REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 13 OF 2019

HELLE SEJER HANSEN ……..……..……1ST APPELLANT

THE SAFARI COLLECTION ……...…….2ND APPELLANT

LEVER BART……...3RD APPELLANT

VERSUS

JULIUS KAKUNGI MUKAVI…….....……...RESPONDENT

(Appeal from the judgment and decree of the Principal Magistrate (Hon. Ruguru, PM) delivered on 17th April 2019 at the Principal Magistrate's court, Ngong)

JUDGMENT

1. The 1st appellant was the registered owner of motor vehicle registration number KPB 862Q, the 2nd appellant was said to be the beneficial owner of the said motor vehicle, while the 3rd appellant was the driver of the motor vehicle. On 19th May 2017, the vehicle was involved in a road traffic accident with motorcycle registration No **KMCB 409K,** along Ushirika Road Karen.

2. The respondent was injured as a result of that accident. And according to his plaint dated 6th July 2018 and filed before the trial court on 11th July 2018, he suffered fracture of the left femur at the intertrochanter. He instituted a suit before the Principal Magistrate's Court, Ngong against the appellants for damages arising from that accident.

3. The trial court heard the case and in a judgment delivered on 17th April, 2019, the court found the appellants liable and awarded general damages of Kshs 1 million, special damages of Kshs 2,300/- costs and interest.

4. The appellants were aggrieved with that judgment and decree and filed a memorandum of appeal dated 15th May, 2019 and filed on 16th May 2019 raising the following grounds, namely: -

> ***1. That the learned Magistrate erred in law and fact in finding that the plaintiff was entitled to general damages that were too high in view of the fact that the plaintiff had made adequate recovery and suffered no fatal incapacity.***
>
> ***2. The learned Magistrate erred in fact and law in failing to consider the defendant's submissions on liability.***
>
> ***3. The learned Magistrate erred in law and fact in failing to consider conventional awards for general damages in cases of similar injuries.***
>
> ***4. The learned Magistrate erred in law and fact in finding that the defendants were to blame for the accident despite the fact that the police blamed the rider of the motorcycle on which the plaintiff was a pillion passenger, wholly for being negligent.***

5. This appeal was disposed of by way of written submissions and oral highlighting. During the hearing of the appeal, Miss Kivuva, learned counsel for the appellants, submitted highlighting their written submissions dated 10th October 2019 and filed on 19th October 2019, that the trial court was wrong in finding the appellants wholly liable for the accident and that it further fell into error in making an inordinately high award.

6. On liability, counsel argued that the motor cycle rider was to blame for the accident and blamed the trial court for not at least apportioning liability. She submitted that the 3rd appellant who was the driver of the motor vehicle was not to blame for the accident. She argued that the respondent who was pillion passenger on the motorcycle was injured due to the negligence of the motor cycle rider. According to counsel,

the respondent as a pillion passenger, did not wear protective gear and, therefore, contributed to the extent of the injuries he sustained.

7. It was further submitted that the trial court did not consider the medical evidence from the appellants' doctor. According to counsel, the trial court erred by disregarding the appellants' medical report dated 11th October, 2018, and more recent, but instead, relied on the respondent's report dated 5th July, 2018. In counsel's view, the second and more recent medical report showed no permanent incapacity, a fact the trial court ignored.

8. Mr. Mwinzi, learned counsel for the respondent, opposed the appeal also highlighting their written submissions dated 22nd October, 2019 and filed on 23rd October, 2019. On liability counsel supported the trial court's finding. According to counsel, the trial court noted that whereas the appellants shifted liability to a third party, they made no effort to join the third party in the suit. In their view, the trial court properly considered the evidence and rightly concluded that the appellants were liable. It was contended that there was no evidence, including police sketch maps, to show that the third party was liable. He therefore argued that the trial court properly held that the appellants were to blame for the accident.

9. On quantum, learned counsel submitted that the appellants never made a proposal on quantum; that the trial court considered the authorities cited before it and arrived at a reasonable award of Kshs. 1,000,000/=.

10. As to whether the respondent contributed to the extent of the injuries he sustained for failing to wear a helmet, counsel argued that the trial court noted that the injuries were on the chest and leg and, therefore, a helmet would not have prevented those injuries. He urged the court to dismiss the appeal with costs.

