REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. 100 OF 2017

(FORMERLY NAKURU HCCA 4 OF 2017)

ERICK MWIRIKI……..….....…….1ST APPELLANT

GIDEON N. MUKINGO.....2ND APPELLANT

V E R S U S

PETER KARIUKI WANJIRU …….....…RESPONDENT

JUDGMENT

The plaintiff/Respondent, Peter Kariuki Wanjiru, by a plaint dated 17/6/2015, sought general and special damages from the Defendants/Appellants Erick Mwiriki and Gideon Mukingo, as a result of a road traffic accident that occurred on 10/11/2013 involving the appellants Motor Vehicle Registration Number KBU 440A and the Respondent who was riding motor cycle Registration Number KMCH 327L along Oljoro orok-Nyahururu Road. The Respondent suffered several bodily injuries and the motor cycle was damaged following which the Respondent filed this case.

The appellant filed a defence on 17/7/2017 denying liability and alleged that the Respondent contributed to the occurrence of the said accident. The respondent then filed a Reply to defence on rejoinder to the defence and the particulars of negligence attributed to him.

By a consent dated 7/6/2016, and filed in court on 9/6/2016, the parties agreed that judgment on liability be entered in favour of the plaintiff against the defendants at 75% and the plaintiff to shoulder 25% contribution. It was also agreed that the police abstract P3 form; treatment notes from Nyahururu Private Hospital, Discharge Summary from A.I.C Kijabe Hospital and Doctor Omuyoma's medical report be produced as Exhibit 1 – 11 respectively. The issue of quantum was to be assessed by the court.

Only the Respondent (PW1) testified in support of his case and the defence did not offer any evidence. The court rendered its judgment and awarded the Respondent a total of Kshs.1,720,064 in general and special damages. The appellant being dissatisfied with the said award preferred this appeal citing four grounds of appeal which are as follows: -

i. That the trial magistrate misdirected himself in law and fact by awarding general damages to the respondent that were manifestly excessive and failed to appreciate principles applicable to award of damages;

ii. That the trial magistrate erred by assessing damages and failing to consider comparable awards;

iii. That the Trial Magistrate failed to analyze the appellant's submissions and arrived at an unjustifiable high award;

iv. The learned Magistrate erred by awarding damages for loss of motor cycle which were not proved.

The appellant therefore, prays that the Judgment delivered on 28/11/2016 be reviewed or set aside and the court do make an appropriate award.

This being a first appeal, it behoves this court to exhaustively examine all the evidence that was adduced in the trial court, analyze it and arrive at its own conclusions but making due allowance for the fact that this court neither saw nor heard the witnesses testifying.

This court is guided by the decision in *Selle & another – vs- Associated Motor Boat Co. Ltd & others (1968) EA 123* where Sir Clement DE Lestang stated:

"*The court must consider the evidence, evaluate it itself and draw its own conclusion though in doing so, it should always bear in*

mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

At the hearing, only the Respondent, Peter Kariuki Wanjiru testified (PW1). PW1 testified that on 10/11/2013, he was working as a motor cycle rider. He left home at Oljoro orok at 7.00 am heading towards Nyahururu. When on Nyahururu- Nairobi highway, while riding motor cycle KMCH 327L, a vehicle KBU 440A came from Olkalou going towards Nyahururu, lost control and went to his side; on the left side and knocked him down. His leg was fractured twice at the thigh and ankle. He was taken to a private hospital in Nyahururu then transferred to Kijabe Mission Hospital. A report was made to Nyahururu Police Station. He was issued with a P3 for. P.Exhibit No. 12. He produced the outpatient card, summary discharge, receipts P. Exhibit 5 ,6a and (b) to 12 and sale agreement for the motor cycle P. Exhibit 13 and photograph P. Exhibit 14.

By a further consent dated 6/7/2016, the appellant's medical report by Dr. Malik dated 18/5/2016 was produced as a defence exhibit. The appellant did not however call any witness to testify.

As regards the appellant's submissions as regards the first two grounds, counsel submitted that the injuries listed in the plaint are exaggerated and were not proved in court and that the evidence only pointed to a fracture; that whereas the Respondent relied on Dr Omuyoma's report which assessed the degree of permanent disability at 30%, Dr. Malik opined that the Respondent suffered 10% permanent disability; that while Dr. Omuyoma merely relied on documents presented to him to come up with the assessment, Dr Malik did the actual examination of the Respondent; that Dr. Malik was more thorough than Dr. Omuyoma especially due to the fact that Dr. Malik is a consultant surgeon while Dr. Omuyoma is a general practitioner.

