REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 108 OF 2019

BARONGO SEVELIUS YOPHEN...............................APPELLANT

VERSUS

GEOFFREY NYAKUNDI.. RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E.A. Obina (P.M.) at the Chief Magistrates Court at Kisii in Civil Suit No. 611 of 2017 dated 17th July 2019)

JUDGMENT

1. **Geoffrey Nyakundi** the respondent in this appeal was the plaintiff in Kisii CMCC No. 611 of 2017. He instituted the suit against **Barango Sevelius Yophen** the appellant for special and general damages for injuries sustained due to a road traffic accident said to have occurred on 1st December 2017 along the Kisii-Keroka Road. He claimed that he was travelling as a pillion passenger on a motor cycle when the appellant negligently drove motor vehicle registration number KBW 265B and knocked them down from behind. As a result, the respondent sustained severe injuries and suffered loss and damage. The trial court found in the respondent's favour and awarded him a sum of Kshs. 807,050/=.

2. The appellant being dissatisfied with the judgment of the trial court has filed the instant appeal challenging both quantum and liability. The appellant's counsel faulted the trial court's finding that the appellant was wholly liable for the accident. He submitted that the respondent had failed to prove his case to the required standard and was particularly aggrieved by the respondent's failure to avail an eye witness to give an account of what transpired. Counsel submitted that the police officer had indicated that the appellant was not to blame for the accident. He also noted that the police abstract did not apportion blame on him or the driver. He argued that the respondent was negligent, reckless and the author of his own misfortunes. That if the court was inclined to find that the appellant was negligent, the court ought to apportion blame to a larger extent on the respondent.

3. On the other hand, the respondent's counsel submitted in support of the trial court's decision. She argued that since the appellant had blamed the rider of the motorcycle for the accident it was his responsibility to enjoin him as a 3rd party in the proceedings. Having failed to do so and having also failed to show the steps he took to avoid the accident, the trial court was justified in finding the appellant 100% liable for the accident.

4. Before I deal with the issue of liability, I will first remind myself of the duty of this court. As a first appellate court, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co. [1968] EA 123 and Kiruga v Kiruga & Another [1988] KLR 348***).

5. At the hearing of his matter the respondent, Geoffrey Nyakundi, accused the appellant of causing the accident. He stated that he was travelling as a pillion passenger along Kisii-Keroka road when the appellant, who was driving at a high speed, knocked them down from behind.

6. The respondent imported into his case, the evidence of P.C. Caleb Osodo, who had testified in CMCC No. 610 of 2017. PC Caleb Osodo stated that on 1st December 2017 at 6:10 p.m. there was an accident involving motor vehicle registration number KBW 265B Toyota premio and an unknown motor cycle occurred along Kisii-Keroka road. He stated that as the appellant was attempting to make a turn to the right side towards Keroka, his vehicle was hit by the unknown motor cycle with two pillion passengers and its front head lamp was damaged. The appellant reported the incident at the police station and was issued with the police abstract which P.C. Osodo produced as his evidence in the matter. He stated that he blamed the motorcycle rider for the accident since the driver had indicated towards the right side.

7. The appellant also adopted the evidence of, Barongo Sevelius, who had told the trial court in CMCC No. 610 of 2017, that on the material day, he was taking his vehicle to the garage and was driving his vehicle at a speed of approximately 30 km/hr. As he was about to take a turn to the left towards the garage, the motorcycle suddenly appeared from the opposite direction, entered his lane and knocked his vehicle at the front right side. The appellant testified that the motorcyclist was carrying excess passengers and took off immediately the accident occurred.

8. The question of liability in road traffic cases was discussed by the Court of Appeal in the case of ***Michael Hubert Kloss & Another v David Seroney & 5 Others [2009] eKLR*** thus;

> *The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:*
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> *"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...*
>
> *"The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."*

9. The foregoing authority states that a determination of liability in road traffic accidents relates to answering the question, *"who was responsible for the accident?"* There is no dispute that an accident occurred on 1st December 2017 along Kisii - Keroka road involving the motorcycle ferrying the respondent and the appellant's vehicle registration number KBW 265B.

10. The respondent accused the appellant of driving at a high speed and knocking down the motorcycle he was travelling on from behind. Conversely, the appellant adopted his statement where he had indicated that motorcyclist encroached onto his lane and knocked his vehicle on the front right side as he was about to make a detour to the left. PC Osodo also blamed the motorcycle rider for the accident. However, PC Osodo's evidence that the appellant was about to take a turn to the right when the accident occurred contradicted the appellant's evidence that he was attempting to turn towards the left when the accident occurred.

11. There is no contention that the respondent was a pillion passenger. It was not shown how his failure to wear a helmet or how the fact that there were two pillion passengers on the motorcycle would have contributed to the occurrence of the accident. As a pillion passenger, the respondent had no control of the motor cycle and could not have done anything to cause or avoid the accident.

12. For his part, the appellant who was driving his vehicle at the material time had a duty to look out for other road users including the respondent and the motor cycle rider. It would also be expected that if the motor cycle encroached into his lane as the appellant claimed, the damage to his vehicle would have been to the side and not on his front head lamp as stated by PC Osodo. The basis upon which PC Osodo came to his conclusion that the motorcycle rider was to blame for the accident is also unknown. Moreover, if the appellant was of the view that the motorcycle rider was responsible for the accident he should have instituted third party proceedings against him. He failed to do so. For these reasons, I uphold the trial court's finding that the appellant was wholly liable for the accident.