11. I have considered this appeal, submissions by counsel for the parties and the authorities relied on. I have also gone through the record of the trial court and the impugned judgment. This being a first appeal it is by way of a retrial and parties are entitled to this court's decision on the evidence on record. The court should however bear in mind that it did not see witnesses testify and give due allowance for that.

12. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal held that:

> ***"This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and 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 allowances in this respect"***

13. And in ***Nkube v Nyamiro*** [1983] KLR 403, the Court of Appeal held that:

> ***"A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."***

14. The respondent who testified as PW1told the court that on the 19th May, 2017 he was going to work at Hardy in the company of his brother Erastus Mukavi; that he was a pillion passenger while Erastus was riding the motorcycle KMCB 409K when they were hit on the left side by motor vehicle KBP 862Q which was from the opposite direction. He told the court that they fell down and sustained injuries. They were taken to Karen Hospital where they were given first aid. He sustained injuries on the left side. He blamed the driver of the motor vehicle, the third appellant, for the accident.

15. In cross-examination, the respondent told the court that the accident occurred at 8.00 in the morning; that he had a helmet and trousers for riding a motorcycle and that his brother was also wearing a helmet and riding gear. He further told the court that they worked at Twiga and they were going to work. According to the respondent, the vehicle was damaged on the left side and that they were off the road when the vehicle hit them.

16. The 3rd appellant testified as DW1 and told the court that on the material day he was driving the motor vehicle to work when the motor cycle encroached onto his lane forcing him to swerve to the left; that the motor cycle also served to the left as well and hit his vehicle on the left side. He testified that he was on his lane and that it was the motor cycle left its lane and hit the left side of his vehicle. He blamed the motor cycle rider for the accident.

17. From evidence and the impugned judgment, the issues that arise in this appeal are; first whether the respondent proved his case on a balance of probability that the 3rd appellant was wholly liable for the accident and whether the quantum was inordinately high.

Whether 3rd appellant was wholly liable for the accident

18. The trial court considered the evidence as well as materials placed before it, including the police abstract, and concluded that the 3rd appellant was liable for the accident. The court also held that since the appellants did not take out third party proceedings against the motor cycle rider, it could not condemn the rider unheard. For that reason, the court further stated that it could not apportion liability against the rider of the motorcycle not being party to the suit.

19. The trial court further concluded that the police abstract was not conclusive proof on the liability given that sketch maps were not produced and that police officers who were at the scene of the accident were not called to testify. According to the trial court, it could not

trace the 3rd appellant's witness statement on record and, therefore, the respondent's evidence had not been challenged. It therefore held the appellants wholly liable for the accident.

20. I have carefully gone through the evidence myself and perused the trial court's record. The fact of the matter is that both the respondent and 3rd appellant testified on how the accident occurred. The respondent gave a brief explanation stating that they were on the left side of the road and the vehicle which was also on the left side and speeding, hit them.

21. The 3rd appellant on his part, testified and blamed the motor cycle rider for encroaching his lane, thus caused the accident. He told the court that the motor cycle was going down a cliff and, encroached on his lane and was responsible for the accident. just like the respondent, he adopted his statement as evidence.

22. . The trial court however stated that it could not trace the 3rd appellant's witness statement on record and concluded that the respondent's evidence was not challenged. I have perused the statement of defence filed on 17 August 2018. It does not contain the 3rd appellant's witness statement. However, the trial court's original record contains the appellant's list of witnesses dated 19th October 2018 and filed on 25th October 2018 with the 3rd appellant's statement attached to that list. The appellants also filed a list of documents dated and filed on the same day. The suit was heard on 6th February 2019 which means the appellant's documents were on record at the time of the hearing the suit. But the trial court never referred to them at all.

23. The trial court's conclusion that the appellants did not challenge the respondent's evident was not therefore correct. First, in its judgment, the trial court did not consider the 3rd appellant's oral evidence as recorded by it regarding the occurrence of the accident. Second, the court did not dismiss the 3rd appellant's evidence regarding how the accident occurred. It did not therefore make a finding of fact whether it believed the respondent's evidence or that of the 3rd appellant on how the accident occurred, and who was to blame for it. Without deciding on that evidence, the trial court could not determine the issue of negligence and, therefore, whether the 3rd appellant was liable or not.