Counsel urged the court to consider expert evidence together with all the other available evidence as was held in *Elizabeth Kamene Ndolo Vrs George Matata Ndolo (1996) eKLR.*

Counsel also relied on Justice Kuloba's book, *"Measure of Damages for bodily injuries"* on what the appellate court's duty is. Counsel also submitted that the court had a discretion to interfere with quantum of damages but it will only interfere in an award if the award is inordinately high or low so that the estimate of the damages is erroneous. For that proposition, Counsel relied on the decisions in *Butt Vrs Khan (1977) ,KAR and Kemfro Africa Ltd T/A Meru Express Services Vrs A.M. Lubia and Olive Lubia CA 21/1984.*

It was counsel's submissions that the award in this case was inordinately high and not in consonance with awards made for comparable injuries. Yet the court expects that the court does consider comparable awards by other courts as was held in *Denshire Muteti Wambua Vrs KPLC Ltd (2013) eKLR.*

Counsel considered the injuries sustained by the plaintiffs in various cases and the awards made by the courts and concluded that the award was too high; that the case of *James Gathirwa Ngugi Vrs Multiple Hauhers (EA) Ltd (2015) eKLR* the injuries therein were more serious than those sustained by the Respondent; but that the case of *Mary Pamela Oyioma Vrs Yess Holdings Ltd* was more comparable to the injuries sustained by the Respondent and an award of Ksh.900,000/= was made. The Counsel also relied on *Tirus Chege Vrs JKM (2018) eKLR; Agnes Wakara Njoka Vrs Josphat Wambugu Gathungu (2015) eKLR.* Awards were made between 2015-2018 that ranged from 400,000/= to 650,000/= where the plaintiffs suffered more serious injuries than the Respondent and that is why they suggested that an award of between 450,000- 500,000 be made based on the 10% permanent disability.

Counsel urged the court to adopt the opinion of Dr. Malik and relied on the decision of *Erick Oting'u Murila Vrs Joseph Muthee Ngure (2019) eKLR* where the court held that the court should have considered the three medical reports that were produced by different doctors.

On whether the court erred in awarding damages for loss of the motor cycle; it was the appellant's submission that there was no proof of ownership; firstly because though the Respondent produced the purchase agreement, there was no receipt of payment and logbook produced. Counsel further submitted that the Respondent never produced evidence to show that the motor cycle was written off by production of an assessment report; that by finding that the Respondent had proved loss of the motor cycle, the court assumed facts but did not rely on evidence and the court was urged to set aside that award.

The firm of Githiru Advocates filed their submissions opposing the appeal. On whether the trial court erred in awarding the Respondent the sum of Kshs. 1,500,000/= as general damages; Counsel submitted that the Respondent sustained very serious injuries, that is, fracture of the right femur, fracture of distal of the right tibia, serious soft tissue injuries of the right thigh, and ankle and permanent disability assessed at 30%; that the said injuries were confirmed by Dr. Malik as detailed in the said Doctor's report; that the Magistrate had an opportunity to see the witness and had the advantage of assessing the Respondent and that the award of 1,500,000/= was fair compensation for the injuries sustained. Counsel made reliance on the decision of *Zachary Kariithi Vrs Jashon Otieno Ochola HCCA 153 of 2012* where the court held that on assessing damages, the court should consider comparable injuries and comparable awards made in the past and the inflationary trend. Counsel also relied on the case of *Denshire Muteti Wambua Supra* where the court made a similar award for comparable injuries.

Counsel also cited the decision in *Ndungu Dennis Vrs Ann Wangari Ndirangu HCCA 54/2016 and Kenya Pipeline Co Ltd Vrs Lucy Njoki Njuku HCC 44/2015* where the court set out a test case when the court may exercise its discretion to interfere in award of damages and that the court met the test set out in *Butts Case (supra.)*

Whether the court erred in finding that the ownership of the motor cycle had been proved. Counsel stated that Section 8 of the Traffic Act provides that the person in whose name the vehicle is registered is deemed to be the owner unless the contrary is proved; that though prima facie a log book is evidence of proof of ownership, it is not the only way of proof of ownership as was held in *John Kinyanjui Waweru & Another Vrs Jonathan Kamau Kiongo HCCA 193/2016;* that the sale agreement was produced in evidence and there was no objection to it and no evidence was led by the appellant to counter it. The court was urged to uphold the trial court's finding.

