



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL APPEAL NO. 49 OF 2019**

**DOMINIC MUTIE KATOO.....APPELLANT**

**=VRS=**

**1. JACOB MUIGAI KARANJA.....1<sup>ST</sup> RESPONDENT**

**2. MARIKO CHACHA.....2<sup>ND</sup> RESPONDENT**

***{Being an appeal against the Ruling of Hon. S. K. Arome – SRM – Keroka***

***dated and delivered on the 21<sup>st</sup> day of August 2019 in the original***

***Keroka Principal Magistrate’s Court Civil Case No. 45 of 2018}***

**JUDGEMENT**

By a plaint dated 5<sup>th</sup> February 2018 the appellant sued the respondents herein for compensation for personal injuries sustained in a motor accident that occurred along the Keroka – Sotik road involving motor vehicle KBD 219P which he was driving and motor vehicle KBV 268M belonging to the respondents. The accident occurred when the vehicle the appellant was driving rammed into the respondent’s vehicle which was allegedly left stationary on the road without any warning signs. The respondents did not enter appearance to the suit and therefore interlocutory judgement was entered in favour of the appellant whereupon the matter proceeded for formal proof. However, after hearing and considering the evidence adduced by the appellant the trial Magistrate found the appellant was guilty of contributory negligence and apportioned liability in the ratio 50%:50%. The trial Magistrate then awarded the appellant a sum of Kshs. 1,000,000/= as damages for pain and suffering and loss of amenities and Kshs. 160,530/= as special damages. The appellant being aggrieved by the trial Magistrate’s finding on liability and the assessment of damages preferred this appeal. The grounds of appeal are: -

**“1. THAT the Learned Trial Magistrate erred both in law and fact by failing to take into account all material and relevant facts as to the causation and circumstances of occurrence of the accident and as a result reached a wrong decision by holding the Appellant 50% and the Respondents 50% liable for the accident.**

**2. THAT the Learned Trial Magistrate erred both in law and fact by failing to find that the accident was wholly or substantially caused by the Respondents sole negligence, in light of the evidence before the trial Court.**

**3. THAT the Learned Trial Magistrate erred both in law and fact by failing to apply or applying the wrong principles in law whilst making assessment of general damages, which assessment when viewed against the medical evidence adduced, particularly that the Appellant was declared to have a 60% permanent disability, the award was manifestly low as to amount to a miscarriage of justice.**

**4. THAT the Learned Trial Magistrate erred both in law and fact by failing to award the Appellant damages for future medical expenses when the same was pleaded and proved.**

**5. THAT the Learned Trial Magistrate erred both in law and fact in failing to evaluate the evidence in its totality and failing to take into consideration submissions and authorities submitted by the Appellant thereby arriving at a wrong decision.**

**6. THAT the Learned Trial Magistrate failed to exercise his discretion judiciously in apportioning liability and awarding damages.”**

By the appeal this court is urged to set aside the judgement on liability and the subsequent decree of the trial Magistrate and substitute it with one in favour of the appellant as prayed in the plaint or in the alternative to remit the suit back to the lower court for retrial. This court is also urged to award the costs of this appeal to the appellant.

The respondents did not enter an appearance in this appeal despite being duly served with several notices for mention/directions.

The appeal was canvassed by way of written submissions. The gravamen of the appeal on liability is that based on the facts of the case it is impossible for there to be contributory negligence on the part of the appellant as his evidence was not controverted and the respondents should be held 100% liable. On the quantum of damages, it is argued that given the nature and extent of the injuries sustained by the appellant an award of Kshs. 2 million would be fair, just and reasonable as general damages for pain and suffering. It is also argued that the pleaded special damages of Kshs. 1,071,922/= were proved by way of receipts and so should have been awarded. Counsel for the appellant also submitted that the appellant is entitled to the costs of the suit and interest thereon at court rates from the date of filing suit. Relying on the case of **Gibson Kariithi Kairu & Another v Joseph Mutio Peter [2009] eKLR** where he submitted a sum of Kshs. 400,000/= was awarded for injuries similar to those of the appellant, Counsel urged this court to consider the passage of time and hence increase the appellant's award to Kshs. 1 million (sic).

As the first appellate court I have a duty to reconsider the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses (**see Selle v Associated Motor Boat Company Limited [1968] EA 123**).