24. I have reevaluated the evidence of both the respondent and the 3rd appellant, the only people who testified. The respondent blamed the 3rd appellant for the accident, while the 3rd appellant blamed the rider of the motor cycle. The rider of the motor cycle did not testify on how the accident occurred since he was the one riding that motor cycle, while the respondent was a pillion passenger behind the rider.

24. This being a civil suit grounded on negligence, sections 107 through 109 of the Evidence Act place the burden on the respondent to prove his case against the 3rd appellant on a balance of probability. In ***Kirugi & another v Kabiya & 3 others*** [1987] KLR 347, the Court of Appeal emphasized on these provisions stating:

> ***"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."***

25. The respondent testified that the motor vehicle was speeding. That alone, without more, could not amount to negligence. He was required to establish circumstances that amounted to negligent driving.

26. While dealing with the issue of negligence, the Supreme Court of India, **S.B Sinha, J.** stated in ***Machindranath Kermath Kersar v D. S Mylarappa & other*****s**, Civil Appeal NO 3041 of 2008:

> ***"A suit for damages arises out of a tortious action. For the purpose of such action, although there is no statutory definition of negligence, ordinarily, it would mean omission of duty caused either by omission to do something which a reasonable man guided upon those considerations, ordinarily by reason of conduct of human affairs would do or be obligated to, or by doing something which a reasonable or prudent man would not."***

27. In their statement of defence before the trial court, the appellants blamed the rider of the motor cycle for the accident and attributed negligence to him. That was also the appellant's testimony in court that the rider was to blame. The police abstract produced by both sides also attributed negligence to the rider. The trial court was of the view that since the appellants did not join the rider as a Third party in the suit, it could not find the rider liable and therefore it could not apportion liability. The court cited the decisions in ***Global Vehicles Kenya Limited v Lenana Road Motors*** {2015] eKLR and ***David Sironga Ole Tukai v Francis Arap Muge & others*** CA No. 76 of 2014.

28. With respect, the principles in those decisions do not apply to the issue whether the court could apportion liability where one of the offending parties had not been joined in the suit. The trial court was enjoined to decide on the issue of negligence and liability. It could make a finding of act on whom between the 3rd appellant and the rider of the motor cycle was to blame based on the evidence before it. This is so given that the respondent was a pillion passenger on the motor cycle which was being blamed for the accident.

29. The trial court found also as a fact that the police blamed the rider of the motorcycle for the accident, a fact that was also contained in the police abstract, one of the documents relied on by both parties. The rider of the motorcycle was carrying the respondent as a pillion passenger.

30. It is true that a police abstract may not be conclusive evidence on liability. That does not however mean it should be totally disregarded. This is because the law placed the burden on the respondent to prove his case against the 3rd appellant and not otherwise.

31. In that regard, the respondent was under a legal obligation to prove his case against the appellants on a balance of probability that the 3 rd appellant caused the accident through negligent driving. It was not the duty of the 3rd appellant to disprove his liability for the accident.

32. It was not enough for the respondent to merely plead and, thereafter testify, that an accident occurred and that it was caused by the 3rd appellant's negligence. He had to establish on a balance of probability that indeed the 3rd appellant was negligent in his manner of driving.

33. The Police abstract confirmed that a report of occurrence of an accident was made. It was filled from the record filed by police officers who attended the scene of the accident and made the record on how that accident occurred. It was therefore a true police record of events regarding that accident, though it may not be conclusive evidence of negligence. It however becomes relevant when considered alongside other evidence on who was to blame for the accident. That is to say, it is not just documentary evidence that can prove all facts of a case. Proof will depend on the circumstances of each case.

34. In ***Simon Mumo Malonza v British American Tobacco (K) Ltd*** **HCCA 633 of 2002,** where a police abstract was not produced, the court went on to find that other evidence could establish occurrence of an accident, observing:

> ***"Although a police abstract report of the accident would have been appropriate to prove beyond doubt the identity of the motor cycle and the exact location of the accident, the absence of the police abstract report did not in any way negate the evidence adduced before the trial magistrate."***

35. The trial court was in error in blaming the appellants for not joining the rider of the motor cycle in the suit. The respondent had an equal duty to sue the person who caused the accident. The relationship between him and the rider of the motor cycle may have dissuaded him from joining his brother as a defendant in that suit.

