



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 3 OF 2017

GEORGE NJOROGE KARIUKI.....1ST APPELLANT

RT. (EAST AFRICA) LIMITED.....2ND APPELLANT

-VERSUS-

CHARLES MUSYOKA.....1ST RESPONDENT

JAMES GACHUNGA MAINA.....2ND RESPONDENT

NAKURU EQUIPMENT SUPPLIES LIMITED.....3RD RESPONDENT

(An Appeal from Judgment and Decree (Hon. E A Mbicha, R M,)

delivered on 3rd of February 2017 in Civil Case No. 252 of 2012

at Chef Magistrate's Court at Kajiado).

JUDGMENT

1. This is an appeal from the judgment and decree (**Hon Mbicha, RM**), delivered on 3rd February, 2017. The 1st Respondent sued the appellants and the 2nd and 3rd Respondents for negligence for injuries he sustained while a pavilion passenger on motor cycle registration number **KMCF 581F** which was being ridden by the 2nd Respondent and owned by the 3rd Respondent.

2. The accident was due to a collision between the motor cycle and motor vehicle registration number KAV 809R with Trailer ZC 4302 owned by the 2nd appellant and driven by the 1st appellant as a result of which the 1st respondent was injured. The 1st respondent filed a suit in the Chief Magistrate Court at Kajiado, **CMCC No. 252 of 2012** against the 1st and 2nd appellants as well as the 2nd and 3rd respondents for damages.

3. In a Judgment delivered on 3rd February 2017, the trial court found the 1st and 2nd appellants as well as 2nd respondent liable for the accident. The court apportioned liability between 1st and 2nd appellants at 70% and the 2nd respondent at 30%. The court awarded the 1st respondent Kshs. 2,000,000 general damages and special damages of Kshs. 820,125/=. Based on the apportionment, the 1st and 2nd appellants were to shoulder Kshs. 1,974,087, while the 2nd respondent was to shoulder Kshs. 846, 038/=. The 1st

respondent was also awarded costs of the suit and interest.

4. The appellants were aggrieved by the judgment and decree and lodged a memorandum of appeal dated 27th February 2017 and filed on 3rd of March raising the following grounds, namely:

1. That the learned trial magistrate erred in fact and law in finding the 1st and 2nd defendants 70% liable in disregard of the glaring evidence before court.

2. That the learned trial magistrate erred in fact and law in finding the 3rd defendant ONLY 30% liable.

3. That the learned trial magistrate erred in fact and law and misdirected himself in finding that the Respondent is entitled to general damages of Kshs. 2, 000,000/= which amount is excessive in the circumstances.

4. That the learned trial magistrate erred in fact and law in finding that the general damages of Kshs. 2,000,000/= awarded to the plaintiff be apportioned in the ration of 70:30 between the 1st and 2nd defendants and the 3rd defendant which ratio was not fair given the evidence on record.

5. That the learned trial magistrate erred in law and fact in awarding the plaintiff special damages of Kshs. 820,125/= which were never pleaded nor proved as it is required by law.

6. That the learned trial magistrate erred in law and fact and misdirected himself in failing to consider the submissions by the appellants together with the authorities relied on by the appellants;

7. That the learned trial magistrate wholly erred in law and fact in arriving at her said decision.

5. During the hearing of the appeal, Mr. Omondi, learned counsel for the appellants, submitted relying on their written submissions before the trial court arguing that the appeal was against both liability and quantum.

6. On liability, learned counsel submitted that PW1 was a pavilion passenger on motor cycle **KMCF 581F** and, according to PW2, PW1 stated that he could not recall how the accident occurred. He also stated that in the statement which the 1st respondent relied before the trial court, he had stated that he did not know who between the motor cycle and the appellant's motor vehicle was responsible for the accident.

7. Counsel submitted that in cross-examination, the 1st respondent stated that he had said that he had no helmet or protective clothes. According to counsel, the 1st respondent exposed himself to danger and was the author of his own misfortune and, therefore, parties should have shared liability at 50%.

8. On quantum, counsel argued that the trial court failed to take into account the injuries sustained and the appropriate authorities on quantum. In particular, counsel relied on **Jessskay Enterprises Ltd v Nathan Kinyanjui** (Eldoret Civil of Appeal No. 2 of 2010) which had awarded Kshs. 600,000/= on similar injuries. Other authorities included **Jah Hendricks v David Charo Sirya** (Mombasa ELRC Appeal No. 19 of 2015). He urged the court to allow the appeal.