The respondents did not enter appearance to the suit despite being served with summons. The appellant having obtained interlocutory judgement the matter proceeded for formal proof. Nevertheless, the onus to prove the case still lay upon the appellant the standard of proof being one on a balance of probabilities. It is my finding that the appellant discharged this burden. His evidence that the respondents' vehicle was stationary on the road without any sign(s) to warn other road users was uncontroverted. The 1<sup>st</sup> respondent being the driver of the vehicle owed other road users a duty of care and is enjoined by law (**see Section 53 (1) (2) and (3) of the Traffic Act**) to place warning sign(s) on the road as otherwise other motorists were likely to ram into the stationary vehicle. It is my finding that the cause of the accident was the fact that the respondents left their vehicle on the road unattended without anything to warn other road users that it was stationary. It is also my finding that in so doing the 1<sup>st</sup> respondent acted negligently and being the owner of the vehicle the 2<sup>nd</sup> respondent was vicariously liable. I find no blameworthiness on the part of the appellant as he could not have foreseen that the respondents would leave their vehicle on the road unattended without any warning signs. In the premises I am persuaded that the trial Magistrate misdirected himself on the issue of liability and accordingly the apportionment of liability in the ratio 50:50 is set aside and substituted with a finding that the respondents were wholly liable for the accident.

On the quantum of damages, the principle is that an appellate court should be slow to disturb the award of the trial court unless it is satisfied that either the trial court took into account an irrelevant factor or left out a relevant one or that the award is so inordinately high or low that it must be a wholly erroneous estimate of the damage – **see Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) [1987] KLR 30**.

According to the medical report of Dr. Titus Ndeti Nzina dated 10th January 2018 the appellant sustained the following injuries: -

- **Dislocation of the left knee joint/sprain of ligaments**
- **Torn lateral/medial meniscus left knee joint.**
- **Fracture neck of left femur.**
- **Fracture shaft of left femur.**
- **Compound fracture left tibia/fibula.**

In his opinion and prognosis, the doctor stated that injuries had resolved with overt deformities which were permanent and assessed the degree of functional permanent incapacity at 60%. While I agree with Counsel for the appellant that these were serious injuries I find that the trial Magistrate exercised his discretion properly in arriving at the award of Kshs. 1 million. Counsel for the appellant towards the tail end of his submissions agreed that the plaintiff in the case of **Gibson Kariithi Kairu & Another v Joseph Mutio Peter (Supra)** sustained somewhat similar injuries and that given the passage of time the appellant's award should be increased to Kshs. 1 million. That was also the finding of the trial court. The proposed award of Kshs. 2 million is not in any case supported by any authorities. Therefore, I find no justification to interfere with the award of the trial Magistrate on damages for pain, suffering and loss of amenities.

One of the grounds of appeal was that the trial Magistrate erred by not awarding the appellant damages for future medical expenses. That ground of appeal seems to have been abandoned as there is no mention of it in the submissions. I would in any event not have upheld that ground as there was no prayer for future medical expenses in the plaint. Only that which is pleaded and sought in the plaint and proved can be awarded. The trial Magistrate could not have awarded that which was not pleaded and sought in the plaint.

As for special damages the principle is that in addition to being specifically pleaded the same must be strictly proved. The appellant pleaded a sum of Kshs. 1,071,922/= but after adding up the sums in the receipts he produced in evidence he proved only a sum of Kshs. 232,876/=, nett of the National Hospital Insurance Fund contribution, which is what he was entitled to but not more. In his judgement the trial Magistrate refers to a receipt for Kshs. 160,530/= but the record shows several receipts were produced. Accordingly, I allow the appeal in regard to the special damages only to the extent of substituting the sum of Kshs. 160,530/= with one for Kshs. 232,876/=.

On costs, the appellant is entitled to the costs of the suit in the court below and as he has succeeded in this appeal he is also awarded the costs of this appeal.

On interest, the law is that special damages attract interest at court rates from the date of filing suit. General damages attract interest from the date of judgement (in this case from the date of the judgement in the court below). Accordingly, the appeal herein succeeds and judgement is entered for the appellant against the respondents as follows: -

1. Liability 100%.
2. General damages for pain, suffering  
& loss of amenities – Kshs. 1,000,000/=
3. Special damages – Kshs. 232,876/=
- Total – Kshs. 1,232,876/=**
4. Costs of the suit in the court below and in this appeal.
5. Interest as set out above.

It is so ordered.

**Signed, dated and delivered in open court this 23<sup>rd</sup> day of April 2020.**

**E. N. MAINA**

**JUDGE**

***This Judgement was delivered electronically in view of the Ministry of Health and the World Health Organization's guidelines in view of the Covid-19 pandemic, the Advocates for the parties having consented.***