**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 522 OF 2016**

**GEORGE RUTIYU MUKABI.....APPELLANT**

**VERSUS**

**ELVIS OTIENO OCHIENG.....RESPONDENT**

**JUDGMENT**

**1.** This appeal challenges the judgment and decree of the lower court in Nairobi CMCC No. 7568 of 2014 in which the respondent (then the plaintiff) had sued the appellant ( then the defendant) claiming special damages in the sum of KShs.400,599 and general damages as compensation for personal injuries and loss suffered as a result of a road traffic accident which occurred on 24th November 2013 along Limuru Road.

**2.** In his plaint dated 15th December 2014, the respondent averred that on the material date, he was driving motor vehicle registration number KAM 365B when the appellant, his servant or agent negligently drove motor vehicle registration number KAZ 900F Mercedes Benz and caused it to collide with his vehicle occasioning him serious personal injuries and material loss. The particulars of the appellant, his servant or agent's negligence were pleaded in paragraph 5 of the plaint.

**3.** In his statement of defence dated 9th February 2015, the appellant denied all the allegations of negligence as pleaded in the plaint and put the respondent to strict proof thereof.

In the alternative, the appellant pleaded that if the accident occurred, it was solely or substantially contributed to by the respondent's negligence. The particulars of the respondent's alleged negligence were itemized in paragraph 6 of the defence.

**4.** The suit proceeded to full trial after which the learned trial magistrate *Hon. Rachel Ngetich (CM)* entered judgment on liability in the ratio of 10:90 in favour of the respondent against the appellant. She also awarded the respondent damages in the total sum of KShs.2,322,000 itemised as follows:

i. General damages - KShs.2,000,000

ii. Special damages - KShs. 400,000

iii. Costs of future treatment - KShs.180,000

iv. Less 10% contribution - KShs.(258,000)

Total - KShs.2,322,000

**5.** The appellant was aggrieved by the trial court's decision on liability and quantum hence this appeal.

In his memorandum of appeal dated 2nd August 2016, the appellant faulted the trial magistrate's finding on liability claiming that it was erroneous as the circumstantial evidence on record proved that both drivers were equally to blame for the accident.

**6.** On quantum, the appellant complained that the award of general damages was excessive and was not commensurate to the personal injuries suffered by the respondent; that in making the award, the learned trial magistrate failed to consider the principles applicable to assessment of general damages and the authorities cited by the appellant in his submissions; that the award of KShs.180,000 for future medical expanses was inordinately high considering that there was evidence that removal of knee implants could be made in a public hospital

at a cost of KShs.65,000.

**7.** When the appeal came up for hearing, both parties consented to having it prosecuted by way of written submissions which both parties subsequently duly filed.

**8.** This being an appeal to the High Court, it is an appeal on both facts and the law. I am fully conscious of my role as the first appellate court which as summarized by the Court of Appeal in ***Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR*** is to:

> ***"….. re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

**9.** I have carefully considered the grounds of appeal, the parties' rival submissions and the authorities cited. I have also read the evidence on record and the judgment of the trial court. Having done so, I find that only two issues emerge for my determination, namely:

i. Whether the learned trial magistrate erred in law or fact in her finding on liability.

ii. Whether the award of general damages and future medical expenses was excessive and inordinately high.

**10.** Turning to the first issue, the court record shows that the respondent testified as PW1 in support of his case and called three additional witnesses. The appellant was the only witness who testified in support of the defence case.

**11.** In his evidence, PW1 testified that on the material date, he was driving motor vehicle registration number KAM 365B along Limuru Road. It was around 10pm and when negotiating a corner, he saw a vehicle approaching from the opposite direction at high speed and immediately realized that it was being driven on the lane he was lawfully using, that is, the left lane as one faces Parklands direction. Before he had any time to react, the accident occurred with his vehicle being hit from the right front tyre all the way to the driver's door. He sustained serious injuries in the accident and his motor vehicle was extensively damaged.

**12.** PW2, PW3 and PW4 were a motor vehicle assessor, a police officer and a doctor respectively and none of them witnessed the occurrence of the accident.

**13.** In his evidence, the appellant admitted that he was the driver of motor vehicle registration KAZ 900F at the material time but denied that he caused the accident by driving at high speed and on the wrong lane. He blamed the respondent for the accident claiming that it was the respondent who was driving at high speed and caused the accident by encroaching on the lane he was lawfully using.