9. Mr. Masika learned counsel for the 1st respondent opposed the appeal. On liability; counsel submitted that the trial court considered the circumstances of the case and arrived at the correct decision. According to counsel, it was not true that the 1st respondent contributed to negligence and, therefore, the court should not disturb the finding on liability.

10. On quantum, learned counsel, submitted that the award of general damages of Kshs. 2 million was

commensurate with the injuries suffered and the authorities cited to the trial court. Regarding special damages, learned counsel submitted that special damages were pleaded and proved as required.

11. Mr. Masika submitted that Kshs. 620,125 was pleaded in the Complaint dated 18th October 2017 and an oral application for amendment was allowed in court without objection by the appellant. This, he argued, brought the amount of special damages to Kshs. 820,125. He relied on the 1st respondent's list of documents and argued that special damages were proved. He urged the court to dismiss the appeal.

12. I have considered this appeal; submissions made on behalf of the appellants and the 1st respondent and the authorities relied on. The 2nd and 3rd respondents did not attend court and therefore took no part in this appeal. I have also considered the impugned judgment and the reasons therefor.

13. This being a first appeal, it is the duty of this court to review the evidence afresh, reassess and reconsider it and make its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify before the trial court and give allowance for this.

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

“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.”

15. And in *Nkuba v Nyamiro* [1983] KLR 403, the Court of Appeal again 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.”

16. **PW1 Dr. F. Phounice Muhoya**, a general practitioner, testified that on 11th October, 2012 he examined the 1st respondent at the Aga Khan Hospital, prestige branch. He had a history of having been involved in a road traffic accident on a motor bike on 23rd October, 2009. He had been treated at three different hospitals, first at Kitengela medical services and referred to Kenyatta National Hospital where he was admitted for 7 days and had surgery. He developed complications and was admitted at Aga Khan University Hospital.

17. According to the witness when he saw the 1st respondent, he had head injury which had two components. The right frontal compound depressed fracture and right fractal extra axial hematoma. He had a cut wound on the lower limb and lost the incisor of the upper jaw. CT Scans showed head injuries and skull x-rays showed implants which were permanently fixed. He assessed the injuries as grievous harm. The cut wound of the lower limb had healed. Permanent disability was assessed at 10%. He produced the medical report as exhibit.

18. **PW2 Charles Musyoka** testified that on 23rd October 2009 at around 3.50pm he boarded a motor cycle to make an urgent delivery to East African Portland Cement. He boarded the motor cycle near EPZ junction. A truck was coming from the opposite direction and he expected the truck driver to give way. The driver tried to apply brakes but it was too late. He was thrown onto the ground and lost consciousness. When he came to, he found himself in hospital. He told the court that according to the records, he was first taken to Kitengela Medical Hospital, then Kenyatta National Hospital on referral. He was operated on and metal plates implanted to secure the skull which he still had at the time he was testifying. He produced the referral letter as PEX 2. He remained at Kenyatta National Hospital for one week. He produced admission letter dated 21st October 2009 as PEX 3. He also produced the discharge

summary as PEX 4(a) and (b).

19. He testified that spent Kshs. 428,000/- and produced the receipts as PEX 6(a) – (d); did a CT scan at Mombasa Metropolitan and paid Kshs, 9000 and produced the receipts as PEX 7. He stated that he had had paid Kshs. 70,816 and other medical expenses and produced receipts PEX 10, 11 and 12, 13 – 15. He blamed both the truck driver and the rider of the motor cycle for the accident.

20. According to the witness the truck driver of KAV 809R did not give way because the motor cycle rider had the right of way. He also blamed the rider of the motor cycle for not applying brakes. He told the court that by the time he was laid off, his salary was Kshs. 16,000/-. He produced payment voucher as PEX 18.

21. In cross-examination, the 1st respondent told the court that he was travelling on the motor cycle from Kitengela to Athi River and that the trailer turned and hit his head. He had no helmet.

22. **PW3 No. 63953 PC John Makau**, a police officer then attached at Isinya police station, testified that on 23rd October, 2009, PW2, a pavilion passenger on a motor cycle, was involved in a road traffic accident. He produced a police abstract as PEX 4 and told the court that the accident was pending under investigations.