36. Having carefully reevaluated the evidence on how the accident occurred, only the respondent and the 3rd appellant testified, the respondent blaming the 3rd appellant, the driver of the motor vehicle and the 3rd appellant blaming the rider of the motor cycle. The testimonies controverted each other concerning the occurrence of the accident, given that there was no independent witness to support either side.

37. In the circumstances, I hold that the 3rd appellant and the rider of the motor vehicle were equally to blame for the accident. They had an equal duty to other road users and for that reason the 3rd respondent is adjudged fifty percent to blame for the accident.

Whether the quantum was inordinately high

38. Regarding quantum, the trial court considered the medical report by Dr. Okere dated 2nd July, 2018 which showed a fracture of the left femur at the intertrochanteric with a degree of 10% disability. The court awarded general damages of Kshs. 1,000,000/= and special damages of Kshs. 2,300/=. The injury was sustained on 19th May, 2017. The appellants submitted that although they provided a medical report dated 11th October, 2018, the trial court never considered it.

39. I have perused the impugned judgment. It is true that it does not make reference to the appellants' medical report at all. As already adverted to, the appellants filed a list of documents on 25th October 2018 which are on record. There is a medical report prepared by Dr. Wambugu and dated 11th October, 2018. The report shows that the x-rays revealed a non-displaced incomplete intertrochanteric fracture of left femur. Physical examination showed that the respondent walked with a normal gait and there was no sign of shortening of the limb. The respondent had made adequate recovery with the fracture of the femur united. The Doctor's conclusion was that there was no total permanent incapacity.

40. The trial court concluded once again that the respondent's evidence was not controverted. That was not factually correct. There was a medical report on record and the court was bound to consider it. The appellants' argument that their medical report was not considered when dealing with the issue of quantum was correct.

41. I have considered the two medical reports. They are three months apart. Although the report by Dr. Okere states that the respondent suffered 10 percent permanent incapacity, Dr. Wambugu who saw the respondent last, did not find any permanent incapacity. The doctor concluded that the respondent had made sufficient recovery and the fracture had united. There was no challenge to this conclusion by the respondent.

42. The respondent did not testify before the trial court that he had not fully recovered. I cannot trace this either in his witness statement or testimony in court. In that respect, I am inclined to accept the conclusion by Dr. Wambugu that the respondent has sufficiently recovered and has no permanent incapacity.

43. The trial court made an award of Kshs. 1,000,000 general damages on the basis of the medical report by Dr. Okere. She made reference to the decision of ***Charles Mathenge Wahome v Mark Mboya & 2 others*** [2011] eKLR (HCCC No. 87 of 2005) where an award of Kshs. 1,500,000/= was made for a broken right upper leg, deep cut at the back of the head and bruises on the right leg leading to 25 percent incapacity.

44. It has long been held that an appellate court should not normally interfere with an award of a trial court unless the award is inordinately high or low as to represent an erroneous assessment**.** It is also the position in law that award of damages should be proportionate to the injuries sustained and that similar injuries should attract comparable awards

45. In the present appeal, the injury the respondent sustained was not similar to the injuries in the decision the trial court referred to. That is to say, the injuries in that case were more serious than that in the present appeal. There was also no evidence that the respondent underwent prolonged treatment as a result of the injury he sustained. That being the case, I find the award of Kshs. 1,000,000 inordinately high as to amount to an erroneous estimate.

46. Taking into account the nature of the injury the respondent sustained and the recovery progress made, an award of Kshs. 700,000 is reasonable in the circumstances of this case.

47. Having considered the appeal, submissions and the authorities relied on, I am satisfied that the appeal has merit and is partially allowed. I hold that 3rd appellant and the rider of the motor cycle equally contributed to the accident. I also find that the award of Kshs. 1,000,000 was inordinately high. As special damages were not challenged, they are not affected by this judgment.

48. Consequently, the final orders are that this appeal is hereby allowed, the judgment and decree of the trial court set aside in place therefor Judgment is entered against the appellants on liability at fifty percent. The respondent is hereby awarded general damages of Kshs. 700,000 which is reduced to Kshs 350, 000/= against the appellants being fifty percent thereof.

49. The respondent is also awarded special damages as determined by the trial court. The respondent shall have costs of the suit before the trial court and interest. As the appeal has partially succeeded, each party shall bear costs of the appeal.

Dated, Signed and delivered at Kajiado this 6th day of March 2020.

E.C. MWITA

JUDGE