13. I now turn to the issue of quantum. The appellant's counsel argued that it was highly unlikely that two people would sustain similar injuries from the same accident as pleaded by the respondent and the plaintiff in CMCC No. 610 of 2017. Both the respondent and the plaintiff in CMCC No. 610 of 2017 particularized the injuries they had sustained from the accident as follows;

a. Facial bruises;

b. Dislocation on the left shoulder;

c. Fracture of the ribs on the left lateral side;

d. Blunt trauma on the back;

e. Blunt trauma on the left knee joint; and

f. Dislocation on the left knee joint.

14. Counsel also contended that the respondent's failure to honour summons to undergo a second medical examination to ascertain the injuries he sustained was a portrayal of a person keen on unjustly enriching himself. It was also his contention that the award made by the court was inordinately high. That going by the injuries stated by the respondent during cross examination, an award of Kshs. 300,000/= would suffice as general damages. For her part, the respondent's counsel submitted that the award was sufficient for the injuries sustained by the respondents and should be upheld.

15. The principles that govern an appellate Court in considering whether to review an award of general damages were stated by the court in the case of ***Butt v Khan (1977) KAR 1*** as follows;

> "*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 as either inordinately high or low*."

16. The respondent told the trial court that he sustained injuries on his face, left shoulder, ribs and his legs as a result of the accident. He was

examined by Dr. Morebu Peter Momanyi 10 days after the accident. From his examination and the documents given to him by the respondent, Dr. Morebu listed the respondent's injuries as follows;

a. Bruises on the face;

b. Bruises on the right temporal region of the head;

c. A right radius fracture;

d. Bruises on the chest;

e. Bruises on both right and left arms;

f. Left tibia fracture

g. Left fibula fracture,

h. Left knee joint bruises; and

i. Right colles fracture.

17. It is apparent that the respondent's evidence on the nature of the injuries he sustained contradicted what he had pleaded in his plaint. The trial court was of the view that the advocate had copy pasted the injuries in the sister file being CMCC No. 610 of 2017 and proceeded to assess damages at Kshs. 800,000/=.

18. In ***Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 Others NRB CA Civil Appeal No. 219 of 2013 [2014]*** the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLCSC 91/2002**where Adereji, JSC expressed himself thus on the importance of pleadings;

> *It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.*

19. However, in the case of ***Simon Muchemi Atako & another v Gordon Osore CIVIL APPEAL NO. 180 OF 2005 [2013] eKLR*** the Court restated the principle that in some instances the departure from pleadings will not cause a failure of justice where the other party had a fair notice of the case it had to meet and the departure was a mere irregularity not fatal to the case of the party whose evidence departed from its pleadings. In that case, the Court further held;

> *At the very least, the learned judge should have considered the pleaded injuries that were proved by the medical reports and ignored the additional injuries in the medical report that had not been pleaded. As it is, the learned judge virtually ignored all the injuries that the appellants had suffered.*

20. The nature of the injuries sustained by the respondent was essential in determining the suitable award to compensate him for his pain and suffering. The respondent did not amend his plaint to reflect the true nature of the injuries as per his evidence. The only injuries that tallied with his pleadings were facial bruises and injuries on the left knee joint. There was no indication in the plaint that the respondent had suffered fractures of the right colles, right radius and the left tibia and fibula. The trial court therefore erred in considering these injuries in its assessment of general damages.

21. The court in ***G4s Security Service (K) Ltd v Jackline Nagome Barare Civil Appeal No.112,113 &114 of 2015 Consolidated [2017] eKLR*** upheld awards between 150,000/= and 180,000/= for soft tissue injuries including blunt injuries and bruises sustained by the respondents. In ***George Kinyanjui T/A Climax Coaches & another v Hussein Mahad Kuyale Civil Appeal No. 28 of 2012 [2016] eKLR*** the court awarded Kshs. 120,000/= for soft tissue injuries. Whereas the court in ***Channan Agricultural Contractors Ltd v Fred Barasa Mutayo Civil Appeal No. 29 of 2012 [2013] eKLR*** reduced an award of Kshs. 250,000 to Kshs. 150,000 for blunt injuries to the chest, cut wounds to the head and left leg.

22. Since it has been shown that the sum awarded was based on a wrong principle and was manifestly excessive, I will set aside the award of Kshs. 800,000/= awarded by the trial court and substitute it with an award of Kshs. 200,000/= based upon the pleadings the evidence and comparable awards. The award of Kshs. 7,050/= being special damages is upheld as the same was properly pleaded and adequately proved.

23. For the reasons given above, this appeal is partially allowed. The finding on liability by the trial court is upheld. The award of Kshs. 807,050/= is hereby set aside and substituted with an award of Kshs. 207,050/=. The said amount shall accrue interest from the date of judgment in the trial court. The respondent shall bare 1/3 of the costs of the appeal.

Dated, signed and delivered at KISII this 18th day of June 2020.

R.OUGO

JUDGE

In the presence of;

Mr. Wesonga For the Appellant

Miss Sagwa For the Respondent

Mr. Evans Court Assistant