



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 81 OF 2016

BENJAMIN MUSYOKA.....APPELLANT

-VERSUS-

NICHOLAS MUTINDA DANIEL.....RESPONDENT

(Being an appeal against the judgement delivered by Hon Ocharo, SPM on 14.7.2016 in Machakos CMCC 177 of 2015)

BETWEEN

NICHOLAS MUTINDA DANIEL.....PLAINTIFF

-VERSUS-

BENJAMIN MUSYOKA.....DEFENDANT

JUDGEMENT

1. Vide a plaint filed in the trial court on 16.3.2015, by the respondent, the respondent was a pillion passenger aboard motor cycle registration number KMCU 725S being ridden along Machakos-Nairobi road on 10.5.2014 when motor vehicle KBV 518W being driven by the appellant and which knocked the subject motorcycle thereby occasioning the respondent injuries as particularized in paragraph 5 of the plaint. The Respondent pleaded negligence as particularized in Paragraph 4 of the Plaint and sought special damages, general damages for pain, suffering and loss of amenities, Kshs 300,000/- as future medical expenses as well as interest and costs of the suit. The respondent pleaded res ipsa loquitur and vicarious liability.

2. In his defence, the appellant admitted the accident; admitted ownership of the suit vehicle but denied negligence. He pleaded that the accident was caused by the negligence of the rider of the suit motorcycle and prayed that the suit be dismissed with costs.

3. After hearing the matter, judgment was delivered on 14.7.2016 in favour of the Respondent against the Appellant, wherein the trial magistrate apportioned liability at 80:20 and awarded general damages of Kshs 700,000/, special damages of Kshs 96,980/, future medical expenses of Kshs 150,000/- all less 20% contribution bringing a total of Kshs 748,114/-. The Appellant was dissatisfied with the decision and filed the instant appeal wherein counsel took issue with the award as being inordinately high and sought for the dismissal of the respondent's claim or in the alternative a higher percentage of liability be apportioned to the respondent. Counsel prayed that the judgement of the lower court on liability be set aside and that a commensurate award of lower damages be made and that the appellant be awarded costs.

4. The appeal was canvassed vide written submissions and it is only the respondent's submissions that are on record.

5. Learned counsel for the respondent vide submissions filed on 5.2.2020 submitted that the appellant was 100% liable and urged the court to so find. On the issue of quantum, counsel submitted that the court ought to have awarded Kshs 300,000/- as future medical expenses. Counsel submitted that because the respondent sustained 4% permanent incapacity as a result of the accident, an award of Kshs 1,000,000/- ought to have been awarded. Reliance was placed on the case of **Kiru Tea Factory & Another v Peterson Watheka Wanjohi (2008) eKLR**.

6. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that so as to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

7. The evidence in the trial court was thus; **Pw1** was the **respondent** who testified that on 10.5.2014, he was in Machakos town and then

travelled on motor cycle registration KMCU 725S when vehicle KBV 518W which was over speeding hit him. He testified that he was injured on his right elbow, fractured his tibia and was taken to Machakos General Hospital for treatment. It was his testimony that he was taken to Bishop Kioko where he was admitted from 11th to 26th May and discharged. He testified that a metal plate was inserted in his fractured leg and he paid Kshs 75,000/-. He tendered receipts for expenses incurred totaling Kshs 20,280/- and told the court that the metal plate needed to be removed. On cross examination, he testified that the motor vehicle driver was overtaking the vehicle behind him and then it came back to its lane and hit him from behind.

8. **Pw2** was **Dr. Kimuyu Judith** who examined the respondent and in placing reliance on the treatment notes from Machakos Level 5 and Bishop Kioko Hospital she noted that as a result of the accident the respondent had open reduction of fractures. She testified that the inserted implants would require removal at Kshs 300,000/-. On cross examination, she testified that she would be unable to estimate the costs of removal of implants at a public hospital but believed that it would be cheaper.

9. **Pw3** was **Pc John Kanyoro** who sought that his evidence in CC 179 of 2015 be adopted in the instant matter pursuant to a consent entered into by the parties. The evidence was to the effect that the driver of the motor vehicle improperly overtook at a yellow line and hit the motorcycle that had indicated to turn right. After the respondent closed their case the appellant was called upon to tender his defence. The appellant however closed his case without calling any witnesses.

10. At a preliminary stage, I note that the court had indicated on 15.6.2017 that the appeal was not admitted on grounds that the same was filed out of time and the appellant was directed to seek directions from the Deputy Registrar. A perusal of the record indicated that the trial court decision was made on 12.7.2016 and the appeal was filed on 12.8.2016 meaning that the same was filed within time; further directions from the Deputy Registrar were not necessary to the extent that they touch on the time within which the appeal was filed. In that regard, I in *suo moto* find that this appeal is properly on record and the same is admitted; I set aside the direction that was earlier given that the appeal was not admitted. In any case parties herein duly took directions on the disposal of the appeal and have filed submissions now awaiting a judgement. It would cause them prejudice if they are to be taken back to the drawing board.