**14.** In her judgment on liability, the learned trial magistrate stated as follows:

> ***"I have considered evidence adduced. I have also considered submissions by both counsel. The defendant said that the plaintiff was driving in high speed but in cross examination he confirmed that his vehicle was to blame for the accident and that it was him who was driving the vehicle. He further said that he had not made any claims against the plaintiff neither is he aware whether his insurance has made any claim. If plaintiff was driving on the defendant's side as he alleged then he would not have been blamed by police for the accident. It is however evidence that the accident occurred in a corner the nature of the road could have to some small extent contributed to the accident. From the foregoing I find it appropriate to apportion liability at 10:90 the plaintiff to shoulder 10% liability defendant 90% liability."***

**15.** In my view, the learned trial magistrate's finding that the appellant had admitted that he was to blame for the accident was not supported by the evidence on record and was factually incorrect. The appellant was very clear in his evidence that he was not to blame for the accident and that the accident was caused by the negligent driving of the respondent who allegedly drove into his lane and rammed into his vehicle.

**16.** In his evidence on cross examination which appears to have been the basis of the trial court's finding, the appellant stated as follows:

> ***"I have seen this abstract (exhibit 6). Driver of KAZ 900F is to be blamed, it is there in the police abstract. It's me who was driving KAZ 900F…."***

On re-examination, he stated:

> ***"…. The police abstract is not the one I know. I was paid by insurance that is why I have not filed any claim against plaintiff. I blamed plaintiff in my statement."***

**17.** From the foregoing, it is clear that the trial magistrate's finding that the appellant had admitted having negligently caused the accident was based on a misrepresentation of the evidence. The appellant never admitted having caused the accident. He only referred to the claim made in the police abstract that the driver of KAZ 900F was to blame for the accident.

**18.** It is important to note that both drivers blamed each other for the occurrence of the accident. None of them called any independent witness who witnessed the accident to tell the court how exactly the accident happened. This is despite the fact that the respondent mentioned in his evidence that at the time of the accident, he had a passenger in his vehicle.

**19.** Having alleged in his pleadings that the appellant had caused the accident by negligent driving, the burden of proof lay on the respondent to prove that fact on a balance of probabilities. The evidence adduced by the respondent during the trial was not sufficient to discharge that burden since it amounted to the respondent's word against that of the appellant.

**20.** In cases where there is conflicting evidence regarding how an accident occurred like in this case where both drivers blamed each other and there is no independent evidence to resolve the impasse, it would be impossible for the court to make a finding of fact regarding who was to blame for the accident or the extent to which each party contributed to the accident especially where like in this case the police officer who investigated the accident was not called as a witness. PW3 only produced the police abstract. He did not visit the scene nor did he investigate how the accident occurred.

**21.** Given the evidence on record, I agree with the appellant's submissions that the trial magistrate ought to have found both drivers equally liable and should have apportioned liability at 50:50. I am fortified in this finding by the holding of Spry, VP in ***Lakhamshi V Attorney General, [1971] EA 118, 120*** when he stated that:

> ***"… In the case of most traffic accidents, it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them…."***

**22.** Having found as I have above, I am satisfied that the learned trial magistrate erred in her finding on liability. The same is hereby set aside and is substituted with liability in the ratio of 50:50.

**23.** On quantum, the appellant has claimed that both the award of general damages and cost of future medical treatment were excessive. He also complained that in making her assessment, the learned trial magistrate failed to consider the principles of law applicable and comparable awards made in authorities cited in his submissions.

**24.** I wish to state at the outset that the award of damages is always at the discretion of the trial court. That discretion must however be exercised in accordance with sound legal principles taking into account the facts of each case.

**25.** The circumstances in which an appellate court can interfere with an award of damages made by a trial court have been clearly set out in many authorities including those that were referenced by the respondent namely ***Twokay Chemicals Ltd V Patrick Makau Mutisya & Another, [2019] eKLR; Sheikh Mustaq Hassan V Nathan Mwangi Kamau Transportes & 5 Others, [1986] KLR 457; Jane Chalagat Bor V Andrew Otieno Onduu, [1988-92], 2 KAR 288*** and ***Onesmus Kimathi Kibiti V Leneck Gitari Njoka, [2017] eKLR***.