23. In cross-examination, the witness told the court that he could not tell who caused the accident and that the **OB** did not indicate the circumstances of the accident. He also told the court that they had a statement from the plaintiff only in which he stated that he could not recall how the accident occurred.

24. **DW 1 Justus Momanyi Antony**, a witness called by the 3rd respondent, testified that he was a manager with the 3rd respondent who imports and sells motorbikes. He told the court that on 4th July, 2009, they sold a Bajaj Boxer motor bike to Moses Mburu Kiarie of P.O Box 4 Uplands. The motor cycle was sold at Kshs, 78,000/- which was paid in cash and a receipt issued to him. He produced the receipt as DEX 1; issue an ETR receipt which he also produced as DEX 2. He produced an incorporation certificate as DEX 3 and memorandum and Articles of Association as DEX 4. According to the witness, once they sold the motor cycle, the owner took responsibility for it. He was also responsible to have it transferred into his name.

25. After considering the evidence, the trial court correctly, in my view, dismissed the suit against the 3rd respondent on grounds that being an importer and seller of the motor cycles, it had no interest in motor cycle KMCF 581 which was involved in the accident. This was because having sold the motor cycle; the 3rd respondent was no longer its owner. The purchaser was responsible to transfer it into his name and for anything that happened to it including the accident.

26. The trial court found the 1st and 2nd appellants on the one hand and the 2nd respondent on the other, liable for the accident and apportioned liability at 70% against the 1st and 2nd appellant and 30% against the 2nd respondent respectively.

27. On quantum, the trial court considered the injuries suffered and the authorities cited before it and awarded general damages of Kshs 2,000,000/- for pain and suffering. Special damages were allowed at Kshs. 820,125/-. In the end, the trial court awarded Kshs. 2,820,125/-. This amount was apportioned at the ratio of 70% against the 1st and 2nd appellants and 30% against the 2nd respondent which came to Kshs. 1,974,087 against the 1st and 2nd appellants and Kshs. 846,038 against the 2nd respondent, triggering this appeal.

28. I have considered the submissions and the authorities relied on. I have also considered the impugned judgment. The issues that arise for determination in this appeal are whether; the trial court was right in the apportionment of liability between the 1st and 2nd appellants and 2nd respondent as it did; whether the award of Kshs. 2,000,000 general damages was inordinately high and whether the special damages of

Kshs. 820,125 were pleaded and proved.

Whether the trial court erred in apportioning liability

29. The appellants argued that the 1st respondent who was a pillion passenger on motor cycle **KMCF 581F** could not, according to PW3, recall how the accident occurred. They also argued that the statement the 1st respondent relied before the trial court, stated that he did not know who between the motor cycle and the appellants' motor vehicle was responsible for the accident. They contended that the 1st respondent admitted in cross examination that he had no helmet or protective clothes. According to them, the 1st respondent exposed himself to danger and was the author of his own misfortune and, therefore, he should have shared liability at 50%.

30. The 1st respondent argued that the trial court considered the evidence on record, the circumstances of the case and arrived at the correct decision. According to the 1st respondent he did not contribute to negligence and, therefore, the court should not disturb the trial court's finding on liability.

31. I have reevaluated the evidence on record. Particularly that of the 1st respondent who was the only person who witnessed the accident to testify. He stated that the driver of the truck did not give way and applied brakes too late. He also blamed the rider of the motor cycle for not applying brakes. The 1st respondent testified that the truck hit his head and he was thrown down.

32. The motor cycle rider did not testify nor did the driver of the truck. The trial court therefore had the evidence of the 1st respondent as the only evidence on how the accident occurred. I do not it is difficult to fault the trial court on its finding on liability.

33. The appellants have also argued that the 1st respondent should take blame for the accident. according to them, the 1st respondent had stated that could not remember how the accident occurred. This argument is not supported by the record. PW3 did not produce the statement allegedly made by the 1st respondent to the police. The statement, if any, was not made on oath and was not subjected to cross examination. It was of no evidential value to trial court or this court. I also find no value in the argument that the 1st respondent contributed the accident given that he was a pillion passenger and not the rider. I find no reason to interfere with the trial court's finding on liability.

Whether quantum was inordinately high

34. Regarding quantum, the appellants have faulted the trial court for awarding an inordinately high award. The court awarded general damages of Kshs. 2,000,000 for a head injury that required surgeries and a metal implant to repair.