11. I shall now consider the merits of the appeal. Having considered the pleadings and the evidence on record, and having found that the appeal is properly on record, the following issues are to be determined:-

a) Whether the court can interfere with the apportionment of liability in the trial court which was apportioned at 80:20 in favour of the respondent.

b) Whether the court may interfere with the finding of quantum by the trial court.

12. On the first issue, the decision would depend on whether the averment that the respondent ought to shoulder a higher liability than 20% is supported by evidence on record. It is undisputed that the appellant and the respondent owed a duty of care to road users. The evidence on record also points to the fact that the appellant overtook on a yellow line and hit the respondent from behind. From the evidence on record, the evidence of Pw3 is independent and had no inclination of bias. The appellant opted not to give evidence of his version of the accident to rebut or controvert the evidence that was set up against him and neither did he tender evidence as to how the respondent contributed to the accident and as such on a balance of probabilities, the appellant's version is probably true. From the evidence I see nothing to impugn the findings of the trial court.

13. It is for this reason that I decline to interfere with the apportionment of liability by the trial court.

14. Having so found, the medical report and the evidence of Pw2, that is un rebutted speaks to the fact that the appellant sustained injuries as a result of the accident hence the loss was occasioned by the actions of the appellant. In the case of **Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** the court listed some principles to guide the court in awarding general damages, viz;

a. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.

b. The award should be commensurate to the injuries suffered.

c. Awards in decided cases are mere guides and each case should be treated on its facts and merit.

d. Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration.

e. Awards should not be inordinately high or too low.

15. The Appellant avers that the learned magistrate's award was *extremely high*. He asked the court to review the evidence and facts on record and reduce the award; the respondent urged the court to increase the award and pointed out that the court ought to have awarded an amount of Kshs 300,000/- for future medical expenses.

16. The court of appeal in **Henry Hidayu Ilanga v Manyema Manyoka (1961) EA 705, 709, 713** listed the grounds that warranted interference with the award of damages by the trial court and the grounds were if the trial court in assessing the damages, took into consideration an irrelevant factor, failed to take into account a material factor or otherwise applied a wrong principle of law. Secondly, it may intervene where the amount awarded by the trial court is so inordinately low or inordinately high that it is a wholly erroneous estimate of the damage sustained.

17. From the record, the court after considering the injuries suffered by the respondent awarded Kshs 700,000/-. The court found that future

medical expenses had not been proven.

18. In **Godfrey Wamalwa Wamba & another v Kyalo Wambua [2018] eKLR** the court affirmed Kshs. 700,000/- as general damages awarded to the plaintiff who sustained a fracture and a shortened leg.

19. In **Ndathi Mwangi & 2 others v Benson Lumumba Ndivo [2018] eKLR** the court awarded Kshs. 1,250,000/- as general damages where the victim suffered inability to walk without crutches, pain in the left hip joint and leg, pain in the chest at times, Incision scar (13cm) on lower posterior aspect of the forearm, incision scar (13cm) on left gluteal region, scar (4cm) lateral aspect of thigh, restricted movement at the left hip joint, extensive scar of the anterior aspect of the right thigh (the donor site for skin graft). The respondent was in crutches for six months and has a shortened leg but suffered no permanent incapacity.

20. In the instant case, I agree with the finding of the trial court and maintain the award of Kshs 700,000/- as general damages as there is nothing to convince me that the same was too high or too low so as to interfere with the same.

21. I note that the trial court did not award future medical expenses as the same was not proven. I find that the trial court erred for reasons here below. In **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR** that placed reliance on the case of Kenya bus Services Ltd v Gituma, (2004) EA 91, the court stated:

“And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded”.

22. The Medical Report by Dr. Kimuyu noted that the Respondent had required Kshs 300,000/ for future medical expenses; the respondent pleaded the same in his Plaintiff. In view of the failure of the appellant to rebut the evidence, this court ought to make a decision on the cost of removal of implants. It is noted that the quoted cost would be in a private setting. It is also noted that in 2014, the respondent spent a total of Kshs 75,000/- for the implants. In light of the fact that there was no proposal for the amount by the appellant by failing to give evidence, this court finds that the respondent is entitled to the full cost. I shall therefore award Kshs 300,000/- as future medical expenses, bearing in mind the inflation rate from 2014 when the respondent incurred a cost of Kshs 75,000/- to have the metal plate inserted in his leg. Obviously the respondent requires to remove the metal implants and the cost ought naturally to be placed at the doorstep of the appellant since he was the tortfeasor.

23. On the aspect of special damages, Kshs 96,980/- was awarded, and I see no reason to interfere with the same as the appellant had not challenged the same and in addition the receipts on the court record speak to the amount awarded as special damages.

24. The upshot is that the appeal lacks merit. The decision of the trial court on apportionment of liability and award of general damages is maintained save only that an additional sum of **Kshs 300,000/** for future medical expenses is hereby awarded to the respondent. Each party to bear their own costs of the appeal while the respondent shall have the costs in the lower court.

Orders accordingly.

Dated and delivered at Machakos this 30th day of July, 2020.

D. K. Kemei

Judge