I have duly considered all the evidence tendered, submissions of counsel and the case law cited. I must first of all observe that the issue of liability was settled by a consent judgment that was entered in favour of the Respondent against the appellant at 75% and the Respondent was to shoulder 25%.

The only issue that the trial court dealt with was assessment of damages.

The appellate court is always slow to interfere in the exercise of discretion in the award of damages. In considering an invitation to interfere, the court must be guided by the principles that have been laid down in various decisions of the courts. In *Kemfro Africa Ltd (supra)* the court held *"the principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge and that it must be satisfied that either the Judge in assessing the damages, took into account an in 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."*

The above decision had applied the decision in *Butt's case (supra).* Other principles that the court must consider is that the plaintiff may never be put back in the same shoes he was in before the injuries and therefore the plaintiff should receive a fair compensation for the injuries suffered. This is the principle that was annunciated in *Limpoh Choo Vrs Camden & Islingtom AR EA Health Authority (1979) 1ALL Er 332 at page 339, Lord Denning MR* said:

> *"In considering damages in personal injury cases, it is often said; the defendants are wrong doers, so make them pay in full. They do not deserve any consideration. This is a tendentious way of putting the case. The accident like this one, may have been due to a pardonable error such as may befall any of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, for both to her and the defendants. They are simply the people who have to foot the bill. They are as lawyers say only vicariously liable".*

The reason why the court can only consider fair compensation for a plaintiff was captured in *West(H) and Co Ltd Vrs Shepherd 1964 (AC) 347* where Lord Morris said *"But money cannot remedy a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as injuries should be comparable by comparable awards. When all is said, it still must be the amounts which are awarded are to a considerable extent conventional."*

The above principle that the damages must be comparable to previous awards was captured in *Denshire Muteti case (supra).*

Having set out the applicable principles, I must go ahead to consider the grounds of appeal. The appellant's case is that the award of Kshs.1,500,000/- for general damages is inordinately high.

Dr. Obed Omuyoma's report which was admitted in evidence by consent indicates that the Respondent presented discharge summary from AIC Kijabe Hospital dated 16/11/2013, a P3 Form filled by Nyandarua District Hospital on 14/7/2014 and X-Ray film form AIC Kijabe. The documents indicated that the respondent sustained:

(i) Fracture of the femur

(ii0 Fracture of dital end of the right tibia

(iii) Severe soft tissue injuries on the left thigh

(iv) Severe left tissue injuries to the right ankle joint.

The respondent had undergone surgical procedure on the fracture to tibia where there was external fixator applied, while fracture of the femur had sign nail insertion and he was discharged on crutches; The external fixators were removed and plaster of paris applied for six weeks.

The doctor examined the respondents and found a surgical scar on the right ankle joint, 4cm long. External fixators were removed. X-ray of the ankle showed fracture of distal end of the right tibia and surgical scar on the exterior aspect of the right thigh. Scar was 6cm long which showed fracture of right femur. As a result, he assessed degree of permanent disability at 30%.

Dr. Malik who was instructed by the appellant confirmed that indeed the Respondent sustained two fractures and on examination found that the fermeral fracture had united fully and in very good position; that the fracture of the ankle joint was united with slightly deformed ankle joint. She concluded that the respondent suffered total incapacity of a temporary nature for one year followed by a partial incapacity of a permanent nature to date which she assessed at 10%. The Doctor was of the view that the metal fixator could remain.

Dr. Omuyoma saw and examined the Respondent on 19/5/2015 while Dr. Malik examined the Respondent three months later on 19/8/2015. Their findings as respects the injuries that the Respondent sustained are basically similar that Dr. Omuyoma did indicate that the Respondent had sustained grievous harm though he was in fair health.

I have considered the various authorities that have been relied upon by the parties. In *Mary Pamela Oyioma's case,* the plaintiff sustained communuted fracture of the right femur, compound fracture of right tibia and left tibia and multiple cut wounds all over the body, soft tissue injuries and an award of Kshs.900,000/= was made in February 2011. The appellant relied on the case of *Tirus Mburu Chege (Supra).* The

plaintiff sustained a fracture of the tibia and fibula on both legs; blunt injuries at the forehead, broken upper right front tooth, nose bleeding and loss of consciousness and the court awarded Kshs.800,000/= in general damages but an appeal was preferred and the court reduced the damages to Kshs.500,000/= in 2018. In *Agnes Wakaria Njoka (supra)*, the plaintiff suffered two deep cut wounds on left heel, fracture of the skull, deep compound fracture of the right forearm and loss of the left hand at the wrist and an award of ksh 650,000/= was made in 2015.