35. The appellants relied on *Jesskay Enterprises Ltd v Nathan Kinyanjui* (supra, where an award of Kshs. 600,000 was made for fractured skull, head injuries and injury to the left knee. They also relied on *Jah Hendricks v David Charo Sirya*(supra) where an award of Kshs 480,000 was made for a fractured skull at the base with blood clot within the skull, cut on the head and blunt injury on the hand.

36. I must point out that no injuries are similar in all respects. A person may suffer what may on the face of it appear to be an injury similar to that suffered by another but they may not be quite similar. The 1st respondent suffered head injury with a fractured skull that required two operations and a metal implant. The appellants did not show that the injuries in the decisions relied on were similar to those the 1st respondent suffered in every respect. The trial court considered the evidence before it, including the medical evidence, and arrived at the decision it did on the award.

37. It is strite law that an appellate court should not readily interfere with the trial court's exercise of discretion on the award of damages unless it is satisfied that the trial court took into account irrelevant factors or failed to take into account relevant factors and arrived at an award that represented an erroneous

estimate.

38. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated thus;

“[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

39. In *Butt v Khan* [1981] KLR 349, *Law, J.A* observed that:

“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.”

40. And in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia* (1982 –88) 1 KAR 727, it was held that;

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”

41. I have considered the award arrived at *visa vis* the injuries the 1st respondent suffered and the medical evidence on record. The award was, in my respectful view, commensurate with the injuries suffered. I do not find merit in the argument that it was inordinately high to warrant interference by this court. The complaint against quantum is therefore dismissed.

42. There is however an aspect that I find necessary to comment on. The 1st respondent was a pillion passenger on the motor cycle. He admitted that he did not wear a helmet which was against the law. He obviously exposed himself to the danger and perhaps the extent of the injury he suffered. This is because according to his evidence, he was hit on the head which means the helmet would have to some extent assisted in minimizing the impact. To that extent, the 1st respondent contributed not to the accident, but to the extent of the injuries he sustained. On that I find that he should have been adjudged to blame to some degree. I therefore attribute 10% negligence for failure to wear a helmet.

43. Finally, the appellants complained that special damages were not pleaded and proved. The 1st respondent argued that special damages were pleaded and proved. It is strite that special damages must not only be specifically pleaded but must also be strictly proved. I have perused the plaint that was filed before the trial court. The record shows that the 1st respondent pleaded special damages of Kshs 620,123. An oral application was made in court to amend the amount of special damages to Kshs. 820, 125. This was not objected to by the appellants and was therefore allowed.

44. The 1st respondent produced receipts in court as exhibits to support special damages. He was not cross examined on those receipts and their production was not objected to. The appellants have not pointed out which receipts they were opposed to. That being the state of affairs, I do not find merit in this argument. It is dismissed.

45. In the end, the appeal on liability and apportionment of liability is dismissed. The appeal on quantum

is also dismissed. However, the 1st respondent has been adjudged 10% to blame for the extent of the injuries suffered. That in itself affects the amount of quantum and the apportionment between the appellants and the 2nd respondent.

46. The court made an award of general damages of **Kshs. 2,000,000** which is reduced by 10% bringing the figure to **Kshs.1,800,000**. Applying the apportionment at the ration of 70% to 30% between the appellants and the 2nd respondent comes to **Kshs, 1,260,000** against the appellants and **Kshs. 540,000** against the 2nd respondent.

47. Regarding special damages, the effect is the same. That is **Kshs. 820, 125** reduced by 10% comes to **Kshs. 738,112.50**.

When apportioned at the ration of 70% against the appellants and 30% against the 2nd respondent comes to **Kshs. 516,678.75** against the appellants and **Kshs. 221,433.75** against the 2nd respondent. In total, the appellants are to shoulder **Kshs. 1,260,000 + 516,678. 75 =1,776,678.75**, while the 2nd respondent will shoulder **Kshs.540,000+221,433.75= 761,433.75**

48. The final result is that the appeal on liability is dismissed. The Appeal on quantum allowed and judgment on quantum set aside. In place therefor; judgment is entered for the 1st respondent for **Kshs. 2,538,112.50** inclusive of general and special damages. The appellants will bear **Kshs. 1,776,678.75** while the 2nd respondent will bear **Kshs.761, 433.75**. The 1st respondent shall have costs and interest before the trial court as well as costs of this appeal.

Orders accordingly

Dated, Signed and Delivered at Kajiado this 23rd day of April, 2020.

E. C. MWITA

JUDGE