blocking my rightful path and in the process the pedal, cyclists collided into my motor vehicle.”** The appellants' evidence that respondent suddenly swerved into the motor vehicle's path was not controverted since the documentary evidence from the police abstract showed that the case was still under investigation, and no police officer was called to confirm exactly where on the road the accident took place and whether or not the respondent could have contributed to the accident.

23. In my considered view, and from the evidence on record, I find and hold that the respondent did not prove that the appellants were 100% liable in negligence for the accident in which the respondent was injured. I accordingly apportion liability in the ratio of 80:20 percent in favour of the respondent.

24. As regards the award of damages, I do not find any justifiable reason to interfere with the award of Kshs.1,000,000/- in general damages either to a higher or lower figure. The authorities I have referred to elsewhere in this judgment dictate against any interference with the said award which was within the sole discretion of the trial court unless it is shown that the award does not represent a fair assessment of the compensation for the nature of injuries suffered. In this case, the trial court had the opportunity of seeing and hearing both parties in the matter before making the award. In any event, I do not think that the sum of Kshs.1,000,000/- is overly generous. It will only now be subject to 20% contribution.

Conclusion

25. From all the foregoing, I allow this appeal only to the extent that liability is apportioned at 80:20 percent in favour of the respondent. The appeal on quantum of general damages is dismissed. Accordingly, judgement on this appeal is as follows: -

- a) Liability 80:20 percent in favour of respondent

- b) General damages – Kshs.1,000,000/-
Less 20% contribution Kshs. 200,000/-
Net Kshs. 800,000/-

- c) Specials Kshs. 31,850/-

- Total **Kshs. 831,850/-**

26. Plus, costs of this appeal to the appellants at the rate of 20% only.

27. Orders accordingly.

Judgement written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this 12th day of **March 2020**

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CHRISTINE W.MEOLI

JUDGE

In the Presence of

Mr. Ndolo holding brief for Mwangi.....for Appellant

.....N/A.....for Respondent

.....Nancy/Kevin.....Court Assistant