REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 109 OF 2019

BARO NGO SEVELIUS YOPHEN.....APPELLANT

VERSUS

JARED NDEMO.....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. 610 of 2017 dated 17th July 2019)

JUDGMENT

1. The appellant is aggrieved by the trial court's decision in Civil Suit No. 610 of 2017. He has filed this appeal challenging the court's finding on both quantum and liability. The respondent had filed that suit claiming special and general damages for injuries sustained as a result of a road traffic accident said to have occurred on 1st December 2017 along the Kisii-Keroka Road. The respondent claimed that he was travelling as 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.

2. As a first appellate court, this court is called upon to analyze 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***).

3. The respondent called P.C. Caleb Osodo, who testified that on 1st December 2017 at 6:10 p.m. 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 evidence. He stated that he blamed the motorcycle rider for the accident since the driver had indicated towards the right side.

4. In contrast, the respondent testified that as they were travelling on the motor cycle, the driver had hit them from behind. He stated that they were two pillion passengers on the motorcycle and also admitted that he had no helmet on.

5. The appellant, Barongo Sevelius, told the trial court 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.

6. This appeal was canvassed by way of written submissions. On the issue of liability, the appellant's counsel faulted the trial court's finding that the appellant was wholly responsible for the accident. He submitted that the respondent had failed to prove his case to the required standard. He was particularly aggrieved by the respondent's failure to avail an eye witness to give an account of what transpired. He submitted that the police officer had indicated that the appellant was not to blame for the accident and the police abstract did not apportion blame on him or the driver. Counsel argued that the respondent was negligent and reckless and the author of his own misfortune. 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 respondents.

7. 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.

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:

"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 testimony 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 testified 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. With regard to 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. 611 of 2017. Both the respondent and the plaintiff in CMCC No. 611 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 testified that he had sustained injuries on his face, had a dislocation on his left shoulder and the left knee and sustained injuries on his back and left leg as a result of the accident. Doctor Morebu Peter Momanyi confirmed that the respondent had sustained the injuries pleaded in the plaint. He assessed the 2nd respondent's disability at 30% and added that the recovery of the 2nd respondent would take a long time.

17. I reject the appellant's contention that the respondent deliberately failed to attend a second medical examination. On 14th November 2018, the respondent's counsel informed the trial court that the respondent had been taken to Kisumu for a second medical examination but the doctor did not have instructions. These sentiments were reiterated by counsel on 12th March 2019. She indicated that the respondent had gone for the second medical examination on 10th July 2018 but the doctor declined to examine him as he had not received instructions on who would bear the costs. On 16th April 2019, the respondent's counsel submitted to the trial court that they had sent a representative to book an appointment which was refused by the appellant's doctor. Since the counsel's assertions were not disputed, it is my finding that the respondent fulfilled his obligation when he availed himself for the second medical examination. It was upon the appellant to ensure that his appointed doctor had instructions to examine the respondent.

18. The injuries set out in the plaint tallied with the respondent's testimony and his doctor's evidence. The trial court awarded the respondent general damages of Kshs. 400,000/= which the appellant argues was an inordinately high award. He contends that an award of Kshs. 300,000/= would suffice. Before the trial court, he cited the case of ***Morris Miriti vs Nahashon Muriuki & Another [2018] eKLR*** where the court upheld an award of Kshs. 300,000/= as general damages less liability in the ratio of 80:20 for the appellant. The appellant in that case had sustained tender chest posterior and anterior injuries, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lung contusion and fracture of the right scapula.

19. To support his proposal for Kshs. 500,000/=, respondent relied on the case of ***Gabriel Kariuki Kigathi & Anor vs Monica Wangui Wangechi [2016] eKLR*.** The court in that case awarded the respondent a sum of Kshs. 400,000/= for a fracture of the neck, bilateral rib fractures, bilateral lung contusion, injuries to both hands, injuries to both legs.

20. Considering the injuries sustained by the respondent and keeping in mind that no injuries can be completely similar, I find that the trial court was properly guided by the authorities cited before him. The trial court's award of Kshs. 400,000/= was sufficient and the same is upheld. The respondent's award of Kshs. 7,050/= being special damages was supported by evidence and the same is similarly upheld.

21. The upshot is that the appeal is hereby dismissed with costs to the respondent.

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

Ms. Rael Court Clerk