I have also considered that this case *Civicon Ltd Vr Richard Njomo Omwancha (2019) eKLR*, the 2nd respondent suffered deep cut wounds on left ear, tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, fracture of the tibia and fibula and dislocation of left hip joint and the doctor assessed permanent disability at 35% and the court made an award of 450,000/=.

I have considered all the above awards and the most comparable injuries to the Respondent are those in Mary Pamela Oyiomo's case. Having also considered the other cases cited where the plaintiff sustained even more serious injuries, the incidence of inflation, I will find that the award made by the trial magistrate of ksh 1,500,000/= was on the higher side. I hereby set it aside and instead make an award of ksh 800,000/= in general damages.

Whether the Respondent proved the ownership of the motor cycle;

The Respondent in his evidence, produced a sale agreement dated 17/10/2013, whereby he bought the motor cycle from one Francis Wachira Mwaniki for ksh 35,000/=. It is the appellant's submission that a sale agreement is not proof of ownership. It is trite that he who alleges has a duty to prove *(Section 107 of the Evidence Act).* The respondent relied on the decision of *John Kinyanjui Waweru & Another Vrs Jonathan Kamau Kiongo (supra)* where the court considered other decisions in *Super Form Ltd Vrs Gladys Mchororo Mbero (2014) eKLR; Mary Njeri Murigi vrs Peter Macharia and Another (2016) eKLR and Canaan Agricultural Contractor (k) Ltd Vrs Rosemary Nanjala (2013) eKLR* where the courts have held that a log book is prima facie proof of ownership of a vehicle but it is not the only way to prove ownership. Sometimes there are instances where the log book may not have been issued or that the transfer has not yet been done from another person. The Respondent produced the insurance sticker which was issued in the Respondents' name on 17/10/2013 and was expiring on 16/11/2013. The cover is for the said motor cycle. In my view, that was sufficient evidence to prove that the Respondent was the owner of the motor cycle.

In the above cited case of *John Kinyanjui*, the court agreed that evidence that the vehicle was insured in the plaintiff's name was sufficient to prove ownership of the vehicle.

Whether the respondent proved that the motor cycle was a write off:

The motor cycle having been insured, it was upon the respondent to prove that the same had been detained as salvage by the insurer. Further to that, there must have been an assessment by a registered motor vehicle assessor to determine the value of the motor cycle and if there was any salvage, the its value. It is impossible for the court to determine the damage to the motor cycle without an assessment report. I do agree with the findings in *Linus Fredrick Msaky Vrs Lazaro Thuram Richoro & another (2016) eKLR* which relied on the case of *Gulea Jana Vrs BM Muange (2010) eKLR* where the court held

> "Although it was alleged that motor vehicle KAC 996F was damaged, the assessment report was not produced in evidence. This was crucial evidence as without the assessment report it was impossible for the court to establish the damage to the motor vehicle on the estimated costs of repairs. The fact that UAP insurance paid a sum of Kshs 271,874 to unity Auto Garage is not sufficient to establish that payment was in respect of repairs to the damage to motor vehicle KAC 996F arising from the accident subject of this suit. I find the evidence adduced by the respondent was inadequate to strictly prove his claim. The trial magistrate appears to have been swayed by the fact that the appellant did not call any evidence. The trial magistrate apparently lost sight of Section 107 of the Evidence Act which placed the burden of proof squarely upon the respondent. Her judgment cannot be supported."

In the end I find that the cost of the motor cycle was not proved and I hereby set aside the award of Kshs.35,000/=.

The appellant did not dispute the cost of future medical costs and special damages.

In the end I allow the appeal and enter judgment in favour of the Respondent as follows: -

1. General damages Kshs.800,000/=

2. Special damages Kshs.130,064.50

3. Anticipated medical cost 50,000/=

4. Medical Report 5,000/=

Total 985,064.50/=

Less Contribution of 25% 738,798

Having succeeded on appeal, the appellant will have costs of the appeal.

Dated, signed and Delivered at Nyahururu this 25th day of June, 2020.

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R.V.P. Wendoh

JUDGE

PRESENT:

Ms. Muthoni for the Respondent/Plaintiff

Mr. Karanja for the Appellant/Defendant

Eric – Court Assistant