REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 145 OF 2019

MUTIGA KAMAI alias JAPHET MUTIA KAMAI.....APPELLANT

VERSUS

PIUS MUTHURI MUKARIA..... RESPONDENT

(Being an appeal from the Judgment and decree of the Hon. Oscar Wanyaga – SRM delivered on 16/5/2019 in

Maua CMCC No. 74 of 2018)

J U D G M E N T

1. The respondent sued the appellant before the trial Court claiming both general and special damages for injuries sustained in a road traffic accident that allegedly occurred on 30/5/2015.

2. He alleged that at the material time, he was lawfully travelling as a passenger aboard motor vehicle registration number KCA 406T, Toyota Succeed ("the said vehicle") along Karama - Maua Road. That the said vehicle was so negligently driven and/or managed that it was involved in an accident as a result of which he sustained serious injuries.

3. In his statement of defence dated 12/7/2018, the appellant denied the respondent's claim and contended that the accident was unavoidable. The vehicle had lost control and rolled when he was running away from would be hijackers. That in the circumstances, the accident was beyond any human control despite the exercise of all reasonable care.

4. The matter was tried and the trial Court ruled in favour of the respondent holding the appellant 100% liable. Judgment was entered against the appellant for Kshs.111,959/- special damages and Kshs.800,000/- general damages.

5. Aggrieved by the said decision, the appellant preferred this appeal raising 8 grounds which can be collapsed into 3 as follows: -

a) That the trial Court erred in holding that the respondent had proved his case to the required standard.

b) That the trial Court erred in failing to consider the appellant's defense thereby reaching a wrong determination.

c) That the trial Court erred in making an award of general damages that was excessively high.

6. This being a first appeal, this Court is enjoined to re-evaluate and reconsider the evidence afresh with a view of making its own independent findings and conclusions but having regard that it did not have the advantage of seeing the witnesses testify. **(See Selle v. Associated Motor Boat Co. Ltd [1968] EA 123).**

7. It is only the respondent who testified before the trial court as **Pw1.** He testified that on the material day, he was travelling aboard the said vehicle along Karama – Maua road when an accident occurred at Mukoiru. The accident was self-involving as the vehicle was being driven at high speed whereby it veered off the road and rolled. As a passenger, he could do nothing to avoid the accident.

8. As a result of the accident, his left hand was injured and was taken to Chogoria Mission Hospital for treatment. Despite healing, he still cannot use his hand properly. That another passenger by the name **Kabeili M'Muguuka** had filed Maua **CMCC No. 280 of 2015** which had been finalized in her favour. He produced the judgment in the said case and other documents in support of his case.

9. The defendant closed his case without calling any witness. He submitted before the trial Court that the police abstract produced in court did not show any results of the investigation of the said accident. That in the circumstances, he could not be held liable for the accident.

10. The first and second ground of appeal are interrelated. They will be dealt with together. These were that the trial Court erred in holding that the respondent had proved his case to the required standard and that the trial Court disregarded the appellant's defence thereby arriving at a wrong decision.

11. It was submitted for the appellant that the trial Court relied only on the police abstract to find liability against the appellant. That the said abstract had indicated that the matter was still pending investigations and so no liability should have been apportioned at that stage. The cases of **Peter Kanithi Kimunya v. Aden Guyo Haro [2014] eKLR** and **Thuranira Karauri v. Agnes Ncheche [1997] eKLR,** were relied on for that submission.

12. On behalf of the respondent, it was submitted that the police abstract that was produced proved that the said vehicle had been involved in an accident. That the respondent had testified on the occurrence of the accident while the appellant had tendered no evidence in support of his defence. That the trial Court was therefore right in finding for the respondent.

13. The cases of **Motex Knitwear Mills Limited v Gopitex Knitwear Mills Limited [2009] Eklr, Janet Kaphiphe Ouma & Another v. Marie Stopes International (K) Kisumu HCCC No. 68 of 2007** and others were cited in support of those submissions.

14. In its judgment, the trial Court had observed that the fact that the matter was pending investigation did not absolve the defendant of liability. That once the plaintiff raised his allegations, the appellant ought to have brought evidence to refute the same.

15. As already stated, it is only the plaintiff who testified before the trial Court. It is correct that the appellant had filed its defence wherein he had denied the occurrence of the accident. That meant that the respondent had to prove his case. He tendered evidence. The trial Court had before it, the sworn testimony of the respondent which was not shaken in cross-examination as to the manner in which the accident had occurred. There was also on record, the appellant's unsupported defence.

16. The moment the appellant failed to tender any evidence in support of his defence, the defence became a mere piece of paper on record with mere allegations that could not rival tested testimony of the plaintiff. The plaintiff's evidence was in the circumstances uncontroverted and the trial Court was entitled to rely on the same.

17. In **Trust Bank Limited v. Paramount Universal Bank Limited [2009] eKLR** Lessit J held: -

> ***"It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd and 3rd Defendant's were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged".***

18. This court associates itself with the said proposition as the correct position of the law where a party fails to call evidence in support of own pleading.