**26.** An appellate court is only justified in interfering with an award of damages if it is satisfied that the trial court applied the wrong principles in arriving at the award or that it misapprehended the evidence and therefore arrived at a figure that was so inordinately high or low as to represent an entirely wrong estimate of the damage suffered. The appellate court ought not to substitute its discretion with that of the trial court simply because it may have arrived at a different figure if it had tried the case in the first place.

**27.** In this case, it is not disputed that the respondent suffered posterior right hip dislocation with fracture of the acetabulum; blunt trauma right knee joint with tear of medial and lateral menisci posterior horns; that he underwent surgery to fix the fracture on the hip joint through open reduction and fixing of metal implants.

**28.** *Dr. Wambugu* in his report stated that though the respondent had made adequate recovery at the time of his examination on 30th July 2014, his hip joint was predisposed to early onset of osteoarthritic changes. He assessed degree of permanent incapacity at 16%.

**29.** In his submissions in the lower court, the respondent proposed a sum of KShs.4,000,000 in general damages relying on decisions of the High Court where the plaintiffs had suffered related and other injuries and were awarded damages ranging from KShs.1,500,000 to KShs.2,000,000.

**30.** The appellant on his part proposed a sum of KShs.600,000 relying on authorities in which the plaintiffs had suffered multiple serious injuries some of which were similar to those sustained by the respondent. Those plaintiffs were awarded general damages ranging from KShs.980,000 to KShs.1,000,000 in the year 2007, 2009 and 2011.

**31.** Considering the nature of the injuries sustained by the respondent, the sum of KShs.600,000 proposed by the appellant was inordinately low. The sum proposed by the respondent was unreasonably high considering the awards made to plaintiffs in the authorities cited by the parties for almost comparable injuries.

**32.** Looking at the trial court's judgment, I am unable to find any evidence to suggest that in making her award of general damages, the learned trial magistrate considered either irrelevant factors, misinterpreted the evidence or applied the wrong legal principles. I cannot also say that the amount of KShs.2,000,000 was either inordinately low or high as to be an erroneous estimate of the damage suffered.

**33.** Given that the authorities relied upon by the parties had been decided 5-19 years prior to the date the trial court made its decision, taking into account the serious nature of the injuries sustained by the respondent and inflationary trends, I am satisfied that the award of KShs.2,000,000 in general damages was reasonable and adequate compensation for the respondent's pain and suffering as well as loss of amenities. I therefore find no basis to disturb the award. The same is hereby upheld.

**34.** With regard to the award of damages for future medical expenses, *Dr. Wambugu* in his evidence stated that should the respondent opt to have the metal implants removed, the cost of such removal was KShs.180,000 in private hospitals and KShs.65,000 in a public institution. The learned trial magistrate exercised her discretion and decided to award the respondent the higher amount. I am unable to fault the trial magistrate's discretion in this award since there is nothing to suggest that it was wrongly exercised. In my view, the award is justified given that the respondent had a choice of having the implants removed in either a public or private institution. The award is therefore upheld.

**35.** The award of special damages was not contested and the same remains undisturbed.

**36.** The upshot of this judgment is that the appellant's appeal partially succeeds to the extent that the trial magistrate's finding on liability is set aside and is substituted with an order of this court apportioning liability between the parties in the ratio of 50:50. As the award on quantum has been upheld, the amount now payable to the respondent is KShs.2,580,000 less 50% which amounts to KShs.1,290,000.

**37.** The judgment of the trial court is consequently set aide and is substituted with a judgment of this court in favour of the respondent in the total sum of KShs.1,290,000. The award of general damages will attract interest at court rates from the date of the trial court's judgment while the award of special damages will attract interest from the date of filing suit in the lower court till payment in full.

**38.** The respondent is granted costs of the suit in the lower court but since the appeal has partially succeeded, each party shall bear its own costs of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2020 THROUGH ELECTRONIC MAIL WITH THE WRITTEN CONSENT OF THE PARTIES IN COMPLIANCE WITH THE PRACTICE DIRECTIONS ISSUED BY THE HONOURABLE CHIEF JUSTICE AIMED AT MITIGATING THE SPREAD OF THE COVID-19 PANDEMI.**

**C. W. GITHUA**

**JUDGE**