19. The appellant's criticism of the trial Court that it relied on a police abstract to hold him liable cannot therefore stand. The police abstract was but an official document which showed that the occurrence of an accident involving the respondent and the said vehicle had been reported. I do not agree with the notion that a police abstract is not evidence of occurrence of an accident. It is but an official document that extracts information from the Police Official Occurrence Book regarding a reported incident.

20. In this regard, a Police Abstract is but a prima facie evidence of an occurrence of an accident. In the present case, it was not necessary for the respondent to call the investigations officer or produce the Occurrence Book to prove the occurrence of the accident. His direct evidence as the person who saw and experienced the accident was enough. The Police Abstract only corroborated his testimony.

21. As regards liability, there was no contrary evidence to that of the respondent. In this regard, the trial Court was entitled to hold the appellant at 100% having failed to rebut the respondent's evidence. The respondent had blamed the appellant for the accident. He had told the Court that the said vehicle was over speeding at the time leading to loss of control and thereby rolling over. Grounds 1 and 2 are therefore without merit and are dismissed.

22. The third ground was that the trial Court erred in making an award of general damages that was excessively high. The appellant submitted that the award of Kshs.800,000/- was excessive. That such high and extravagant awards should be discouraged since the long effect would be expensive to maintain by the public. The cases of **Hassan v. Nathan Mwangi Kamau Transporters & 5 Others [1986] Eklr** and **Mohamed Mohamoud Jabane v. Highstone Butty Tongoi Olenja [1986] Eklr** were relied on for those submissions.

23. In this regard, the appellant submitted that the injuries suffered by the respondent did not warrant the award of Kshs.800,000/-. A sum of Kshs.150,000/- was submitted as being adequate. The cases of **Jitan Nagra v. Abedinego Nyandusi Oigo [2018] Eklr, Jitan Nagra v. R D O [2018] eKLR** and **Songole Elam v. Paul Kivisi Lunalo [2020] eKLR** were relied on in support of those submissions.

24. On his part, the respondent submitted that he had suffered lacerations to the right side of his face, fractures metacarpal 2nd, 3rd and 4th digits and severed extensor tendon with 40% permanent disability. That the award was adequate since in the case of **Barry Proudfoot v. Coast Broadway Company Limited & Coast Bus Company [2001] Eklr,** a similar award of Kshs.800,000/- was made for similar injuries.

25. This Court's jurisdiction on quantum on appeals is well settled. In **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55,** the court held: -

> ***"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."***

26. I have considered the cases relied on by the appellant. The injuries sustained by the claimants may have been more or less the same, but in the present case, the respondent spent more time in hospital and suffered 40% permanent disability. In the cases relied on, the claimants had fully recovered with no permanent disability.

27. In the case of **City Engineering Works (K) Ltd v Venatsio Mutua Wambua [2016] Eklr,** the respondent sustained injuries on his left hand resulting in the loss of two fingers with the other two being rendered incapable of any function. Injury was assessed at 40 – 45% permanent disability. An award of Kshs. 600,000/- was made.

28. In **Songole Elam v Paul Kivisi Lunalo [2020] Eklr,** the respondent sustained bruises on the right knee and leg, soft tissue injuries on the chest and knees and fracture of the 4th and 5th phalanges with no permanent disability. The trial court awarded him Kshs. 300,000/- as general damages which was set aside by the High court in its appellate jurisdiction and substituted the same with Kshs.250,000/-.

29. In the case of **Jitan Nagra v R D O [2018] Eklr,** the respondent sustained a compound fracture of the right distal femur and a fracture of the right 1st, 2nd and 3rd metacarpal bone. The trial court awarded him Kshs. 1,500,000/- as general damages which was set aside by the High Court and substituted with **Kshs. 450,000/-.**

30. In the present case, the doctor's report shows that the respondent sustained lacerations to the right side of the face, fractures metacarpal of the 2nd, 3rd and 4th digits and severed extensor tendon of the 3rd digit. He was admitted in hospital for 10 days. As at the time of trial, he had low range of motion in the digits of the left hand and stiffness of the metacarpal pharyngeal joints in the 2nd and 3rd digits and interphalangeal joint stiffness in all 3 digits.

31. Further, the respondent would require extensive rehabilitative period and numerous physiotherapy sessions. The degree of injury was categorized as grievous harm with 40% permanent disability for the digits are unlikely to ever regain full mobility.

32. In this regard, considering similar cases with similar injuries, the award of Kshs.800,000/- was in my view inordinately high. I set aside the same and substitute therefor with an award of Kshs. 650,000/-. as general damages.

33. Accordingly, the appeal is partially successful. The judgment of the trial Court is hereby set aside to the extent that the general damages are assessed at Kshs.650,000/-. The rest of the judgment remains intact. The respondent will have 50% of the costs of the appeal.

DATED and DELIVERED at Meru this 25th day of June, 2020.

A. MABEYA

JUDGE